1. INTRODUCTION

1.1 Canada, Norway, and the European Union each appeals certain issues of law and legal interpretations developed in the Panel Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*[3] (Panel Reports).[4] The Panel was established[5] to consider complaints by Canada[6] and Norway[7] (the complainants) with respect to a European Union measure dealing with seal products.[8]

1.2 The measure at issue in these disputes, as identified by the Panel[9], consists of the following legal instruments:

a. Regulation (EC) No. 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products[10] (Basic Regulation); and

b. Commission Regulation (EU) No. 737/2010 of 10 August 2010 laying down detailed rules for the implementation of Regulation

[3] WT/DS400/R, 25 November 2013 (Canada Panel Report (DS400)); WT/DS401/R, 25 November 2013 (Norway Panel Report (DS401)).

[4] The Panel issued its findings in the form of a single document containing two separate reports, with a common cover page, table of contents, and sections 1 through 7 (including the Panel's findings), and with separate conclusions and recommendations in respect of the dispute initiated by Canada and in respect of the dispute initiated by Norway.

[5] At its meeting held on 25 March 2011, the Dispute Settlement Body (DSB) established a panel pursuant to the request of Canada in document WT/DS400/4, in accordance with Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). At its meeting on 21 April 2011, the DSB established a panel pursuant to the request of Norway in WT/DS401/5, in accordance with Article 6 of the DSU, and agreed, as provided for in Article 9 of the DSU in respect of multiple complainants, that the panel established to examine the complaint by Canada would also examine the complaint by Norway. (Panel Reports, para. 1.6)

[6] Request for the Establishment of a Panel by Canada, WT/DS400/4.

[7] Request for the Establishment of a Panel by Norway, WT/DS401/5.

[8] These disputes concern products either processed or unprocessed, deriving or obtained from seals, including meat, oil, blubber, organs, raw fur skins and tanned fur skins, as well as articles (such as clothing and accessories, and omega-3 capsules) made from fur skins and oil. (Panel Reports, para. 2.6 (referring to Article 2(2) of the Regulation (EC) No. 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products, *Official Journal of the European Union*, L Series, No. 286 (31 October 2009); Canada's first written submission to the Panel, paras. 61-70; and Norway's first written submission to the Panel, paras. 86-102))

[9] Panel Reports, para. 7.7.

[10] *Official Journal of the European Union*, L Series, No. 286 (31 October 2009) (Panel Exhibit JE-1).

(EC) No. 1007/2009 of the European Parliament and of the Council on trade in seal products[11] (Implementing Regulation).

1.3 The Panel considered it appropriate to treat the Basic Regulation and the Implementing Regulation as a single measure, which it referred to as the "EU Seal Regime".[12] We do the same in these Reports.

1.4 The EU Seal Regime prohibits the placing of seal products on the EU market unless they qualify under certain exceptions, consisting of the following: (i) seal products obtained from seals hunted by Inuit or other indigenous communities (IC exception); (ii) seal products obtained from seals hunted for purposes of marine resource management (MRM exception); and (iii) seal products brought by travellers into the European Union in limited circumstances (Travellers exception).[13] The EU Seal Regime lays down specific requirements in respect of each of these exceptions.[14]

1.5 Canada and Norway claimed before the Panel that the EU Seal Regime violates various obligations under the General Agreement on Tariffs and Trade 1994 (GATT 1994) and the Agreement on Technical Barriers to Trade (TBT Agreement). The complainants alleged 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 1994 and, according to Canada, also under Article 2.1 of the TBT Agreement. Both complainants contended, in essence, that the IC and MRM exceptions accord seal products from Canada and Norway less favourable treatment than that accorded to like seal products of domestic origin, mainly from Sweden and Finland, and those of other foreign origin, particularly from Greenland. The complainants also 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. They further argued that certain procedural aspects of the measure violate the requirements for conformity assessment under Article 5 of the TBT Agreement. The complainants additionally claimed that the IC, MRM, and Travellers exceptions impose quantitative restrictions on trade, in a manner inconsistent with Article XI:1 of the GATT 1994.[15] Norway also argued that, if the EU Seal Regime was found to violate Article XI:1 of the GATT 1994, then it would also violate Article 4.2 of the Agreement on Agriculture. Finally, Canada

[11] *Official Journal of the European Union*, L Series, No. 216 (17 August 2010) (Panel Exhibit JE-2).

[12] Panel Reports, para. 7.8; see also para. 7.26 (referring to the parties' responses to Panel question No. 2).

[13] Panel Reports, para. 7.1. Apart from the reference to "conditions" in paragraphs 7.1 and 7.2, the Panel referred throughout its Reports to the IC, MRM, and Travellers "exceptions". (See e.g. *Ibid*., para. 7.35)

[14] Panel Reports, para. 7.1.

[15] Panel Reports, para. 7.2.

and Norway both contended that the application of the EU Seal Regime nullifies or impairs benefits accruing to them under the covered agreements within the meaning of Article XXIII:1(b) of the GATT 1994.[16]

1.6 The Panel Reports were circulated to Members of the World Trade Organization (WTO) on 25 November 2013. In its Reports, the Panel found it appropriate first to address the claims under the TBT Agreement, followed by those made under the GATT 1994.[17]

1.7 With respect to Canada's and Norway's claims under the TBT Agreement, the Panel concluded that:

a. the EU Seal Regime is a "technical regulation" within the meaning of Annex 1.1 to the TBT Agreement;

b. with respect to Canada's claim under Article 2.1, the IC exception and MRM exception under the EU Seal Regime are inconsistent with Article 2.1 because the detrimental impact caused by these 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;

c. the EU Seal Regime is not inconsistent with Article 2.2 because it fulfils the objective of addressing EU public moral concerns regarding seal welfare to a certain extent, and no alternative measure has been demonstrated to make an equivalent or greater contribution to the fulfilment of the objective of the EU Seal Regime;

d. the European Union acted inconsistently with its obligations under Article 5.1.2 because the conformity assessment procedures under the EU Seal Regime were incapable of enabling trade in qualifying products to take place as from the date of entry into force of the EU Seal Regime; and

e. Canada and Norway did not demonstrate that the European Union had acted inconsistently with its obligations under Article 5.2.1.[18]

1.8 With respect to Canada's and Norway's claims under the GATT 1994, the Panel concluded that:

[16] *Ibid*.
[17] Panel Reports, para. 7.69.
[18] Canada Panel Report (DS400), para. 8.2; Norway Panel Report (DS401), para. 8.2.

a. the IC exception under the EU Seal Regime is inconsistent with Article I:1 because an advantage granted by the European Union to seal products originating in Greenland is not accorded immediately and unconditionally to like seal products originating in Canada and Norway;

b. the MRM exception under the EU Seal Regime is inconsistent with Article III:4 because it accords imported seal products treatment less favourable than that accorded to like domestic seal products;

c. each of the IC, MRM, and Travellers exceptions under the EU Seal Regime is not inconsistent with Article XI:1;

d. the IC exception and the MRM exception under the EU Seal Regime are not justified under Article XX(a) because they fail to meet the requirements under the chapeau of Article XX; and

e. the IC exception and the MRM exception under the EU Seal Regime are not justified under Article XX(b) because the European Union failed to make a *prima facie* case for its claim.[19]

1.9 The Panel rejected Norway's claim under Article 4.2 of the Agreement on Agriculture[20], and refrained from examining Canada's and Norway's non-violation claim under Article XXIII:1 of the GATT 1994.[21] The Panel found that, pursuant to Article 3.8 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), to the extent that the European Union had acted inconsistently with Article 2.1 (in the case of Canada) and Article 5.1.2 of the TBT Agreement, and Articles I:1 and III:4 of the GATT 1994, it nullified or impaired benefits accruing to Canada and Norway under these agreements.[22]

1.10 On 24 January 2014, Canada and Norway each notified the Dispute Settlement Body (DSB), pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Reports and certain legal interpretations developed by the Panel, and each filed a Notice of Appeal[23] and an appellant's submission pursuant to Rule 20 and Rule 21, respectively, of the Working Procedures for Appellate Review[24] (Working Procedures). On 29

[19] Canada Panel Report (DS400), para. 8.3; Norway Panel Report (DS401), para. 8.3.

[20] Norway Panel Report (DS401), para. 8.4.

[21] Canada Panel Report (DS400), para. 8.4; Norway Panel Report (DS401), para. 8.5.

[22] Canada Panel Report, para. 8.5 (DS400); Norway Panel Report (DS401), para. 8.6.

[23] WT/DS400/8 (Canada), WT/DS401/9 (Norway) (attached as Annexes 1 and 2 to these Reports, respectively).

[24] WT/AB/WP/6, 16 August 2010.

January 2014, the European Union notified the DSB, pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Reports and certain legal interpretations developed by the Panel and filed a Notice of Other Appeal[25] and an other appellant's submission pursuant to Rule 23 of the Working Procedures. On 11 February 2014, the European Union, Canada, and Norway each filed an appellee's submission.[26] On 14 February 2014, Iceland, Japan, Mexico, and the United States each filed a third participant's submission.[27] On the same day, Namibia notified its intention to appear at the oral hearing as a third participant[28] (in DS401 only), and Argentina, China, and Ecuador (on 17 February 2014), Colombia (on 19 February 2014), and Russia (on 21 February 2014) each notified its intention to appear at the oral hearing as a third participant.[29]

1.11 On 29 January 2014, the Appellate Body received a joint communication from Canada and Norway requesting that the oral hearing in these appellate proceedings be opened to public observation. Both complainants proposed that public observation be permitted via simultaneous closed-circuit television broadcasting with the option for the transmission to be turned off should a third participant indicate that it wished to keep its oral statement confidential. They further requested the adoption of additional procedures to ensure the security and orderly conduct of the proceedings. On the same date, the Appellate Body received a communication from the European Union, joining Canada and Norway's request for public observation of the hearing, and indicating that it had no objections to the proposed additional security arrangements.

1.12 On 30 January 2014, the Appellate Body Division in these appellate proceedings invited the third parties to comment in writing on the participants' request for an open oral hearing. Japan, Mexico, and the United States submitted their responses on 3 February 2014. In its communication, Japan indicated that it had no objection to the request for public observation or the proposed logistical arrangements. Mexico also did not object, but nevertheless stated that its position in these appeals was without prejudice to its systemic views on the public observation of oral hearings. The United States articulated its support for the request to open the hearing to the public, and suggested that the Division accommodate the participants' logistical requests to the extent possible.

1.13 On 5 February 2014, the Division issued a Procedural Ruling authorizing the request of Canada, Norway, and the European Union to open the hearing to

[25] WT/DS400/9, WT/DS401/10 (attached as Annex 3 to these Reports).
[26] Pursuant to Rules 22 and 23(4) of the Working Procedures.
[27] Pursuant to Rule 24(1) of the Working Procedures.
[28] Pursuant to Rule 24(2) of the Working Procedures.
[29] Pursuant to Rule 24(4) of the Working Procedures.

public observation and adopting additional procedures for the conduct of the hearing. The Procedural Ruling is attached as Annex 4 to these Reports.

1.14 The oral hearing in these appeals was originally scheduled for 3-5 March 2014. On 30 January 2014, the Appellate Body received letters from Canada, Norway, and the European Union, requesting the postponement of the dates for the oral hearing due to logistical difficulties faced by the parties during the week of 3 March 2014. The participants requested that the oral hearing be postponed to no earlier than the week of 17 March 2014. On 31 January 2014, the Division invited the third parties to comment in writing on the request for postponement of the oral hearing. Japan, Mexico, and the United States submitted their comments on 4 February 2014, indicating that they had no objection to the participants' request. On 5 February 2014, the Division issued a Procedural Ruling rescheduling the oral hearing for 17 to 19 March 2014. The Procedural Ruling is attached as Annex 5 to these Reports.

1.15 On 19 February[30], 6 March[31], and 17 March 2014[32], the Appellate Body received unsolicited *amicus curiae* briefs. The participants and third participants were given an opportunity to express their views on the admissibility and substance of these briefs at the oral hearing, if they so wished. We note that the brief of 17 March 2014 was received on the first day of the oral hearing. In the light of its late filing, and mindful of the requirement to ensure that participants and third participants are given an adequate opportunity fully to consider any written submission filed with the Appellate Body, the Division deemed this brief inadmissible. The Division did not find it necessary to rely on the other two *amicus curiae* briefs in rendering its decision.

1.16 The oral hearing in these appeals was held from 17 to 19 March 2014. Public observation took place via simultaneous closed-circuit television broadcast to a separate viewing room. The participants and Ecuador, Japan, Mexico, Namibia, and the United States made opening statements. The participants and third participants responded to questions posed by the Members of the Division hearing the appeals.

1.17 On 24 March 2014, the Chair of the Appellate Body informed the Chair of the DSB that, due to the requests made by the participants to postpone the date for the oral hearing and the subsequent rescheduling of the oral hearing

[30] From a group of animal welfare organizations. These organizations include Anima, Animal Rights Action Network, Asociación Nacional para la Defensa de los Animales, Bont Voor Dieren, Compassion in World Farming, Djurens Rätt, Eurogroup for Animals, Fondation Brigitte Bardot, Fondation Franz Weber, Four Paws, GAIA, Humane Society of the United States/Humane Society International, International Fund for Animal Welfare, Lega Anti Vivisezione, Prijatelji živontinja, Respect for Animals, Royal Society for the Prevention of Cruelty to Animals, Svoboda zvířat, and World Society for the Protection of Animals.

[31] From the International Fur Federation.

[32] From Professor Robert Howse, Joanna Langille, and Professor Katie Sykes.

from 3-5 March 2014 to 17-19 March 2014, and also due to the size of these appeals and the other appeal by the European Union, including the number and complexity of the issues raised by the participants, it was expected that the Appellate Body Reports in these appeals would be circulated to WTO Members no later than Tuesday, 20 May 2014.[33] Subsequently, by letter dated 16 May 2014, the Chair of the Appellate Body informed the Chair of the DSB that due to the time required for translation and the caseload of the Appellate Body, the Reports in these appeals would be circulated on Thursday, 22 May 2014 in all official languages.[34]

2. ARGUMENTS OF THE PARTICIPANTS AND THIRD PARTICIPANTS

2.1 Claims of error by Canada – Appellant

2.1.1 Article 2.1 of the TBT Agreement

2.1 Canada submits that the Panel erred by formulating and applying the wrong legal test under Article 2.1 of the TBT Agreement. Canada further challenges the Panel's intermediate conclusion, in the context of its analysis under Article 2.1, that the regulatory distinction between commercial hunts and hunts undertaken by Inuit or other indigenous communities (IC hunts) is justified. Canada requests the Appellate Body to complete the legal analysis under Article 2.1 by applying the correct "even-handedness" test; and to uphold the Panel's ultimate finding that the detrimental impact of the EU Seal Regime does not stem exclusively from a legitimate regulatory distinction under Article 2.1, but on the modified grounds that the distinction between commercial and IC hunts is arbitrary and unjustifiable.

2.2 Canada submits that the Panel committed a legal error by articulating the wrong test to determine whether the detrimental impact of the EU Seal Regime on the competitive opportunities of Canadian seal products stems exclusively from a legitimate regulatory distinction. Specifically, Canada takes issue with the Panel's framing of the test as consisting of three distinct elements. According to Canada, this is contrary to the Appellate Body's framing of the test, in three previous disputes under the TBT Agreement, as "a determination of whether the regulatory distinction that resulted in the detrimental impact was designed or applied in an even-handed manner."[35] Canada submits that the Panel erred in treating the first two elements of its test – i.e. whether the regulatory distinction

[33] This letter was circulated as document WT/DS400/10, WT/DS401/11.

[34] This letter was circulated as document WT/DS400/11, WT/DS401/12.

[35] Canada's appellant's submission, para. 51 (referring to Appellate Body Reports, *US – Clove Cigarettes*, paras. 182 and 215; *US – Tuna II (Mexico)*, paras. 216 and 225; and *US – COOL*, paras. 271, 272, and 341).

was rationally connected to the objective and, if not, whether there was another cause or rationale that could justify the distinction – as distinct from the third element – i.e. whether the regulatory distinction was designed and applied in an even-handed manner.[36] In support of its argument, Canada points to the Appellate Body's findings in *US – Clove Cigarettes* and *US – COOL*. Canada argues that, in both of these cases, "the absence of [a] rationale explaining or justifying the regulatory distinction played a central role in the Appellate Body finding that there had been a lack of even-handedness in how the distinction was designed and applied."[37] Hence, in Canada's view, "the presence or absence of a rationale that explains or justifies the regulatory distinction is a critical aspect in determining whether a regulatory distinction is even-handed."[38]

2.3 Canada further submits that the Panel committed a number of legal errors in finding that the regulatory distinction between non-conforming Canadian seal products and Greenlandic Inuit seal products was justifiable. First, Canada asserts that the Panel erred in finding that the distinction was justifiable despite evidence demonstrating that the rationale for the distinction "goes against" the objective of the EU Seal Regime.[39] Canada highlights that, in its assessment of the EU Seal Regime's contribution to its objective, the Panel found that the IC exception actually "diminishes" the overall contribution of the EU Seal Regime to that objective.[40] Canada submits that a regulatory distinction that undermines the objective of a measure cannot be justified, as it would constitute arbitrary or unjustifiable discrimination. Canada argues that, in *Brazil – Retreaded Tyres*, the finding that the rationale for the discrimination undermined the objective of the measure at issue was determinative for the finding of arbitrary and unjustifiable discrimination.[41] Given the similarities between the test under Article 2.1 of the TBT Agreement and the chapeau of Article XX of the GATT 1994, Canada argues that the fact that the rationale for the discrimination completely undermines the objective of the measure must play a determinative role under both provisions. Canada further clarifies its view that the Panel committed an error in attempting to distinguish the Appellate Body's reasoning in *Brazil – Retreaded Tyres*.[42] Canada notes that, according to the Panel, the Appellate Body's conclusion of arbitrary and unjustifiable discrimination in that case was based on a finding that the rationale for the exception was not sufficient to justify the exception in the face of the rational disconnection to the objective of

[36] Canada's appellant's submission, para. 52 (referring to Panel Reports, para. 7.259).

[37] Canada's appellant's submission, para. 77.

[38] *Ibid*.

[39] Canada's appellant's submission, para. 78 (quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 228).

[40] Canada's appellant's submission, para. 78 (referring to Panel Reports, para. 7.448).

[41] Canada's appellant's submission, paras. 80-82 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, para. 227).

[42] Canada's opening statement at the oral hearing.

the measure. Canada submits that this is not correct. In Canada's view, the Appellate Body's conclusion was based solely on its determination that there was no rational connection between the exception and the objective of the ban, and did not involve a balancing of the objective of the exception with the rational disconnection.

2.4 Second, Canada alleges that the Panel committed a legal error "by relying on international instruments extraneous to the case" to justify the distinction between IC and commercial hunts.[43] Canada notes that the international agreements cited by the European Union before the Panel do not require the European Union to protect the interests of Inuit or other indigenous communities by discriminating against the products of non-indigenous peoples. Canada further argues that "the merits of according preferential treatment to indigenous peoples must still be balanced with how such treatment accords with the objective of the measure."[44] Canada recalls the Appellate Body's observation in *Brazil – Retreaded Tyres* that, even if a rationale is not capricious or random, it can still be found to be arbitrary or unjustifiable because it bears no relationship to the objective of the measure or goes against it.[45] Canada submits that the existence of international agreements that recognize, in general terms, the interests of indigenous people cannot be a determining factor in assessing whether the rationale for the regulatory distinction is justified.

2.5 The third legal error that Canada identifies is the Panel's failure to examine whether giving effect to the distinction will actually fulfil its rationale. Canada points to the Appellate Body's discussion of the rationales for the distinction between clove and menthol cigarettes that the United States put forward in the *US – Clove Cigarettes* case. According to Canada, the Appellate Body in that case dismissed the rationales on the basis that "it was not clear" that the alleged consequences of not making the distinction – namely, the impact on the US health care system associated with banning menthol and the risk of the development of a black market for menthol cigarettes – would materialize.[46] Canada argues that, in the present disputes, it is equally "not clear" that the IC exception will serve to protect Inuit or other indigenous communities' (IC) interests. Canada notes that Inuit communities were opposed to the EU Seal Regime as a whole despite the IC exception because they believe that it will have a negative impact on the market for all seal products.[47] Canada submits that

[43] Canada's appellant's submission, heading B.a), at p. 27.

[44] Canada's appellant's submission, para. 89.

[45] Canada's appellant's submission, para. 89 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, para. 232).

[46] Canada's appellant's submission, para. 90 (quoting Appellate Body Report, *US – Clove Cigarettes*, para. 225).

[47] Canada's appellant's submission, para. 91 (referring to Nunavut Department of Environment, Fisheries and Sealing Division, *Report on the Impacts of the European Union Seal Ban, (EC) No. 1007/2009, in Nunavut* (2012) (Panel Exhibit JE-30) (Nunavut 2012 Report), p. 3; Government of

the Panel's failure to consider the lack of fulfilment of the regulatory distinction's purpose constitutes legal error.[48]

2.6 Canada further alleges that the Panel erred by focusing on the wrong comparison in its assessment of whether the regulatory distinction is even-handed. According to Canada, the Panel erroneously applied the "even-handedness" test by analysing different Inuit hunts rather than the regulatory distinction between commercial and IC hunts, which it had found to be causing the detrimental impact. Canada notes that, in assessing the legitimacy of a regulatory distinction for the purposes of Article 2.1 of the TBT Agreement, the Appellate Body has focused only on the distinction that accounts for the detrimental impact on imported products as compared to domestic products.[49] Canada submits that, by not focusing on the proper regulatory distinction, the Panel failed to follow the guidance provided by the Appellate Body in previous TBT disputes. Canada argues that, had the Panel directed its attention towards the regulatory distinction between commercial and IC hunts, it would have had the correct basis to conclude that this regulatory distinction was designed and applied in an arbitrary manner because the IC hunt in Greenland exhibits the characteristics of a commercial hunt. As Canada sees it, the fact that the application of the IC exception results in differentiated benefits amongst the Inuit is not germane to the question of whether the regulatory distinction between commercial and IC hunts is even-handed. As a result, Canada argues, the Panel failed to determine whether the regulatory distinction between commercial and IC hunts is even-handed.

2.7 Canada further submits that the Panel erred by failing to examine the arbitrary aspects of the regulatory distinction between commercial and IC hunts.[50] In Canada's view, the Panel should have taken into account its finding that the Inuit hunt in Greenland has "characteristics that are closely related to that of commercial hunts" in examining whether the regulatory distinction between commercial and IC hunts was designed and applied in an arbitrary or unjustifiable manner.[51] For Canada, the Panel's findings regarding the similarities between the Inuit hunt in Greenland and commercial hunts are relevant to the application of the test under Article 2.1, not because they show that the IC exception was not designed or applied in an even-handed manner, but because they demonstrate that the distinction between Inuit and commercial

Greenland, Ministry of Fisheries, Hunting and Agriculture, *Management and Utilization of Seals in Greenland* (revised April 2012) (Panel Exhibit JE-26) (Greenland 2012 Seal Management Report), pp. 31-36; and Canada's first written submission to the Panel, paras. 526-532).

[48] Canada's appellant's submission, para. 92.

[49] Canada's appellant's submission, para. 94 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, para. 286).

[50] Canada's appellant's submission, para. 99.

[51] Canada's appellant's submission, para. 99 (quoting Panel Reports, para. 7.313).