A Comment on the Appellate Body Report in "EC-Seal Products" in the Context of the Trade and Environment Debate

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The Appellate Body (AB) Report in EC-Seal Products has potential ramifications for the environmental or social concerns in the World Trade Organization. It refines the jurisprudence on the balance between members' market access obligations and their right to give priority consideration to non-trade concerns under the General Agreement on Tariffs and Trade (GATT) and the Agreement on Technical Barriers to Trade (TBT). This article outlines the main points of the AB Report, particularly related to what measures constitute technical regulations within the scope of the TBT Agreement, and the relationship between the GATT and TBT Agreement in the context of the pursuit of legitimate non-trade concerns. It further highlights one of the issues raised in the report concerning processes and production methods (PPMs). In particular, it offers comments on what could constitute product-related and non-product related PPMs – a categorization that has emerged in the trade-environment doctrine over the last 40 years and that should now be informed by the AB's interpretation of the TBT Agreement in this case.

INTRODUCTION

Within the last 20 years the Appellate Body (AB) has interpreted relevant provisions of the World Trade Organization (WTO) agreements so as to provide WTO members with policy space for measures based on justifiable non-trade concerns applied in good faith. Initially, the pursuit of justifiable non-trade concerns was achieved by interpreting the general exceptions in Article XX of the General Agreement on Tariffs and Trade (GATT) in a way that gave WTO members the necessary flexibility to pursue environmental and social policies in relation to trade in goods, as long as their measures respected the prescriptions of the relevant provisions. It then applied the same jurisprudence principles to trade in services. The AB recently charted a similar course through its interpretation of Articles 2.1 and 2.2 of the Agreement on Technical Barriers to Trade (TBT Agreement, or TBT) along the lines of the existing GATT balance between members’ market access obligations and their right to give priority to non-trade concerns.

The recent AB Report in EC-Seal Products further refines this jurisprudence, as the AB pronounced on a European Union (EU) measure claimed to be a TBT-consistent regulation on trade, necessary for the protection of public morals concerning seal welfare. The measure at issue (referred to here as the ‘EU Seal Law’) has potential ramifications for the environmental or social concerns in the World Trade Organization. It refines the jurisprudence on the balance between members’ market access obligations and their right to give priority to non-trade concerns.

2 General Agreement on Tariffs and Trade 1994 (Marrakesh, 15 April 1994; in force 1 January 1995) (‘GATT’).
5 Agreement on Technical Barriers to Trade (Marrakesh, 15 April 1994; in force 1 January 1995) (‘TBT Agreement’).
7 WTO AB 22 May 2014, European Communities – Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS400/ AB/R; WT/DS401/AB/R (EC-Seal Products, AB).

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Regime') concerns a restriction on seal products based on criteria related to the identity of the hunter and the purpose of the hunt, as will be reviewed below. Canada and Norway claimed that this EU measure was inconsistent with the GATT and the TBT Agreement. The Panel determined that the EU Seal Regime is a technical regulation in compliance with Article 2.2 of the TBT Agreement because it addresses EU public moral concerns on seal welfare to a certain extent. It concluded, however, that the exceptions of the concerned measures—allowing the placing on the market of seal products deriving from hunts by Inuit communities or for marine resource management—violated Articles I and III of the GATT, and that they could not be justified under Article XX(a) because they violated the provision's chapeau in constituting unjustifiable discriminatory treatment. The Panel found that the exceptions of the EU Seal Regime create an unnecessary obstacle to trade, inconsistent with Article 2.2 of the TBT Agreement, because it is more trade restrictive than necessary to fulfil a legitimate objective.

This article outlines the main points of the AB Report, particularly related to what measures constitute technical regulations within the scope of the TBT Agreement, and the relationship between the GATT and TBT in the context of the pursuit of non-trade concerns. It highlights one of the issues raised by the Report: processes and production methods (PPMs). In particular, it offers comments on elements of the definition of what constitutes product-related (PR) and non-product-related (NPR) PPMs—a categorization developed by the environment and trade doctrine over the last 40 years. The Panel determined that the EU Seal Regime does not constitute a technical regulation within the scope of the TBT Agreement.

OUTLINE OF THE AB REPORT IN EC-SEAL PRODUCTS

This article outlines the main points of the AB Report, particularly related to what measures constitute technical regulations within the scope of the TBT Agreement, and the relationship between the GATT and TBT in the context of the pursuit of non-trade concerns. It highlights one of the issues raised by the Report: processes and production methods (PPMs). In particular, it offers comments on elements of the definition of what constitutes product-related (PR) and non-product-related (NPR) PPMs—a categorization developed by the environment and trade doctrine over the last 40 years. The Panel determined that the EU Seal Regime does not constitute a technical regulation within the scope of the TBT Agreement.

Canada and Norway (the complainants) argued at the Panel stage that the EU Seal Regime violates various obligations under the GATT and the TBT Agreement. The EU Seal Regime prohibits the placing of seal products on the EU market unless they qualify under certain exceptions: (i) seals hunted by Inuit or other indigenous communities for their subsistence (the 'IC exception'); (ii) seals hunted for the purpose of marine resource management on a non-systematic and not-for-profit basis (the 'MRM exception'); and (iii) seal products brought by travellers into the EU in limited circumstances (the 'travellers exception'). The complainants argued that the IC and MRM exceptions of the EU Seal Regime violate the non-discrimination obligations under Articles I.1 and III.4 of the GATT, and according to Canada, also under Article 2.1 of the TBT Agreement. They further asserted that the EU Seal Regime creates an unnecessary obstacle to trade, inconsistent with Article 2.2 of the TBT Agreement, because it is more trade restrictive than necessary to fulfil a legitimate objective.

The Panel first addressed the claims under the TBT Agreement and then addressed those made under the GATT. Regarding the claims under the TBT Agreement, the Panel concluded that the EU Seal Regime is a 'technical regulation' within the meaning of Annex 1.1 to the TBT Agreement. The Panel based its finding in this regard on its interpretation of EC-Asbestos, where nature and quantity of the seal products shall not be such as to indicate that they are being placed on the market for commercial reasons. The application of this paragraph shall not undermine the achievement of the objective of this Regulation. It should be noted that there may be a discrepancy between the public perception of the measure as an 'anti-cruelty ban' and what the measure actually is. An examination of the actual measure reveals that it may not be an 'anti-cruelty ban' since it does not restrict access to the market for seal products based on how they are killed (humanely rather than inhumanely), but instead restricts them based on the identity of the hunter (indigenous communities) and purpose of the hunt (marine resource management on a non-profit basis), regardless of the methods used for killing the seals.

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The Panel found that the exceptions of the EU Seal Regime create an unnecessary obstacle to trade, inconsistent with Article 2.2 of the TBT Agreement, because it is more trade restrictive than necessary to fulfil a legitimate objective. The Panel first addressed the claims under the TBT Agreement and then addressed those made under the GATT. Regarding the claims under the TBT Agreement, the Panel concluded that the EU Seal Regime is a ‘technical regulation’ within the meaning of Annex 1.1 to the TBT Agreement. The Panel based its finding in this regard on its interpretation of EC-Asbestos, where nature and quantity of the seal products shall not be such as to indicate that they are being placed on the market for commercial reasons. The application of this paragraph shall not undermine the achievement of the objective of this Regulation. It should be noted that there may be a discrepancy between the public perception of the measure as an ‘anti-cruelty ban’ and what the measure actually is. An examination of the actual measure reveals that it may not be an ‘anti-cruelty ban’ since it does not restrict access to the market for seal products based on how they are killed (humanely rather than inhumanely), but instead restricts them based on the identity of the hunter (indigenous communities) and purpose of the hunt (marine resource management on a non-profit basis), regardless of the methods used for killing the seals.

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the AB found the prohibition on asbestos-containing products to ‘lay down a product characteristic in the negative form by requiring that all products must not contain asbestos’.

After this finding, it followed the recent TBT AB jurisprudence, which determined that the existence of ‘less favourable treatment’ (within the meaning of Article 2.1 of the TBT) is not merely based on whether there is any detrimental impact of the measure on imports, but also whether this impact stems from ‘legitimate regulatory distinctions’. In accordance with these cases, a detrimental impact arising from ‘legitimate regulatory distinctions’ would not amount to ‘less favourable treatment’ under the TBT Agreement in the first place.

All three parties to the dispute appealed certain issues of law and legal interpretations developed by the Panel, and several members filed third participant submissions during the appeal, in keeping with the high-profile nature of the case.

WHAT IS A ‘TECHNICAL REGULATION’?

The first step of any TBT claim is to determine whether the measure at issue is or is not a ‘technical regulation’, as defined in Annex 1.1. Accordingly, the analysis of the AB begins with the legal characterization of the EU Seal Regime under Annex 1.1 of the TBT Agreement, particularly since the EU appealed the panel’s finding in that regard. Annex 1.1 of the TBT Agreement defines the term ‘technical regulation’ as follows:

[A document] which lays down product characteristics or their related processes and production methods. . . . It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method.

Further, before determining whether the measure at dispute constitutes a technical regulation, the AB outlined the interpretation of Annex 1.1 to the TBT Agreement with respect to PPMs as the term appears in the first sentence. It noted, in its review of the text of Annex 1.1, that: ‘The use here of the disjunctive “or” indicates that “related [PPMs]” may play an additional or alternative role vis-à-vis “product characteristics” under Annex 1.1.’

The AB found that in order to determine whether a measure concerns a PR PPM, one must examine ‘whether the processes and production method prescribed by the measure has a sufficient nexus to the characteristics of a product in order to be considered related to those characteristics’.

The AB with respect to the second sentence of Annex 1.1 of the TBT Agreement noted ‘that technical regulations “may also include or deal exclusively with”, namely, “terminology, symbols, packaging, marking or labeling requirements” as they apply to a product, process or production method have “technical content”. While the term “technical” can have a range of meanings, it does not appear plausible that a measure that purportedly distinguishes between seal products on the basis of criteria relating to the identity of the hunter and the purpose of the hunt would be “technical” in nature or have “technical” content.’

13 See EC-Seal Products, Panel, n. 9 above, at paragraph 7.104 (referring to the AB in EC-Asbestos, n. 4 above, at paragraph 71).
14 See G. Marceau, n. 6 above. The Panel then found, in relation to Canada’s claim under Article 2.1 of the TBT, that the IC and MRM exceptions are inconsistent with Article 2.1 because the detrimental impact caused by the exceptions does not stem exclusively from legitimate regulatory distinctions and, consequently, the exceptions accord imported seal products treatment less favourable than that accorded to like domestic and other foreign seal products. It further found, however, that the EU Seal Regime is consistent with Article 2.2 because it fulfills the objective of addressing EU public moral concerns regarding seal welfare and to a certain extent no alternative measure has been demonstrated to make an equivalent or greater contribution to the fulfillment of the objective of the EU Seal Regime. Regarding the claims under GATT Article XX, the Panel found that the IC and MRM exceptions are not justified under Article XX(a) because they fail to meet the requirements under the chapeau of Article XX, and that the EU failed to make a prima facie case for its claim that the IC and MRM exceptions are justified under Article XX(b). The Panel therefore found that, pursuant to Article 3.8 of the Dispute Settlement Understanding (DSU), to the extent that the EU acted inconsistently with Article 2.1 (in Canada’s case) and Article 5.1(2) of the TBT Agreement, and Articles I.1 and III.4 of the GATT, it nullified or impaired benefits accruing to Canada and Norway under these agreements. See EC-Seal Products, Panel, n. 9 above, section 7.3.3.3.5.
15 See EC-Seal Products, AB, n. 7 above, at paragraph 1.10.
16 Ibid., at paragraph 5.1.
17 Ibid., at paragraph 5.11. The AB in EC-Seal Products also noted that ‘Article 2.9 of the TBT Agreement envisages that technical regulations “may also include or deal exclusively with”, namely, “terminology, symbols, packaging, marking or labeling requirements” as they apply to a product, process or production method.

18 Ibid., quoting EC-Asbestos, n. 4 above, at paragraph 67.
19 Ibid., at paragraph 5.12.
20 Ibid.
21 Ibid.
Production method.22 It further noted that the use of the words ‘also include’ and ‘deal exclusively with’ indicates that terminology, symbols, labelling requirements, and so on include elements that are ‘additional to’ and ‘may be distinct from’ product characteristics and their PPMs.23 These pronouncements on PPM matters will be further discussed below.

After its review of the text, the AB examined whether the Panel erred in its application of Annex 1.1 when it found that the EU Seal Regime constitutes a technical regulation. Before discussing the substance of the Panel’s characterization of the measure at issue under Annex 1.1, the AB made a few preliminary remarks in this context. First, the AB highlighted that whether a measure constitutes a technical regulation must be determined by analyzing the ‘integral and essential’ aspects of the measure.24 It noted that the ‘integral and essential’ features of the measure are to be accorded the most weight for the purposes of characterizing the measure, and thus for determining whether it is within the scope of the TBT Agreement.25 It then reiterated that the conclusion as to the legal characterization of the measure ‘must be made in respect of, and having considered, the measure as a whole’.26

The AB disagreed with the approach of the Panel as to whether the EU Seal Regime constitutes a technical regulation. It considered that the Panel erred by reaching its final conclusion as to the legal character of the measure on the basis of an examination of the prohibitive elements (the prohibition on seal containing products) taken alone. It considered that the Panel could not have properly reached a conclusion as to the legal character without analyzing the integral and essential elements of the measure as a whole, including the permissive elements contained in the exceptions.27

The AB then examined both the prohibitive and permissive elements of the regime. It considered that the prohibition on seal-containing products ‘may be seen as imposing certain “objective features, qualities or characteristics” on all products by providing that they may not contain seal’, but recalled that the prohibition is ‘but one of the components’ of the regime, which must be analyzed together with the permissive elements before reaching a conclusion under Annex 1.1 of the TBT Agreement.28 In considering whether the exceptions under the EU Seal Regime lay down product characteristics, the AB determined that:

The Panel’s discussion . . . gives the impression that the Panel treated the identity of the hunter, the type of hunt, and the purpose of the hunt as ‘product characteristics’ within the meaning of Annex 1.1. . . . We consider the Panel to have erred in this regard. We see no basis in the text of Annex 1.1,

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or in prior Appellate Body reports, to suggest that the identity of the hunter, the type of hunt, or the purpose of the hunt could be viewed as product characteristics. Nor do we see a basis to find that the market access conditions under the exceptions to the EU Seal Regime exhibit features setting out product characteristics.\[29\]

This is a critical finding of the AB Report. The issue of whether the EU Seal Regime sets out product characteristics is central for the applicability of the disciplines of Articles 2.1 and 2.2 of the TBT Agreement.\[30\] The measure must first fall within the scope of the TBT Agreement by meeting the requirements of its Annex 1.1. The characterization of the measure at issue and its subsequent analysis under Annex 1.1 of the TBT is thus a crucial step in this context.

The AB determined that:

Unlike the measure at issue in EC-Asbestos, the EU Seal Regime does not prohibit (or permit) the importation or placing on the EU market of products depending on whether or not they contain seal as an input. Instead . . . the measure conditions market access on the type and purpose of the seal hunt, and the identity of the hunter. . . . Such criteria do not constitute product characteristics in the sense of Annex 1.1.\[31\]

It therefore concluded:

When the prohibitive aspects of the EU Seal Regime are considered in the light of the IC and MRM exceptions, it becomes apparent that the measure is not concerned with banning the placing on the EU market of seal products as such. Instead, it establishes the conditions for placing seal products on the EU market based on criteria relating to the identity of the hunter or the type or purpose of the hunt from which the product is derived. We view this as the main feature of the measure. That being so, we do not consider that the measure as a whole lays down product characteristics. This is not changed by the fact that the administrative provisions under the EU Seal Regime may ‘apply’ to products containing seal.\[32\]

Importantly, the AB characterized the main features of the EU Seal Regime as ‘establish[ing] the conditions for placing seal products on the EU market based on criteria relating to the identity of the hunter or the type or purpose of the hunt from which the product is derived’,\[33\] not based on criteria relating to the manner in which seal is killed (i.e., humanely or inhumanely). It therefore reversed the Panel’s finding that the regime lays down product characteristics, and therefore reversed the Panel’s finding that the regime constitutes a ‘technical regulation’ within the meaning of Annex 1.1 of the TBT.

However, both Canada and Norway asked that the AB complete the legal analysis and find that the regime constitutes a technical regulation within the meaning of Annex 1.1 in the event the AB reversed the Panel finding as they did above. Having based its reasoning above on whether the EU seals regime lays down product characteristics, the AB further considered the first sentence of Annex 1.1, which refers to product characteristics or their related processes and production methods. It noted that ‘we might, in principle, be able to complete the analysis by ruling on whether the EU Seal Regime lays down “related processes and production methods” and therefore qualifies as a technical regulation even though it does not lay down product characteristics’.\[34\] It noted, however, that:

The Appellate Body has refrained from completing the legal analysis in view of the novel character of an issue which the panel ‘had not examined at all’ and on which the Panel had made no findings. Importantly, it has not completed the analysis in the absence of a full exploration of issues before the panel that might have given rise to concerns about the parties’ due process rights. We believe that all these elements are present in this case. We further note that the line between PPMs that fail, and those that do not fail, within the scope of the TBT Agreement raises important systemic issues. Although we explored the issue of whether the EU Seal Regime lays down related PPMs with the participants and third participants at the oral hearing, and while the participants’ answers to the Division’s questions did shed at least some light on the issue, we consider that in order to develop an interpretation of that phrase in the first sentence of Annex 1.1 and in order to reach a conclusion in this respect regarding the EU Seal Regime, more argumentation by the participants and exploration in questioning would have been required. The Panel has made no findings on this issue and the question was not explored by the Panel. Moreover, the complainants focused in their argumentation on the issue of whether the EU Seal Regime lays down ‘product characteristics’ and ‘applicable administrative provisions’ within the meaning of Annex 1.1. In these circumstances, we do not consider it appropriate to complete the legal analysis by ruling on whether the EU Seal Regime lays down ‘related processes and production methods’ within the meaning of Annex 1.1 to the TBT Agreement.\[35\]
The AB’s pronouncements above and its review of the text of Annex 1.1 as it relates to related PPMs raise several questions and may have implications for the trade and environment debate. Having reversed the Panel and concluded that the EU Seal Regime was not a technical regulation to trade because it did not lay down product characteristics, and thus that the TBT Agreement was not applicable, it reversed the Panel’s findings that the EU Seal Regime was inconsistent with Articles 2.1 and 2.2 of the TBT. Thus the AB did not answer this fundamental question and therefore the contours of the PPM aspect of Annex 1.1 of the TBT Agreement have been left to another day.

There are several other elements of the case relevant to this context, particularly regarding the relationship between the GATT, the TBT and the pursuit of non-trade objectives. The elements elucidated by the AB in that regard will be highlighted next.

THE RELATIONSHIP BETWEEN THE GATT AND THE TBT

The EU attempted to suggest that the legal tests under GATT Articles I and III were somewhat similar to those developed under Article 2.1 of the TBT Agreement. It also argued that the standard of the necessity of GATT Article XX requires a ‘material’ contribution, while the TBT Article 2.2 necessity test requires a lower degree of contribution to the policy goal. In particular, the EU argued on appeal that the legal standard developed under Article 2.1 of the TBT applies equally to claims under Articles I.1 and III.4 of the GATT, and therefore only detrimental impacts for like imported products that do not stem exclusively from a legitimate regulatory distinction are prohibited under the GATT.36

The AB disposed of the argument under Article I.1 of the GATT by noting that there is no textual basis in Article I.1 for an examination of whether the detrimental impact of the measure on competitive opportunities for like products stems exclusively from legitimate regulatory distinctions.37 It dealt with the claim in relation to Article III in a more detailed manner,38 and noted that:

[T]he term ‘treatment no less favorable’ in Article III:4 requires effective equality of opportunities for imported products to compete with like domestic products. Thus, Article III:4 permits regulatory distinctions to be drawn between products, provided that such distinctions do not modify the conditions of competition between imported and like domestic products.39

It therefore found that a Panel is not required to examine whether the detrimental impact of a measure stems exclusively from a legitimate regulatory distinction for the purposes of its analysis under Article III.4 of the GATT.40

In this regard, the AB noted the EU’s argument that a technical regulation could be considered non-discriminatory under the TBT Agreement, but could still violate the GATT.41 It also noted the EU’s submission in support of that argument, that ‘the list of possible legitimate objectives that may factor into an analysis under Article 2.1 of the TBT Agreement is open, in contrast to the closed list of objectives enumerated under Article XX of the GATT 1994’.42 In the EU’s view, the Panel’s ‘divergent approach to de facto discrimination’ could lead to a situation where, under Article 2.1, a technical regulation that has a detrimental impact on imports would be permitted if such detrimental impact stems from a legitimate regulatory distinction, while, under Articles I:1 and III:4 of the GATT 1994, the same technical regulation would be prohibited if the objective that it pursues does not fall within the subparagraphs of Article XX of the GATT 1994.43

According to the EU, the Panel’s interpretation of Articles I:1 and III:4 would thus ‘render Article 2.1 of the TBT Agreement irrelevant’ as complainants would have a strong incentive not to invoke Article 2.1 of the TBT Agreement, and, instead, would bring claims under the GATT 1994, even if the measure at issue qualified as a technical regulation.44

In response to this argument, the AB recalled its observations in US-Clove Cigarettes concerning the preamble of the TBT Agreement, the relevance of Article III.4 of the GATT in interpreting Article 2.1 of the TBT Agreement, and the absence of a general exception provision in the TBT Agreement similar to Article XX of the GATT.45 It considered that ‘the language of the second recital of the TBT Agreement indicates that the TBT Agreement expands on pre-existing GATT disciplines and emphasized that the two agreements should be interpreted in a coherent and consistent manner’.46 Regarding the TBT Agreement, the AB noted that:

[T]he balance between the desire to avoid creating unnecessary obstacles to international trade under the fifth recital, domestic products involves an assessment of the implications of the contested measure for the equality of competitive conditions between imported and like domestic products. If the outcome of this assessment is that the measure has a detrimental impact on the conditions of competition for like imported products, then such detrimental impact will amount to treatment that is “less favourable” within the meaning of Article III.4.’ Ibid., at paragraph 5.116 (emphasis added).

40 Ibid., at paragraph 5.117.
41 Ibid., at paragraph 5.118.
42 Ibid.
43 Ibid.
44 Ibid.
45 Ibid., at paragraph 5.121.
46 Ibid.
and the recognition of a Member’s right to regulate under the sixth recital, is not, in principle, different from the balance set out in the GATT 1994, where obligations such as national treatment in Article III are qualified by the general exceptions provision of Article XX.47

The AB noted that, unlike the TBT Agreement, the non-discrimination principles under GATT Articles I.1 and III.4 are balanced by a member’s right to regulate in a manner consistent with the express exceptions clause of Article XX.48 This weighed heavily against importing into the interpretation of Articles I and III of the GATT for interpreting the provisions of the TBT Agreement, which does not have an express Article XX-type exception.49 It noted that it was not ‘persuaded’ by the EU’s argument that there would be divergent outcomes under the TBT Agreement and GATT in respect of the same measure and would therefore render Article 2.1 of the TBT Agreement irrelevant. It further noted that:

[It seems to us that the European Union’s argument is predicated on a perceived imbalance between, on the one hand, the scope of a Member’s right to regulate under Article XX of the GATT 1994, and, on the other hand, the scope of that right under Article 2.1 of the TBT Agreement. Yet, under the TBT Agreement, the balance between the desire to avoid creating unnecessary obstacles to international trade under the fifth recital, and the recognition of Members’ right to regulate under the sixth recital, is not, in principle, different from the balance set out in the GATT 1994, where obligations such as national treatment in Article III are qualified by the general exceptions provision of Article XX.50

It further opined that: ‘If there is a perceived imbalance in the existing rights and obligations under the TBT Agreement and the GATT 1994, the authority rests with the Members of the WTO to address that imbalance.’51

In its analysis of Article XX of the GATT,52 the AB further highlighted the similarities and differences between the pursuit of non-trade objectives under Article 2.1 of the TBT and Article XX of the GATT. In its analysis of necessity under Article XX of the GATT, the AB stated:

We further note that the Appellate Body was careful not to suggest that its approach in [Brazil-Retreaded Tyres] was requiring the use of a generally applicable threshold for a contribution analysis. Rather, the Appellate Body was making the more limited statement that ‘when a measure produces restrictive effects on international trade as severe as those resulting from an import ban, it appears to us that it would be difficult for a panel to find that measure necessary unless it is satisfied that the measure is apt to make a material contribution to the achievement of its objective’. We therefore do not see that the Appellate Body’s approach in Brazil-Retreaded Tyres sets out a generally applicable standard requiring the use of a pre-determined threshold of contribution in analyzing the necessity of a measure under Article XX of the GATT 1994.53

It therefore concluded that:

A measure’s contribution is thus only one component of the necessity calculus under Article XX. This means that whether a measure is ‘necessary’ cannot be determined by the level of contribution alone, but will depend on the manner in which the other factors of the necessity analysis, including a consideration of potential alternative measures, inform the analysis.54

51 The AB observed at the outset of its analysis that: ‘As established in WTO jurisprudence, the assessment of a claim of justification under Article XX of the GATT involves a two-tiered analysis in which a measure must first be provisionally justified under one of the subparagraphs of Article XX, before it is subsequently appraised under the chapeau of Article XX. As the Appellate Body has stated, provisional justification under one of the subparagraphs requires that a challenged measure “address the particular interest specified in that paragraph” and that “there be a sufficient nexus between the measure and the interest protected”. In the context of Article XX(a), this means that a Member wishing to justify its measure must demonstrate that it has adopted or enforced a measure “to protect public morals”, and that the measure is “necessary” to protect such public morals. As the Appellate Body has explained, a necessity analysis involves a process of “weighing and balancing” a series of factors, including the importance of the objective, the contribution of the measure to that objective, and the trade-restrictiveness of the measure. The Appellate Body has further explained that, in most cases, a comparison between the challenged measure and possible alternatives should then be undertaken. The burden of proving that a measure is “necessary to protect public morals” within the meaning of Article XX(a) resides with the responding party, although a complaining party must identify any alternative measures that, in its view, the responding party should have taken.’ Ibid., at paragraph 5.169 (footnotes omitted).

52 Ibid., at paragraphs 5.210–5.215. The AB then upheld the Panel’s finding that the objective of the EU Seal Regime falls within the scope of Article XX(a) of the GATT dealing with on the protection of public morals, and upheld the finding that the regime is provisionally deemed necessary within the meaning of Article XX(a). However, the AB reversed the Panel’s finding under the chapeau of Article XX on
This confirms that the balance between the pursuit of non-trade concerns and market access obligations is similar in the GATT and the TBT since there is equally no minimum threshold for contribution under the TBT Agreement. In its analysis of the chapeau of Article XX, the AB further highlighted the similarities and differences between the pursuit of non-trade objectives under Article 2.1 of the TBT and Article XX of the GATT. Since the Panel relied heavily on its analysis of TBT Article 2.1 in its analysis of the chapeau of Article XX, the AB pronounced:

Moreover, both Article 2.1 and the chapeau of Article XX do not ‘operate to prohibit a priori any obstacle to international trade’. Instead, as interpreted by the Appellate Body, Article 2.1 ‘permits[ ] detrimental impact on competitive opportunities for imports that stems exclusively from legitimate regulatory distinctions’, while under the chapeau of Article XX, discrimination is permitted if it is not arbitrary or unjustifiable.

However, there are significant differences between the analyses under Article 2.1 of the TBT Agreement and the chapeau of Article XX of the GATT 1994. First, the legal standards applicable under the two provisions differ. Under Article 2.1 of the TBT Agreement, a panel has to examine whether the detrimental impact that a measure has on imported products stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products. Under the chapeau of Article XX, by contrast, the question is whether a measure is applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.

Another important difference between Article 2.1 of the TBT Agreement and the chapeau of Article XX of the GATT relates to their main function and scope. Article 2.1 is a non-discrimination provision in respect of technical regulations. Consequently, in the context of Article 2.1, it is only the regulatory distinction that accounts for the detrimental impact on imported products that is to be examined to determine whether it is ‘a legitimate regulatory distinction’. By contrast, the function of the chapeau of Article XX is to maintain a balance between a Member’s right to invoke the exceptions under the subparagraphs of Article XX and the substantive rights of the other Members under the various other provisions of the GATT 1994. Indeed, a measure can be found to be applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.

The AB thus reversed the Panel’s findings under the chapeau of Article XX on the basis that the Panel applied an incorrect legal test since it relied on its findings under Article 2.1 of the TBT Agreement to conclude that the measure was thus necessarily inconsistent with GATT Article XX, despite the differences in legal standards between Article 2.1 TBT and GATT Article XX, as noted above. The AB then completed the analysis and found that the EU Seal Regime, particularly the IC exception, did not meet the requirements of the chapeau of Article XX since it was discriminatory. It accordingly found that the measure was not justified under Article XX(a).

These clarifications are important in the context of trade and the environment. Rather than in opposition, the above shows that environmental and social concerns may be reflected and enforced through the WTO, and how this may be done through the GATT and the TBT. Understanding the balance between market access obligations and legitimate policy objectives under these agreements is crucial for the future. It remains to be seen whether the similarities and differences between the GATT and the TBT in this context will have a substantial impact, as contended by the EU.

**PRODUCT-RELATED AND NON-PRODUCT-RELATED PPMs**

PPMs have been at the heart of the trade and the environment debate. Traditionally, PPMs refer to the processes and production methods of producing goods. For environmentalists, they serve to distinguish between goods produced in an environmentally sound manner, and those that are produced in a manner that harms the environment, although both sets of products may look alike. From an environmental law perspective, PPMs are said to represent a valuable tool of environmental policy, a chance to give teeth to environmental norms and obligations where goods following environmentally sound PPMs are not like other goods that do not comply with said PPM requirements. From a trade perspective, PPMs represent a risk of protectionist distinctions based on non-transparent policies and criteria, threatening the market access guarantees under the WTO covered agreements.

55 See G. Marceau and J. Wyatt, n. 1 above.
56 EC-Seal Products, AB, n. 7 above, at paragraphs 5.310–5.312.
57 Ibid., at paragraph 5.313.
58 Ibid., at paragraphs 5.316–5.338.
59 Ibid., at paragraph 5.339.
61 Ibid.
surrounding PPMs are beyond the scope of this article. Nonetheless, the AB’s pronouncements regarding PPMs raise central questions in this debate and may serve to rekindle the discussion in this area. This section aims to highlight these areas for further study and debate, and proposes an analytical framework for PR and NPR PPMs in light of the AB’s pronouncement in *EC-Seal Products*. The central elements of the PPM controversy will be briefly outlined, so that the implications of this case may be fully understood in context.

A central element in the PPM debate is the product-process distinction or ‘product-process doctrine’, as coined by Hudec in 1998. He observed that ‘under this so-called “product-process doctrine”, product distinctions based on characteristics of the production process, or of the producer, that are not determinants of product characteristics are simply viewed as a priori illegitimate’. The product-process distinction has been severely criticized. Hudec even noted that the distinction posed a potentially lethal threat to process-based regulation. This is arguably the murkiest area in the issue of PPMs.

Traditionally, the central element of the debate surrounding PPMs is the distinction between PR PPMs and NPR PPMs. There is no generally accepted legal definition of a PR PPM or NPR PPM. The conventional view seems to be that PR PPMs are those that alter, leave a trace, effect or are detectable in the final product; and NPR PPMs do not. Although the distinction between the two is not expressly referred to in the WTO covered agreements, it has nonetheless dominated the discourse on PPMs among environmentalists and trade and environment experts. For many, the line between ‘acceptable’ PPMs is drawn at the product-related/product-non-related distinction. Under this view, those measures that are product-related are covered by the TBT and Article III (and allow for likeness distinctions); those that are non-product-related are outside the scope of the TBT, but possibly within the scope of GATT Article XX in certain circumstances (recalling that the distinction between shrimp that are fished while inadvertently killing turtles and shrimp that are fished without killing turtles was considered legitimate in *US-Shrimp*).

This product-related/non-product-related distinction has found expression and even foundation in the case law of the GATT and the WTO. GATT Panels in *Tuna-Dolphin I* and *Tuna-Dolphin II*, two unadopted GATT Panel reports, found that measures concerned with the way tuna are fished are not concerned with product criteria and were thus not covered by GATT Articles I and III, and instead violated GATT Article XI as they imposed trade restrictions. For those panels, Article III of the GATT was concerned with regulations related to ‘products’ only.

For those who adhere to the traditional definition of NPR PPM, the AB report in *US-Shrimp* demonstrates that NPR PPMs can be legitimate under GATT Article XX, because the United States in its second dispute (the Article 21.5 dispute) managed to justify its import restrictions based on the way shrimp are fished – a clear PPM, but handled under the GATT exception provisions. It may also be the case that the PPM measure in *US-Shrimp* could be considered as ‘related’ to the product of shrimp, and thus that the measure in that case was not a NPR PPM in the first place but rather a PR PPM. In any case, it seems clear that the traditional product-related/non-product-related distinction may no longer be relevant in the GATT context, particularly since it is not expressly referred to therein. Moreover, Article XX is open to a series of policy considerations, without any distinction of whether and how such policy affects the products subject to the challenged restriction. This gives a reason to revisit the PR and NPR distinction and rethink the meaning of the PR PPMs in the light of the AB Report in *EC-Seal Products*.

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64 See R.E. Hudec, n. 63 above.

65 See R. Howse and D. Regan, n. 63 above.

66 See R.E. Hudec, n. 63 above. PPMs have been a further controversial topic, and have been subject to claims of ‘neo-imperialism’ due to the disproportionate burden placed on developing countries as the primary target of such measures. See S. Charnovitz, n. 60 above.

67 The distinction between product-related and non-product-related PPMs emerged through the debate surrounding the product-process doctrine, referred to in note 63 above, and has since become a widely accepted analytical tool. See C.R Conrad, n. 63 above, at 28.

68 See S. Charnovitz, n. 60 above; S.E. Gaines, n. 60 above, at 397; and C.R. Conrad, n. 63 above, at 28.

69 GATT Panel Report 3 September 1991, *United States – Restrictions on Imports of Tuna*, DS21R, BISD 39S/155; WTO DS 15 September 2011, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R. However, it must be noted that the Panel in *Tuna-Dolphin I* observed that ‘the tuna products labelling provisions of the DPCIA relating to tuna caught in the ETP were not inconsistent with the obligations of the United States under Article I:1 of the General Agreement’. Ibid., at paragraph 5.44.

The PR/NPR PPM debate emerged in the wake of these cases, before the TBT Agreement existed and thus before there was any textual basis to draw such a distinction. However, the explicit references to PPMs in the TBT, and the subsequent pronouncement on ‘product-related PPMs’ in **EC-Seal Products** suggests that the distinction remains relevant for the TBT. As discussed below, however, there is no clear definition of what is a ‘product characteristic’ or what is to be considered ‘related to product characteristics’. Furthermore, the AB’s pronouncement in this case may justify a wider scope of PR PPMs.

It should be added that in the more recent WTO dispute **US-Tuna II**, the AB found the United States measure, a label concerned with the method of fishing tuna, to be covered by the TBT Agreement, but in violation of its Article 2.1. The AB did not expressly discuss the issue of PPMs in that case, but its consideration under the TBT could lend support to the view that a PR PPM – such as the way tuna is fished, by killing dolphins or not – comprises a PPM measure that leaves no physical trace on the product but has a sufficient nexus or connection with the restricted product. For example, the method of fishing tuna is directly related to the tuna products containing tuna, although not necessarily physically affected by it. According to this view, it would be a PR PPM subject to the TBT Agreement.

It should be noted, however, that some have argued that the **Tuna II** dispute was concerned with a label which is expressly referred to in Annex 1.1 of the TBT Agreement. According to that view, the second sentence of Annex 1.1 offers a broader scope to PPMs that take the form of a label and thus labelling requirements form a special regime that exceptionally brings traditionally defined NPR PPMs within the scope of the TBT. It is suggested that the special regime of labelling requirements is more flexible since such measures do not completely restrict trade but essentially provide information.

As noted, a PR PPM is not mentioned in the WTO covered agreements, but Annex 1.1 of the TBT defines a technical regulation as a ‘[d]ocument which lays down product characteristics or their related processes and production methods’. Therefore, the technical regulation – and thus the scope of TBT – includes product characteristics and PR PPMs. Determining the meaning of so-called ‘product-related PPMs’ is one of the difficulties of the PPM debate. We could all agree that PR PPMs are regulations that relate to the product in two manners. Initially, all would likely agree that when either the process or production method leaves a trace on – or is detectable in – the final product, the PPM is related to the product. However, upon further reflection, if PR PPMs are composed only of processes and production methods that ‘leave a trace’ or ‘are physically incorporated’ into the products, what then, is the difference between a product characteristic and a PR PPM? It is also possible to argue that a PR PPM includes processes and production methods that are ‘linked’ or ‘related’ to the product in question. In the expression ‘product-related PPMs’, the term ‘related’ must be given a meaning, and arguably, PR PPMs include PPMs that ‘relate to’ the concerned products and not only PPMs that physically affect products.

Thus, a regulation based on the process and production method (e.g., methods of fishing tuna that do not kill dolphins) that has a nexus, connection or sufficient link with the regulated imported product (e.g., trade of tuna) could be considered a PR PPM. Indeed, the AB referred to the ‘nexus’ between the PPMs and the product. This entails an examination of whether the PPM in question is ‘related’, ‘connected’ or has a sufficient ‘nexus’ with a product. This conclusion of the AB seems to provide guidance as to what would be included in a PR and NPR PPM. It seems to open the door for a broader meaning of PR PPM than has been understood in the literature thus far. It does, however, raise a series of questions. The nature and extent of the required nexus or relationship is not clear. What would be a sufficient nexus and how may this be demonstrated? The matter was not pursued further by the AB. However, it is noted that the language used by the AB (‘nexus’, ‘relation’, ‘connection’) seems to require less than ‘leaving a trace’ or ‘being physically incorporated’ into the products.

On the other hand, NPR PPMs can be thought afresh and possibly could be defined as including processes and production methods designed to achieve a social and/or environmental purpose through trade measures applicable to products that may not have direct links with the concerned product itself. For example, this would be the case when a regulation restricts imports on the basis of criteria or conditions that do not (directly) relate to the restricted products or their characteristics, such as a ban on all imports from Member X where industries is claimed to maintain slavery and forced labour. A NPR PPM therefore would have no relationship to restricted products. It seems that the traditional distinction may no longer be relevant in the GATT context. Article XX of the GATT opens the door for any policies, including

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72 Moreover, the AB’s approach in EC-Seal Products also suggests that PPMs are distinct from the product characteristics as it decided to raise the issue of PPMs right at the end after having completed its analysis of ‘whether the measure lays down the product characteristics’. It also noted that ‘we might, in principle, be able to complete the analysis by ruling on whether the EU Seal Regime lays down their related processes and production methods and therefore qualifies as a technical regulation even though it does not lay down product characteristics’. Ibid., at paragraph 5.64. This seems to imply that the measure which did not lay down product characteristics could very well be a technical regulation if it was found to lay down PR PPMs.

73 **EC-Seal Products**, AB, n. 7 above, at paragraph 5.12.

74 Such NPR PPMs, although outside the scope of the TBT, would still be within the scope of the GATT and would be justifiable under Article XX.
PPMs, however broadly defined, regardless of whether it is product-related or not. Moreover, the PPM distinction may be relevant in the GATT context of Article III and its ‘like products’ to the extent that it affects the competitive relationship between two otherwise like products.

It is important to note that the issue of whether or not a PPM is product-related is a threshold issue to determine whether or not the measure is within the scope of the TBT Agreement. As noted by the AB in *EC-Seal Products*, the first step to any TBT claim is to examine whether or not the measure constitutes a technical regulation under its Annex 1.1. The product-related/non-product-related distinction is therefore relevant in the context of the TBT since although one can extrapolate from the AB findings that that only PR PPMs fall within the scope of the TBT, it seems that the concept of PR PPMs may not be so clear and may be broader than previously understood.

The AB’s pronouncement in *EC-Seal Products* demonstrates that the relationship between the PPM measure and the restricted product does not need to be exclusively physical; that a ‘nexus’, ‘connection’ or ‘relation’ is sufficient to determine that a PPM is product-related. This suggests that a measure like the one in *US-Shrimp* could be a PR PPM. The method of fishing shrimp arguably has a direct relationship, connection and nexus with shrimp as a product. Further questions as to the nature and extent of the nexus or relationship still need clarification, however. The conventional view – which limits PR PPMs to those that ‘leave a trace’ or ‘are physically incorporated’ into the products – would seem to hold true if the term was affected rather than related. The above seems to indicate, however, that there is in fact no requirement that the measure leave a physical trace on the product in order to be sufficiently ‘related’.

In *EC-Asbestos*, the AB held that:

In the definition of a ‘technical regulation’ in Annex 1.1, the TBT Agreement itself gives certain examples of ‘product characteristics’ – ‘terminology, symbols, packaging, marking or labeling requirements’. These examples indicate that ‘product characteristics’ include, not only features and qualities intrinsic to the product itself, but also related ‘characteristics’, such as the means of identification, the presentation and the appearance of a product. This could suggest that what is ‘related’ to the product goes beyond the physical characteristics intrinsic to the product itself. Otherwise, it is difficult to distinguish between product characteristics so broadly defined, and a PR PPM in the narrow conventional understanding. The very point of a PPM is to address concerns that may not be immediately detectable in a product, but nonetheless present themselves in the processes and production methods of the particular product.

Should we understand the AB in *EC-Seal Products* to have said that the traditionally defined NPR PPMs are outside the scope of the TBT Agreement. In my view, the conventional understanding of what is and what is not a PR PPM may need to be reviewed (at least under the TBT Agreement) in light of the specific wording.

It is also important to emphasize that in any case the issue of whether a regulation is a PR PPM is only the first step. If the PPM is product-related and within the scope of the TBT, the policy basis or the reasons for the distinction implemented by the PR PPM must be consistent with the TBT Agreement – that is, it must comply with Article 2.1 and 2.2 and thus must be based on legitimate considerations. In other words, there are legitimate and illegitimate PR PPMs where only the former are TBT-consistent. The recent TBT cases in which the AB noted that a detrimental impact arising from ‘legitimate regulatory distinctions’ would not amount to ‘less favourable treatment’ under the TBT Agreement in the first place is relevant in this context to determine whether the PPM distinction is based on legitimate considerations and therefore TBT-consistent.

**CONCLUSION**

The AB Report in *EC-Seal Products* provides useful insight and opportunities for engagement with the relationship between trade and the environment. Given that the PPM issue lies at the heart of the tension between trade and the environment, the report raises several pertinent issues and questions to be further explored. In particular, the question of what are PR and NPR PPMs can become crucial in determining whether a concerned regulation is covered by the TBT Agreement. It has been noted that PPMs arise because of the ‘ecological footprint’ of processes and production methods. This issue is not likely to fall by the wayside. It may be that the traditional categorization developed by the trade and environment scholarship is now outdated or not as appropriate as some have thought.

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75 *EC-Asbestos*, n. 4 above, at paragraph 67.
76 See G. Marceau, n. 6 above; and G. Marceau and J. Wyatt, n. 1 above.
77 See S. Charnovitz, n. 60 above, at 70.