The 2009 EU Regulation on Trade in Seal Products

Mohamed Coulibaly
The EU Regulation on Trade in Seal Products  
Ascertaining the Justifiability of Trade Restriction Measures for Environmental Protection  
By Mohamed Coulibaly  
LL.M. International Legal Studies  
American University Washington College of Law

I. Introduction

On May 5th 2009, the EU adopted a new regulation on trade in seal products.\(^1\) This regulation imposes a total ban on the import of seal products into the EU market and the export therefrom, except for seal products from hunts traditionally conducted by Inuit and other indigenous population for their subsistence. The rationale of adopting such a regulation was said to be the protection of “animal welfare,” as the hunting, including killing and skinning, of seals was found by the European Commission, Parliament and consumers, to be “cruel” and “inhumane” in sealing countries.

Seals are sentient beings and they can experience pain, distress, fear and other forms of suffering. In the process of the adoption of this new regulation, the EC conducted, via the European Food Safety Administration (EFSA), an analysis of the animal welfare aspects of seal hunting in sealing countries.\(^2\) The analysis showed that the systems were different according to each country, but that improvements could be made within all systems. Moreover, the EFSA provided a scientific opinion indicating that seals can be killed rapidly and effectively using a variety of methods without causing avoidable pain, distress and suffering.\(^3\)

The animal welfare aspect of killing and skinning of seals was also a concern for EC citizens and consumers.\(^4\) The products obtained from seals killed and skinned in a way that causes pain, and other forms of suffering are difficult or impossible to identify from similar products not derived from seals killed in a way that avoids such pains. To balance the consumers’ concerns and the animal welfare protection in seal hunting, the EC commission and its parliament decided to impose a ban on seals products deriving from commercial hunting. This measure was included in the EC Regulation and prohibits the “placing on the market and the import to, transit through, or export from the Community of all seal products not deriving from traditional hunts conducted by Inuit and other indigenous community, hunts which is done for the subsistence of those communities.”\(^5\)

Set to enter into force by the beginning of the seal hunt period (20 August 2010), the EU seal ban will have a significant economic consequence on sealing countries. Canada, the largest seal-products-exporting country, exported around $2.5 million worth of seal products to the EU market in 2008. Likewise, 6,000 Canadians earn part of their livelihood from the seal hunt.\(^6\) The other sealing countries are Norway, Namibia, Sweden, Finland and Russia.\(^7\)

In November 2009, Canada and Norway submitted a request for consultations with the EC under the WTO Dispute Settlement Understanding (DSU).\(^8\) These countries challenged the legality of the EC Regulation on three grounds. First, the regulation is alleged to be inconsistent with EU’s obligations under the General Agreement on Tariffs and Trade (GATT) of 1994.
Specifically, it allegedly violates Article I:1; that is, it discriminates among foreign like products. The complainants submitted that the EC Regulation also violated Article III:4, i.e. they discriminates against foreign like products; and Article XI:1 on the prohibition of quantitative restrictions. Essentially, the requests for consultations contend that the EU regulation violates the non-discrimination principle of the GATT and imposes a quantitative restriction on international trade. Second, the EC Regulation is suspected to be a technical regulation and reproached to be inconsistent with the Agreement on Technical Barriers to Trade (TBT Agreement) in its Article 2.1, that is, that it discriminates among and against foreign like products; and Article 2.2, meaning the regulation puts an unnecessary restriction to trade. Third, the two countries contend that the regulation is inconsistent with Article 4.2 of the Agreement on Agriculture. The analysis of issues under the Agreement on Agriculture is beyond the scope of the present paper.

The EC is more likely to assert two different grounds to support the legality of its new measure. First, it can invoke some of the exceptions of Article XX to justify the adoption of such regulation, probably Paragraph (b) (which is related to human, animal or plant life or health). Second, the EC may respond, with respect to the TBT Agreement, that the regulation is not a technical regulation and thus is not covered by this Agreement.

This paper focuses on the issues raised by the complainants’ submissions – Norway and Canada and it analyzes those issues in the light of relevant jurisprudence of the WTO dispute settlement bodies. With regard to the GATT 1994, the issues are: (i) whether the regulation is a border measure falling under Article XI or an external measure subject to Article III; (ii) whether it is discriminatory among foreign like products in the meaning of Article I:1; (iii) the last issue under the GATT 94 is whether the measure is justifiable under one of the exceptions of Article XX of the GATT and if it complies with the requirements of the chapeau. Under the TBT Agreement, a threshold question is whether the regulation is a technical one in the meaning of that Agreement (i). The subsequent issues are: (ii) whether the measure discriminates among and against foreign products (Article 2.1), and the determination of whether the regulation is an unnecessary restriction on international trade (Article 2.2) (iii).

II. the EC Regulation is challenged under the GATT 1994

According to the submissions from Canada and Norway as mentioned above, The EU seal products ban violates some of the articles of GATT 1994, i.e. Article I.1, Article III.4, and Article XI.1. Essentially, these countries claim inconsistency of the regulation with the core GATT obligations: the non-discriminatory principle and the prohibition of quantitative restriction on international trade. The analysis of the issues arising out of the requests for consultation with respect to the GATT 1994 necessitates the consideration of a threshold question: whether the regulation is a border measure, thus falling under Article XI’s prohibition, or an internal measure, subject to Article III which is must be consistent with the non-discriminatory principle.
1) Is the regulation a quantitative restriction or an internal measure?

The legal issue behind the categorization of a given regulation or provision of law as an Article III measure (internal measure) or an Article XI measure (border measure) is the identification of a GATT-consistent measure and inconsistent one. Article XI measures are prohibited under the GATT 1994 because considered as quantitative restrictions, tariffs being the only permissible restriction within the multilateral trading system underpinned by the GATT. In contrast, Article III measures are authorized but, have to be taken in a non-discriminatory way, that is, with no distinction among and/or against foreign like products. Article XI.1 reads:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

In other words, tariffs are the only restrictions permitted under the GATT. Therefore, countries cannot adopt any measure which will result in the prevention of foreign products from entering the internal market and the prevention of the national products from being exported. Anything contrary to this obligation will give rise to a claim by an affected WTO member and subsequently lead to a finding of inconsistency with Article XI of the GATT 1994.

As for Article III, it reads in its relevant parts as follows:

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

Under Article III, a WTO member is entitled to adopt any kind of measures (quantitative of tariff) provided that they apply internally to the sale or movement of products and that they accord “no less favourable treatment” to foreign products than that accorded to the same products produced within the importing country.

The key difference between an internal measure and a border measure resides in their application. An internal measure “affects the internal sale of products”, that is, while the
products are present on the market of the regulating country after clearing the custom; whereas a border measure (a quantitative restriction) applies to the product before they clear the custom and can prevent them from entering importing country’s market, something that is, a priori, against the logic of trade liberalization. With the prohibition of quantitative restriction (Article XI.1) and the submission of internal measures to national treatment obligation (Article III.4), the General Agreement ensures that countries do not adopt protectionist measures, and treat foreign products and national like products the same. In practise, the categorization of a measure as an internal or a border measure is not simple. For instance, a tax imposed on, or a regulation laying down conditions of sale of a given foreign and national like product, can be viewed a border measure if the tax is collected and the regulation is enforced at the border before the product enters the internal market, although they aim to “affect the internal sale” of the product. To avoid such confusion, an interpretative note to Article III makes the following clarification:

Any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in [Article III:1] which applies to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III.

The EC Regulation can now be examined to determine which category it falls within. According to the regulation, “The placing on the market of seal products shall be allowed only where the seal products result from hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence.” By this provision, the regulation lays down conditions for placing seals products on the EC internal market. The phrase “placing on the market” is defined by the regulation as “[the introduction] onto the [EC] market, thereby making available to third parties, in exchange for payment.” This is certainly covered by the phrase “internal sale” mentioned in Article III. In addition, the regulation specifies that the conditions for placing on the market “shall apply at the time or point of import for imported product.” This provision applies to products “on their importation” as mentioned and prohibited by article XI. However, it concerns the conditions that the products have to meet to be sold on EC “internal” market. This makes the regulation subject to Article III in the light of the provisions of Ad Article III, which expressly stipulates that regulation applying to imported and domestic like products and “enforced in the case of imported product at the time or the point of importation, is to be regarded as an internal [measure]…and is accordingly subject to the provisions of Article III.” This conclusion, however, needs to be assessed in the light of the GATT jurisprudence relating to the two articles in order to be accepted.

In Lobsters, arising under the US-Canada free trade Agreement, the Panel had to determine whether the U.S. regulation on the minimum lobster size requirement was an internal or a border measure. This requirement was imposed to the sale or transport in or from the United States of a definite species of lobster (American Lobster or Homarus americanus). The regulation prohibited the import of Canadian lobsters which were under this minimum size. Articles 407 and 501 of the free trade agreement referenced GATT Articles XI and III,
respectively. Thus, the panel addressed the issue under the relevant GATT Articles. The panel members had different views in ruling on the issue, and the majority found that the lobster size requirement fell within the scope of Article III of the GATT because the U.S. measures were not imposed “at the time of, and as a condition to the entry of the goods into the importing country” and they were not “applied exclusively to imported goods without being related in any way to similar charges collected… internally on like domestic products.” Otherwise put, the measures affected the internal sale of the lobster, were enforced at the border for imported lobster and were also applied to both national and foreign lobsters. Quoting a previous panel decision on the application of Article III, the majority also found that the word “affecting” in Article III.4 covers “not only the laws and regulations which directly govern the conditions of sale or purchase but also any laws or regulations which might adversely modify the conditions of competition between the domestic and imported products on the internal market.”

The Tuna/Dolphin panels did not reach the same conclusions on this issue. To protect dolphins from incidental killing in the course of tuna fishing, the US took a measure, namely Section 101 (a) (2) of the Marine Mammal Protection Act (MMPA), which authorized limited incidental harvesting of marine mammals by US fishers in the course of commercial fishing pursuant to a permit issued by the National Marine Fisheries Services (NMFS). The measure also prohibited the importation of commercial fish or fish products caught with commercial fishing technology which results in incidental kill or incidental serious injury of ocean mammal in excess of US standards. A specific prohibition was posed on the importation of yellowfin tuna harvested with purse-seine nets in the Eastern Tropical Pacific (ETP) unless the US secretary of commerce certifies that the harvesting country has a fishing program similar to that of the US and the average rate of incidental taking of marine mammals by vessels of the harvesting nation is comparable to, but must not exceed 1.25 times, that of the US vessels during the same period.

In Tuna/Dolphin I Mexico challenged the measure arguing that it was a quantitative restriction under article XI. The United States, on the other hand, argued that it was an internal measure governing domestic harvesting of tuna and applying to imported products at the point or the time of importation under Article III.4. The panel concluded that “Article III covers only measures affecting products as such” and that the measure at issue (the import prohibition imposed by the MMPA) was not an internal measure under Article III because it did not regulate tuna products as such, and in particular did not regulate the sale of tuna and tuna products. Accordingly, even if a measure lays down the same conditions for both foreign and national products, the conditions laid down have to be applied to the products as such, not related to the production methods.

Similarly, the Tuna/Dolphin II Panel concluded that “Article III.4 calls for a comparison of the treatment accorded to domestic and imported like “products” [rather than a] comparison of the policies or practices” for product production in different countries. In the same line of analysis, the panel found that the “Note Ad Article III could only permit the enforcement, at the time or the point of importation [of regulations affecting or applying] to the imported and
domestic products considered as products.”

The following conclusion can be drawn from the rulings outlined above. First of all, the Tuna/Dolphin panels suggest that WTO members are not allowed to distinguish between products on the basis of their productions methods and manners, and that products remain “like” irrespective of how they are produced. In addition, an equal treatment “does not remove an import prohibition from the realm of Article XI.1.” Although they were not adopted, the Tuna/Dolphin decisions bear a persuasive authority in the WTO dispute settlement. Consequently, in the Shrimp/Turtle case, which involved a similar measure as we will see in part III of this paper, the U.S conceded that its measure at issue did not meet the criteria of article III and violated Article XI of the GATT 1994 and tried to justify it under Article XX.

The EC Regulation is bear similitude with the measures at issue in the Lobsters and Tuna/Dolphin. Similarly to the US lobster size requirement, the EC Regulation lays down the conditions to be met by both domestic and imported seal products in order to be allowed in the EC market. However, although not mentioned by the Lobsters panel, the lobster size requirement could be seen as a measure that affects the product as such, the size being a physical aspect of lobsters, and distinguishes, by the way, the EC Regulation from the US Lobster size requirement.

Second, like the MMPA in Tuna/Dolphin, the EC Regulation is based on the production and harvesting method of seals although even-handed as to national and foreign products’ treatment. Indeed, by allowing only seal products resulting from seal “traditionally [harvested] by Inuit and other indigenous communities,” the EC Regulation distinguishes between seal products based on their production methods. Although the regulation imposes the same conditions to the placing on the market for products irrespective of their origin, and is enforced for imported products at the time or the point of import, it is likely to fall under Article XI. 1 for the reason that it relates to policy or practice concerning production, like the MMPA in the Tuna/Dolphin cases and not the product as “product.” Accordingly, the EC Regulation is inconsistent with the EC obligations under the GATT 1994, namely its obligation to refrain from adopting quantitative restriction imposed by Article XI.1.

Having Found the EC Regulation to be inconsistent with Article XI, it would not be necessary to consider the other issues relating to the inconsistency of the measure with the GATT 1994. This finding does not mean, however, that the EC Regulation is GATT-inconsistent. In reality, a measure can be inconsistent with the core obligations of the GATT 1994 provided for in Articles I, III and XI and still be justified under some of the exceptions included in the GATT. The EC is perceptibly likely to submit the justification of its regulation under some of those exceptions. This issue of justifiability is now to be analyzed.

2) Is the EC Regulation justifiable under Article XX of the GATT 1994?

As noted above, a measure found to be inconsistent with Article XI can still be permissible under the GATT 1994 if it can be justified under the general exceptions of Article XX. Article XX provides WTO members with a list of exceptions under which they can “adopt
or enforce” measures inconsistent with the core GATT rules if those measures satisfy some conditions. These conditions are to be found specifically in each exception from paragraphs a) to j), and in general, in the introductory clause (chapeau) of Article XX.

Some preliminary issues have been resolved by the GATT Panels in considering measures under this article. First, the burden of proving that the measure falls within one of the exceptions rests on the party invoking the exception. Second, an analytical framework was drawn to be followed by panels in the application of Article XX. This analytical method constitutes of three phases: (i) the panel determines whether the measure at issue falls within one of the general exceptions; (ii) this determination is followed by the inquiry whether the measure meets the specific conditions of the paragraph relied upon; (iii) the measure is lastly scrutinized as to whether it meets the requirements of the chapeau of Article XX. The same steps were reviewed by the Appellate body which reduced them to two. The Appellate Body stated that:

...The analysis is... two-tiered: first, provisional justification by reason of characterization of the measure under [one of the exceptions]; second, further appraisal of the same measure under the introductory clauses of Article XX.

The understanding of this ruling is that the first step of the analysis, i.e. whether the measure falls within one of the exceptions, generally goes uncontested or is self-evident in most cases and can easily be integrated into the second step determining whether the measure meets the specific requirement of the exception invoked.

For environmental trade-restriction measures, the pertinent exceptions are contained in Articles XX (b) and (g). Article XX (b) allows countries to adopt measures “necessary” to protect human, animal, or plant life or health, and XX (g) concerns those “relating to” the conservation of exhaustible natural resources. To some extent, environmental measures restricting trade can rely also upon the Article XX (a) exception, which authorizes the adoption of measures “necessary” to protect public moral. The general exception relevant to the case involving the justification of the EC Regulation is Article XX (b).

i) The Article XX (b) exception: measures “necessary” to protect animal health

The general exception likely available to justify the EC Regulation is that “necessary” to protect animal health Article XX (b). Article XX (b) reads in full as follows:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

... (b) necessary to protect human, animal or plant life or health;
To take advantage of this exception, the EC must show that the policy pursued through the measure amounts to those concerning the protection of “animal life or health” (a) and that it is necessary to achieve this goal (b).

a) Protection of animal life or health

The first condition to be met by a measure in order to profit from the protection of Article XX (b) is that it must concern or amount to measures concerning the protection of human, animal or plant life or health. In *Thailand-Cigarettes,* concerning a measure adopted by Thailand to impose restrictions on imports of and internal taxes on cigarettes, the panel agreed with the parties and the World Health Organization (WHO) that “measures designed to reduce the consumption of cigarettes fell within the scope of Article XX(b),” because “smoking constituted a serious risk to human health.” Similarly in *Tuna/Dolphin II,* the panel and the parties accepted “that the protection of dolphin life or health was a policy that could come within [the scope of] Article XX(b).” In some cases, however, there is a need to present evidence that the policy goal sought by the measure amounts to those falling under this exception. In *EC-Asbestos,* for instance, the Panel first, accepted the assumption that “a policy [seeking] to reduce exposure to a risk should fall within the range of policies designed to protect human life or health, *insofar as a risk exists.*” The panel then, provided an assessment of the alleged risk posed by the chrysotile-cement products banned by the EC on the ground of this risk, which Canada, the claimant disagreed with. The panel concluded that “the evidence before it tends to show that handling chrysotile-cement products constitutes a risk to health...” and that “the EC have shown that the policy of prohibiting chrysotile asbestos implemented by the Decree falls within [Article XX(b)].”

The EC Regulation is likely to meet this first condition of Article XX (b). The regulation was adopted to protect “the animal welfare aspects” of seal hunting by considerably reducing the “cruel and inhumane” hunting, including killing and skinning, of seals in sealing countries as found by the EC council, parliament and citizens. Although the apparent objective of the regulation is to harmonize national legislations on trade in seal products in the EC market, the rationale behind its adoption is the protection of animal health “in response to concerns of citizens and consumers [within the EC] about the animal welfare aspects of the killing and skinning of seals.” In its 2007 scientific opinion, the EFSA concluded that “seals are sentient beings that can experience pain, distress fear and other forms of suffering” and therefore, that they “should be protected from acts that cause them avoidable pain…and other forms of suffering.” The opinion also identified different practices in seal hunting varying from country to country, and ultimately found that more painless and fearless hunting methods exist but are not, in reality, used in sealing countries. Since the hunting is done for commercial purpose and the EC represent a major share of the seal products market, the EC concluded that restrictions on access to its market can protect the animal welfare and health of seals. The policy goal pursued by the EC Regulation is therefore, likely to fall within those designed to “protect animal life or health” in the meaning of Article XX(b).
b) The necessity of the EC Regulation

The specificity of the Article XX(b) exception is that the measure tried to be justified must be “necessary” to protect human, animal or plant life or health. In the case of the EC regulation, the measure must be “necessary” to protect the animal welfare aspects of seal hunting.

The word “necessary” is not defined in the GATT 1994 provisions. Nor the panels have tried to find a settled definition in the GATT practice. Rather, the GATT panels developed a test to be performed when it comes to determining of whether a measure is “necessary” in the meaning of article XX(b). This test is commonly referred to as “the necessity test” and applies to the word “necessary” in paragraphs b) and d) of article XX. In Thailand-Cigarettes, the term “necessary” was found to have the same meaning in these paragraphs because it “was used for the same objective: to allow [WTO members] to impose trade restrictive measures inconsistent with the General Agreement to pursue overriding public policy goals to the extent that such inconsistencies were avoidable.”

The “necessity test,” earlier performed by the US-Section 337 panel to interpret the term “necessary” under Article XX (d), could therefore be used for the same purpose under Article XX(b). The panel then moved on to describe the “necessity test” as follows:

The import restrictions imposed by Thailand could be considered to be “necessary” in terms of Article XX(b) only if there were no alternative measure consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives.

In this regard, a measure is not considered “necessary” if there is a GATT-consistent alternative reasonably available through which the government have achieve the same policy goals. If no GATT-consistent alternative is reasonably available, a WTO member would be in obligation to adopt the less trade-restrictive measure to preserve a compelling public interest within its territory.

The “necessity test” underwent a little refinement in a more recent Appellate Body ruling on Article XX(d). In Korea-Beef, the Appellate Body found that the panel was correct in the application of the “necessity test” as developed by the US-Section 337 Panel. It, however, gave details on factors to take into account in the test. Indeed, the Appellate Body, after ascertaining the ordinary meaning of the term, stated that “necessary” refers “to a range of degrees of necessity” with “indispensable” at one end of the continuum and “making a contribution to” at the other. The Appellate Body concluded that a “necessary” measure is, in the context of paragraph d), located significantly closer to the pole of “indispensable” than to the opposite pole of “making contribution to.” It then went on to state:

In sum, determination of whether a measure, which is not "indispensable", may nevertheless be "necessary" within the contemplation of Article XX(d), involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by
that law or regulation, and the accompanying impact of the law or regulation on imports or exports.\textsuperscript{60}

The “necessity test” as supplemented by the Appellate Body in \textit{Korea-beef} was followed by the Appellate Body in the \textit{Asbestos} case.\textsuperscript{61} In this case, the Appellate Body recalled the findings of the \textit{Korea-beef} Appellate Body and noted that the extent to which the alternative measure “contribute[d] to the realization of the end pursued” should be taken into account.\textsuperscript{62} In the same vein, it stated that “[t]he more vital or important [the] common interests or values” pursued, the easier it would be to accept, as "necessary", measures designed to achieve those ends.\textsuperscript{63} To elaborate on that, one can affirm that it exist differing levels of scrutiny applicable to the analysis (weighing and balancing) of the necessity test, depending on the importance of the ‘interests or values’ it served.\textsuperscript{64} The human life and health protection goal involved in the \textit{EC-Asbestos}, was found to be “vital and important in the highest degree” by the Appellate Body.\textsuperscript{65}

As regards the necessity of the EC Regulation to protect the animal welfare aspects of sealing, the question is whether there was a reasonably available GATT-consistent measure or a measure less GATT-inconsistent, with which the EC could achieve the same policy goal pursued by the regulation. Prior to the inquiry as to the availability of an alternative, it is important to consider the scope of the policy goal pursued by the regulation.

As stated above, the regulation at issue is designed to protect the animal welfare aspects of seal hunting.\textsuperscript{66} The measure seeks to reduce the cruel and inhumane practices of seal hunting which cause “avoidable pain and other kind of suffering” to seals, by means of harmonization of national regulations on trade in seal products at the Community level.\textsuperscript{67} The commercialization of seal products is the major cause of seal hunting. By prohibiting the market access of seal products resulting from seals hunted inconsistently with the hunting manner described in the regulation, irrespective of the national or foreign origin, it appears clear that the objective is to reduce considerably the “cruel and inhumane hunting” of seals. The measure cannot be said as intended to end these sealing practices, since the EC does not constitute the only market where seal products can be sold. The prohibition is, therefore, the measure included in the regulation to achieve a considerable reduction in cruel and inhumane seal hunting practices.

If there is any alternative to the measure taken by the EC, it must be “reasonably” available to be used by the EC. The word “reasonably” has not been defined in the panel reports dealing with the necessity test. The EC-Asbestos panel explained that it “suggests ... that the availability of the measure should not be examined theoretically and in absolute terms.”\textsuperscript{68} It also added that the word “reasonably” “should not be interpreted loosely either.”\textsuperscript{69} The existence of a reasonably available alternative is, therefore, to be assessed “in the light of the economic and administrative realities facing the Member concerned but also by taking into account the fact that the State must provide itself with the means of implementing its policies.”\textsuperscript{70}

An alternative measure for the EC could be harmonized labelling of seal products. But, whether labelling requirements could achieve the same result remains to be demonstrated. The EC seems to make a prima facie case that this alternative would not achieve the same goal it seeks to achieve with the measure chosen in its regulation. Indeed, the EC Regulation states that the labelling requirements would “impose a significant burden on economic operators’ involved
in seals products trading and “would also be disproportionately costly in cases where seal products represent a minor part of the product concerned” conversely to the prohibition of seal products resulting from non-traditional hunting, which “will be easier to comply with, whilst reassuring consumers.”

Considering that the goal of the EC Regulation is to considerably reduce the hunting practices which would protect the animal welfare aspects of the sealing, labeling is not an effective solution. Indeed, given that trade in seal products is the most important cause for sealing, only the reduction of market access can influence sealing practices. By prohibiting seal products deriving from seal hunted in a certain manner, the regulation is likely to achieve its goal of reducing the offending hunting practices. On the contrary, labeling requirements will only permit the identification of seal products on the basis of whether they derived from seals traditionally hunted or not. While labeling may still prevent prohibited seal products from entering into the EC market, the compliance is difficult to administer and, above all, it will not reduce the offending practices. The conclusion here is that the labeling requirements are not measures reasonably available for the EC to achieve the same policy goal it seeks to achieve with the regulation at issue. Accordingly, the EC Regulation is necessary to achieve the policy goal pursued by the measure.

The EC Regulation still has to meet the conditions set in the chapeau of Article XX. As stated supra, the third step of the Article XX analysis framework is the consistency with the chapeau. Once a measure was found to fall within and satisfied the specific conditions of the exception under which it is to be justified, the GATT panels have turned to verify it consistency with the chapeau.

ii) Does the EC Regulation comply with the requirements of the Article XX Chapeau?

In order for a measure to be justifiable under one of the exceptions of Article XX, the chapeau requires that it must not be “applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.”

The object and purpose of the chapeau is to prevent the abuse of the general exceptions of Article XX. In US-Gasoline, the Appellate Body held that “while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the General Agreement.” It also stated that the measures falling within one of the exceptions of Article XX “must be applied reasonably with due regard both to the legal duties of the party claiming the exception and the legal rights of the other party concerned.” The same conclusion was reached by the Shrimp/Turtle Appellate Body, which stated that the chapeau is “but one expression of the principle of good faith.”

Under the Article XX chapeau, the justifiable measure must meet three conditions. First, the measure must not be a means of unjustifiable discrimination between countries where the same conditions prevail. Second, it must not be a means of arbitrary discrimination between countries where the same conditions prevail. Third, the measure must not be a disguised restriction on international trade. These conditions are cumulative, that is, the non-satisfaction
of one requirement could impair the satisfaction of the two others and make the measure unjustifiable under article XX. In *US-Shrimp*, the Appellate Body found it unnecessary to examine whether the measure at issue was applied as a disguised restriction on international trade after finding that it did not meet the first two requirements, namely that the measure was a means of “unjustifiable” and “arbitrary” discrimination between countries where the same conditions prevail.\textsuperscript{78} Also, it is important to recall that the requirements concern the manner in which the measure is applied.\textsuperscript{79}

A threshold question in examining the compliance of a measure with the discriminatory standards of the Article XX chapeau is to determine first whether “the measure is ‘discriminatory’ in its application.”\textsuperscript{80} It is if, and only if, the measure is applied in a discriminatory fashion that the panel proceeds to ascertain whether it is a means of “unjustifiable” or “arbitrary” discrimination between countries where the same conditions prevail.\textsuperscript{81} If it is found to be non-discriminatory in its application, the EC regulation will not be scrutinized under this standard. The “disguised restriction” requirement applies independently of the discriminatory inquiry on the measure.

The tree requirements of the chapeau can now be examined.

\textit{a) The measure must not be a means of unjustifiable discrimination where the same conditions prevail}

The terms “unjustifiable discrimination” is not defined within the text of the GATT 1994. The understanding of this requirement is that a member is to some extent entitled to discriminate between other members. It must, however, justify such discrimination by satisfactory argument or excuse, and take into account the conditions prevailing in different countries. The jurisprudence so far developed has established two standards for the analysis of whether a measure is a means of “unjustifiable discrimination”: (a) cooperative effort or effort to negotiate, and (b) flexibility of the measure.\textsuperscript{82}

In *Reformulated-Gasoline*, the United States conceded that its measure at issue was discriminatory because it differentiated between domestic and foreign gasoline operators. The United States, however, argued that the discrimination was justified because the differentiated treatment avoided “the difficulties which the EPA would have had to face” if foreign refiners had been applied the same treatment.\textsuperscript{83} The Panel viewed this argument as insufficient to justify the discrimination and the Appellate Body agreed.\textsuperscript{84} The Appellate Body ruled that “[t]he United States must have been aware that...cooperative arrangements with both foreign refiners and the foreign governments concerned would have been necessary and appropriate.”\textsuperscript{85} In the view of the Appellate Body, the United States has not done so or, if so, “not to the point it encountered governments that were unwilling to cooperate.”\textsuperscript{86} Similarly, the *Shrimp/Turtle* Appellate Body found the US measure as applied is a manner that constituted an “unjustifiable discrimination”\textsuperscript{87} because of “the failure of the United States to engage the appellants, as well as other [interested] Members in serious... negotiations.”\textsuperscript{88} In this case, the negotiation was undertaken by the US, but not with all the parties concerned with the measure at issue. With this consideration in mind, one can conclude for a “discrimination” to be justifiable, the acting government must enter into
negotiation or undertake cooperative acts towards all the states whose rights could be impaired by the application of the measure. An important declaration of the Appellate Body in *Shrimp/Turtle (Article 21.5)* is that the acting state has an obligation to negotiate in good faith, but not an obligation to conclude an agreement. In addition to cooperative efforts, the measure must be flexible.

The criterion of flexibility was addressed by the Appellate Body in *Shrimp/Turtle* and in *Shrimp/Turtle (Article 21.5)*. In the former case, the Appellate Body considered that the lack of flexibility in taking into consideration the different situations in different countries amounted to “unjustifiable discrimination.” The US measure at issue, namely Section 609, was found to be unjustifiably discriminatory because the certification process as imposed lacked flexibility. The Panel in *Shrimp/Turtle (Article 21.5)* also ruled that the United States failed to pass the ‘unjustified discrimination’ test “by unilaterally defining and implementing criteria for applying Section 609, [and by not taking] into account the different situations... in exporting countries.”

With regard to the EC regulation, a first step is to determine whether it is “discriminatory” in its application. In this regard, the EC Regulation, at a glance, does not appear to be discriminatory in its application. And the text of the regulation confirms that. The conditions of placing on the EC market set forth in article 3 apply to all seal products irrespective of their origin. The same conditions apply to seal products of national origin and those of foreign origin. The EC is therefore likely to make a prima facie case that its regulation does not constitute, in its application, arbitrary discrimination. As result, the measure will not be considered under the ‘unjustified discrimination’ test. The measure can then be said to be “applied reasonably, with due regard to both the legal duties of the party claiming the exception and the legal rights of the other parties concerned.” The same conclusion was reached by the EC-Asbestos Panel. Indeed, after analyzing the French decree at issue in that case, the panel found that the measure was not discriminatory in its application. It therefore did not consider the question of arbitrariness. Accordingly, by applying to foreign products from any country the same way as to national products, the EC Regulation complies with the first requirement of the chapeau.

**b) The measure must not be a means of arbitrary discrimination between countries where the same conditions prevail.**

It is difficult to distinct arbitrary and unjustifiable discrimination and both seem to imply one and the same standard within the chapeau. Nevertheless, the Appellate body separates its analysis, in *Shrimp/Turtle*, in determining whether the measure at issue was a means of “arbitrary discrimination” or of an “unjustifiable discrimination”. This analysis did not provide, however, a clear distinction between the two. Indeed, the Appellate Body concluded that Section 609, the US measure at issue, amounted to an “arbitrary discrimination” for the same reason that it lacked flexibility. Accordingly, the measure was said to be arbitrarily discriminatory because, through its application, the exporting countries were faced with a “single, rigid and unbending requirement” to adopt essentially the same policies as those of the United States. The “rigidity and the inflexibility” of the application of the measure, in the view of the Appellate Body, constituted an “‘arbitrary discrimination’ within the meaning of the chapeau.”
*Shrimp/Turtle* (Article 21.5), the measure in its application ceased to amount to an “arbitrary discrimination” after the United States revised the 1996 implementation guidelines which contained “a degree of flexibility that... will enable the [US] to consider the particular conditions prevailing in [any exporting country when it] applies for certification.”

The EC Regulation will not be scrutinized under the standard of “arbitrary discrimination” for the same reason stated above, i.e. it is not applied in a discriminatory manner.

c) The measure must not be a disguised restriction on international trade

The words “disguised restriction” are not defined within the GATT 1994. In *EC-Asbestos*, the panel recalled the general background of the meaning of these terms:

Under the GATT 1947, panels seem mainly to have considered that a disguised restriction on international trade was a restriction that had not been taken in the form of a trade measure or had not been announced beforehand or formed the subject of a publication, or even had not been the subject of an investigation.

Three criteria has been so far developed in jurisprudence for the determination whether a measure constitutes a “disguised restriction on international trade”:

(i) the publicity of the measure, (ii) the consideration of whether the application of the measure amounts to arbitrary or unjustifiable discrimination and, (iii) the examination of “the design, architecture and revealing structure” of the measure at issue. In *EC-Asbestos*, the panel had to determine whether the EC measure, namely the French Decree, was a “disguised restriction on international.” The panel relied upon the three criteria defined independently by GATT panels and Appellate Bodies in different cases, and found that the French Decree was not a “disguised restriction on international trade.”

In *US Tuna from Canada*, the panel relied only on the publicity criteria to interpret the concept of disguised restriction. In this case the US measure at issue imposed a ban on tuna and tuna products from Canada and sought justification under Article XX. The panel held that “the United States action should not be considered to be a disguised restriction on international trade, noting that the United States prohibition of imports of tuna and tuna products from Canada had been taken as a trade measure and publicly announced as such.” This first criterion was found to be met by the French Decree in *EC-Asbestos* because the decree was published in the official journal of the French Republic. The panel then went on to recall in the light of the Appellate Body decision in *Reformulated-Gasoline*, that “the expression ‘disguised restriction on international trade’ covers other requirements.” In the same token, the panel considered, as did the Appellate Body in *Reformulate-Gasoline*, that the findings on the “unjustifiable” and “arbitrary” discriminatory application of the measure can be used in determining whether the Decree constitutes a disguised restriction. Since the Decree was already found to be non-discriminatory, it automatically past this step of the scrutiny under the “disguised restriction” concept.
The last criterion to be considered by the panel in *EC-Asbestos* was the “design, architecture, and revealing structure” of the measure at issue. This criterion was introduced by the Appellate Body in *Japan-Alcoholic Beverages*, but for the purpose of determining the protective nature of a measure under Article III of the General Agreement. The case involved a measure taken by the government of Japan to impose taxes on alcoholic beverages on the basis of a categorization of these products. This results in a difference of treatment between beverages of foreign origin and those of domestic origin. The ruling of this case is relevant to the issue here only to the extent of the Appellate Body’s statement that the protective application of a measure can most often be discerned from its design, architecture and revealing structure. The *EC-Asbestos* Appellate Body saw no reason not to extend this approach to the context of determining the protective purpose of the French Decree, and found “nothing [in the Decree] to conclude that [it] has protectionist objective.”

The EC Regulation is likely to meet the three criteria outlined above for the determination of the “disguised restriction on international trade” purpose. The measure was published in the Official Journal of the European Community, and will therefore successfully pass the publicity test. It was also found to be non-discriminatory in its application like the French Decree at issue in *EC-Asbestos*. Finally, the regulation through its “design, architecture and revealing structure” does not show anything to attribute it a protectionist purpose. Considering its objective, namely harmonization, animal welfare protection and the circumstances backing its adoption (public opinion denouncing seal hunting as it is currently conducted), the measure is difficult to be considered taken with an intention to protect the EC seals products operators. In addition, seal hunting is conducted in the EC as well (Sweden and Finland), and products derived from this hunt are imposed the same conditions as foreign seal products. Accordingly, the EC Regulation is not a disguised restriction on international trade.

In the light of the above paragraph, the EC Regulation is justifiable under Article XX (b) of the GATT 1994. Accordingly, the measure is consistent with the GATT 1994.

The paper turns to the challenge to the EC Regulation under the Agreement on Technical Barriers to Trade.

**IV. The EC Regulation is challenged under the TBT Agreement**

The EC Regulation was challenged by Canada and Norway under the Agreement on Technical Barriers to trade (TBT Agreement). These WTO members argue that the regulation violates Article 2.1 of this agreement, i.e. it discriminates against and/or among foreign “like products,” and that the measure is inconsistent with Article 2.2, which means that it creates “unnecessary obstacles to international trade.” In order for the measure to be considered under the TBT Agreement, it must fall within the definition of a technical regulation provided in this Agreement. The threshold question is whether the EC Regulation is a technical regulation in the meaning of the TBT Agreement.
1) Is the EC Regulation a technical regulation?

The TBT Agreement provides, at Article 1.2 that “for the purposes of this Agreement the meaning of the terms given in Annex 1 applies.”\textsuperscript{117} Annex 1.1 defines a technical regulation as a:

Document which \textit{lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory.} It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.\textsuperscript{118}

In this regards, three conditions must be met by a measure in order to be termed a technical regulation in the meaning of the TBT Agreement. These criteria have been identified by the Appellate Body in EC-Asbestos.\textsuperscript{119} The Appellate Body held that the definition of a technical regulation in the TBT Agreement prescribes three conditions. First, a technical regulation must “lay down – [meaning], set forth, stipulate or provide- ‘product characteristics’. ” These product characteristics include features and qualities intrinsic to the product itself or its related characteristics, such as “the means of identification or the presentation and appearance of a product.”\textsuperscript{120} Second, characteristics must be regulated in a \textit{mandatory} fashion either affirmatively - by laying down the characteristics a product must possess - or negatively - by laying down the characteristics a product must not possess.\textsuperscript{121} Third, the document must apply to an \textit{identifiable} product or group of products.\textsuperscript{122} The French Decree at issue, viewed as an integrated whole, was found to be a technical regulation because it fell within the definition deciphered by the Appellate Body.\textsuperscript{123} The Appellate Body ruled that the Decree “effectively prescribes or imposes certain characteristics of all products” in a negative \textit{mandatory} manner: “\textit{all products must not} contain asbestos fibres.”\textsuperscript{124} The products covered by the measure are also “\textit{identifiable},” even though this might be a difficult process, because it is inferable from the measure that “\textit{all products must be asbestos free [ant that] any product containing asbestos are prohibited.”\textsuperscript{125}

The EC Regulation applies to the processes and productions methods (PPMs) rather than to product characteristics. By allowing seal products resulting from seals harvested in traditional hunting, the regulation prohibits those resulting from seals harvested otherwise. As result, it sets forth no characteristic of seal products. The definition of a technical regulation covers also measures laying down “product related processes and productions methods.” The AB has not had opportunity to rule on this aspect of the definition. It is, however, clear in the words of Annex 1.1 that product \textit{related} PPMs can be regulated by a technical regulation.\textsuperscript{126} The condition is that the regulation must apply to PPMs which are \textit{related to} the product concerned. An example of a product-related PPM is the sterilization or packaging requirement under certain national legislations. These types of PPMs are covered by the TBT Agreement.

The EC Regulation concerns, however, processes and productions methods \textit{unrelated to} the product. As already found in this paper in the consideration of the measure under Article XI.1, the regulation governs the conditions of marketability of seals products which do not relate to the product. This finding is relevant to the issue in consideration here. The hunting practices and usages have no effects on the products intrinsic characteristics, nor do they \textit{relate to} the
products in the meaning of the TBT Agreement. The question is whether the TBT Agreement covers technical regulation based on non-product-related PPMs. The answer to this question is still not clear after ten years of discussion in the WTO. The negotiating history of the TBT agreement shows that the majority of participating members were of the view that PPMs unrelated to a product’s characteristics were not covered by the TBT Agreement. Since the EC Regulation applies to PPMs unrelated to product’s characteristics, the assumption here is that it falls outside the scope of the TBT Agreement. Accordingly, Norway and Canada are likely to have their claims dismissed on the issues under the TBT Agreement.

VI. Conclusion

The adoption by the EC Regulation adds to the trade and environment debate launched since the early 1990s after the Tuna/Dolphin I case. Although possibly justifiable under the general exceptions of Article XX, the regulation, if considered by a WTO panel, will provide such body with some unresolved issues. The most relevant issues are the following: (i) the permissibility of the regulation of non-product-related PPMs; (ii) the justifiability of certain environmental measure under Article XX(a); (iii) the extraterritorial reach of environmental measure.

The issue of non-product-related PPMs concerns both the GATT 1994 and the TBT Agreement. While, the general exception of GATT 1994 is available to WTO members to justify non-product-related PPMs-based regulations, it is still not clear enough whether those regulations are covered by the TBT Agreement or not. Given the sincere environmental motivation behind some regulations and the widely-accepted need for international action to protect the environment and natural resources; it is important that such an issue be addressed. And for a veritable operationalization of sustainable development within the WTO, the non-product-related PPMs warrant positive consideration mainly under the GATT 1994.

The use of paragraph a) of Article XX is also possible to justify an environmental trade-restricting measure. This Article XX exception gives protection to GATT-inconsistent measures “necessary to protect public morals.” An environmental measure was not justified under this exception. Some scholars submit that trade measures motivated by religious reasons are likely to be justified under it. For example, it would be acceptable for India to prohibit the import of beef, and for an Islamic country to prohibit or strictly restrict the import of pork on religious grounds. This would be granted the protection of Article XX(a) because such measures are “necessary to protect public morals” in those countries. There is often a genuine public moral concern for adopting some environmental measures. In adopting the EC regulation, for example, the Parliament and Council of the EU clearly stated that European citizens and consumers were concerned by sealing practices employed in commercial sealing, and recognized that those practices were “inhumane.” This could be a ground for the EC to assert Article XX(a) in addition to XX(b) in order to justify its measure, something that would give occasion to the GATT panels to develop standards for considering a measure under this exception.

The justification of the EC Regulation under an Article XX exception (a, b or both) raises the question of the acceptability of an import ban in reaction to events occurring outside the
territory of the regulating state. Only the unadopted panel report in *Tuna/Dolphin II* clearly addresses the extraterritorial issue under Article XX(b) and (c). This panel concluded that no territorial limitation is imposed on measures falling under these paragraphs. While the assumption is these measures are permitted to protect resources wholly located outside the territory of the importing state, the issue can be said to be moot. The question of sustainable development as a universal concern also offers a ground to take side of the extraterritorial reach of environmental measures affecting trade.

The consultation is moving forward between the EC and the complainants, Norway and Canada. They may reach a settlement and develop perhaps standards for humane sealing. The EC will therefore authorize the import as far as the standards would be complied with. If an agreement cannot be reached, the issues will then be considered by a GATT panel.


European Communities – Measures Prohibiting The Importation And Marketing of Seal Products: Request for Consultations by Canada, WT/DS400/1 (4 November 2009); European Communities – Measures Prohibiting The Importation And Marketing of Seal Products: Request for Consultations by Norway, WT/DS4001/1 (10 November 2009)


GATT 1994, Articles III.1, III.4

GATT 1994, supra note 9 at 149

GATT 1994, supra note 10, Ad Article III (Annex I: Notes and Supplementary Provision) [emphasis added]

REGULATION (EC) No 1007/2009, supra not 1, Article 3.1

Id., Article 2.3

Id., Article 3.1


Wold et al., supra note 9, at 149

Lobsters, supra note 17, at Para. 7.12.4

Id., at para. 7.15.1


Tuna/Dolphin I, Panel report, supra note 21 para. 5.8

Id.

Id., Para. 5.11

Id., Para. 5.14

Id., Para. 5.11 [emphasis added]

Tuna/Dolphin II, Panel report, supra note 21 Para. 5.8

Id. [emphasis in the original text]

Id.

Id., Para. 5.9


United States - Import Prohibition of Certain Shrimp And Shrimp Products, WT/DS58/AB/R (12 October 1998) (dealing with a US measure prohibiting the harvesting in the US of Shrimps without the use of a device permitting sea turtle to escape from incidental taking in the course of shrimp fishing, the ‘Turtle Excluder Device’ {TED}. The measure also imposed a ban and the importation of shrimp and shrimp products from countries not using the same device in commercial fishing or not having a similar fishing program to that of the US). [hereinafter, US Shrimp/Turtle]
33 World Trade Organization, Committee on Trade and Environment, GATT/WTO Dispute Settlement Practice Relating To GATT Article XX, Paragraphs (b), (d) and (g), WT/CTE/W/203, p 5 (8 March 2002); available at: http://docsonline.wto.org/GEN_searchResult.asp [hereinafter the GATT Practice]


36 Wold et al., supra note 9, at 289

37 GATT 1994, supra note 10, Article XX (b)


39 Id., Para. 73

40 Id.

41 Tuna/Dolphin II, supra note 21


43 Id., Paras. 8.183-8.184

44 EC Regulation, supra note 1, Para. 1 of the Preamble; see also, the European Parliament Press Release, supra note 4

45 EC Regulation, supra note 1, Par. 5 of the Preamble

46 The EFSA Scientific Opinion, supra note 2 at 3

47 Id., at 4

48 Id.

49 See the EC Regulation; supra note 1, Para.1 of the preamble.

50 The GATT Practice, supra note 33, at 13

51 Thailand-Cigarettes, Panel Report, supra note 38

52 Id., Para. 74


54 Thailand-Cigarettes, Panel Report, supra note 38, Para. 75 [emphasis added]

55 See US-Section 337, Panel Report, supra note 53, Para. 5.26


57 Id., Para. 159 ff.

58 Id., Para. 160

59 Id., Para. 161

60 Id., Para. 164. [emphasis added]


62 Id., Para. 172

63 Id.

64 See the GATT practice, supra note 33, at 16

65 EC-Asbestos, Appellate Body report, supra note 61, Para. 172

66 The European Parliament Press Release, supra note 4

67 See the EC Regulation, supra note 1, Paras. 1, 4-8, 9,10, 12, 13, 15 and 21 of the preamble

68 EC-Asbestos, Panel Report, supra note 4, Para. 8.207

69 Id.
Id.
70 The EC Regulation, supra note 1, Para. 12 of the Preamble
71 GATT 1994, supra note 10, Article XX. [Emphasis added]
72 Reformulated-Gasoline, Appellate Body Report, supra note 35, p. 22
73 Id.
74 US Shrimp/Turtle, supra note 32, Para. 156
75 Id., Para. 158
77 Id., Para. 184.
78 See Reformulated-Gasoline, Appellate Body Report, supra note 35, p. 21; see also Shrimp/Turtle, Appellate Body Report, supra note 33, Para. 160
79 See EC Asbestos, Panel report, surpa note 42, Para. 8.226
80 Id.
81 See the GATT practice, supra note 33, at 23
82 Reformulated-Gasoline, Appellate Body Report supra note 35, p. 25-26
83 Id.
84 Id., p. 27
85 Id.
86 Shrimp/Turtle, supra note 32, Para. 172
87 Id., Para. 166
89 Id., Para.134
90 Shrimp/Turtle, supra note 32, Para. 161-164
91 Id.
92 Shrimp/Turtle (Article 21.5), panel report, para. 5.124
93 See the EC Regulation, supra note 1, Article 3
94 EC-Asbestos, Panel Report, supra note 41, Para. 8.226
95 Id., Para. 172
96 Wold, supra note 5, at 352
97 Shrimp/Turtle, Appellate Body Report, supra note 35, Para. 177
98 Id.
99 Id.
100 Shrimp/Turtle (Article 21.5), Appellate Body Report, supra note 89, Para.148
101 EC-Asbestos, Panel Report, supra note 42, Para. 8.233, [footnote omitted]
102 See the GATT practice, supra note 33 at (Para. 79)
103 EC-Asbestos, Panel Report, supra note 42, Paras. 8.234-8.240
105 Id., Para. 4.8, [emphasis added]
106 EC-Asbestos, Panel Report, supra note 42, Para. 8.234
107 Id., Para. 208
108 See Reformulated Gasoline, Appellate Body Report, supra note 35, p. 23
109 EC-Asbestos, Panel Report, supra note 42, Para. 8.237
111 Id.
112 Japan-Alcoholic Beverages, Appellate Body Report, supra note 111, P 29
113 EC-Asbestos, Panel Report, supra note 42, Para. 8.236, Footnote 199.
114 Id., Para. 8.238
115 See Canada and Norway’s Request for Consultation, supra note 4
The Agreement on Technical Barriers to Trade, Article 1.2; available at http://www.wto.org/english/docs_e/legal_e/17-tbt.pdf, [hereinafter, the TBT Agreement]

Id., Annex 1.1. [emphasis added]


EC-Asbestos, Appellate Body Report, supra note 42, Para. 67-70 [emphasis in the original AB report]

Id., Para. 69

Id., Para. 70

Id., Para. 75

Id., Para. 72 [emphasis in the original AB Report]

Id.

TBT Agreement, supra note 117, Annex 1.1

See Wold et al., supra note 9 at 420

Id., at 421

See Catherine Jean Archibald, Forbidden By the WTO? Discrimination Against a Product When its Creation Causes Harm To The Environment Or Animal Welfare, 48 Nat. Resources J. 15 (2008) (submitting that “PPM distinctions should not be prohibited by the World Trade Organization (WTO) regime, and, indeed, there are several places within the regime where they fit-namely in the General Agreement on Tariffs and Trade (GATT) Articles III.4, XI.2(b), XX(a), XX(b), and XX(g).”)

Tuna/Dolphin II, supra note 21, Para. 5.16

See Wold et al., supra note 9, at 291