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EUROPEAN COMMUNITIES – MEASURES PROHIBITING THE IMPORTATION AND MARKETING OF SEAL PRODUCTS

REPORTS OF THE PANEL

Note by the Secretariat:

These Panel Reports are in the form of a single document constituting two separate Panel Reports: WT/DS400/R and WT/DS401/R. The cover page, preliminary pages, sections 1 through 7 are common to both Reports. The page header throughout the document bears the two document symbols WT/DS400/R and WT/DS401/R, with the following exceptions: section 8 on pages CAN-183 and CAN-184, which bears the document symbol for and contains the Panel's conclusions and recommendations in the Panel Report WT/DS400/R; and section 8 on pages NOR-185 and NOR-186, which bears the document symbol for and contains the Panel's conclusions and recommendations in the Panel Report WT/DS401/R. The annexes, which are a part of the Panel Reports, are circulated in a separate document (WT/DS400/R/Add.1 and WT/DS401/R/Add.1).

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Argentina – Textiles and Apparel	Panel Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/R, adopted 22 April 1998, as modified by Appellate Body Report WT/DS56/AB/R, DSR 1998:III, p. 1033
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Canada – Aircraft	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, p. 1377
Canada – Aircraft	Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, adopted 20 August 1999, upheld by Appellate Body Report WT/DS70/AB/R, DSR 1999:IV, p. 1443
Canada – Autos	Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, p. 2985
Canada – Autos	Panel Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by Appellate Body Report WT/DS139/AB/R, WT/DS142/AB/R, DSR 2000:VII, p. 3043
Canada – Wheat Exports and Grain Imports	Appellate Body Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, adopted 27 September 2004, DSR 2004:VI, p. 2739
Canada – Wheat Exports and Grain Imports	Panel Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/R, adopted 27 September 2004, upheld by Appellate Body Report WT/DS276/AB/R, DSR 2004:VI, p. 2817
China – Publications and Audiovisual Products	Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, adopted 19 January 2010, DSR 2010:I, p. 3
China – Publications and Audiovisual Products	Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R and Corr.1, adopted 19 January 2010, as modified by Appellate Body Report WT/DS363/AB/R, DSR 2010:II, p. 261
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China – Raw Materials	Panel Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R / WT/DS395/R / WT/DS398/R / and Corr.1, adopted 22 February 2012, as modified by Appellate Body Reports WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R
Colombia – Ports of Entry	Panel Report, *Colombia – Indicative Prices and Restrictions on Ports of Entry*, WT/DS366/R and Corr.1, adopted 20 May 2009, DSR 2009:VI, p. 2535
EC – Approval and Marketing of Biotech Products	Panel Reports, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R / WT/DS292/R / WT/DS293/R, Add.1 to Add.9, and Corr.1, adopted 21 November 2006, DSR 2006:III, p. 847
EC – Asbestos	Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 3243

Short Title	Full Case Title and Citation
EC – Asbestos	Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R and Add.1, adopted 5 April 2001, as modified by Appellate Body Report WT/DS135/AB/R, DSR 2001:VIII, p. 3305
EC – Bananas III	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, p. 591
EC – Bananas III (Ecuador)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by Ecuador*, WT/DS27/R/ECU, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:III, p. 1085
EC – Bananas III (Guatemala and Honduras)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by Guatemala and Honduras*, WT/DS27/R/GTM, WT/DS27/R/HND, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:II, p. 695
EC – Bananas III (Mexico)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by Mexico*, WT/DS27/R/MEX, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:II, p. 803
EC – Bananas III (US)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by the United States*, WT/DS27/R/USA, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:II, p. 943
EC – Sardines	Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, p. 3359
EC – Sardines	Panel Report, *European Communities – Trade Description of Sardines*, WT/DS231/R and Corr.1, adopted 23 October 2002, as modified by Appellate Body Report WT/DS231/AB/R, DSR 2002:VIII, p. 3451
EC – Tariff Preferences	Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R, adopted 20 April 2004, as modified by Appellate Body Report WT/DS246/AB/R, DSR 2004:III, p. 1009
EC – Trademarks and Geographical Indications (Australia)	Panel Report, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, Complaint by Australia*, WT/DS290/R, adopted 20 April 2005, DSR 2005:X, p. 4603
India – Autos	Panel Report, *India – Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R and Corr.1, adopted 5 April 2002, DSR 2002:V, p. 1827
Japan – Agricultural Products II	Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, p. 277
Japan – Agricultural Products II	Panel Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/R, adopted 19 March 1999, as modified by Appellate Body Report WT/DS76/AB/R, DSR 1999:I, p. 315
Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 97
Japan – Alcoholic Beverages II	Panel Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/R, WT/DS10/R, WT/DS11/R, adopted 1 November 1996, as modified by Appellate Body Report WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, DSR 1996:I, p. 125
Japan – Film	Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, p. 1179
Korea – Various Measures on Beef	Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, p. 5

Short Title	Full Case Title and Citation
Korea – Various Measures on Beef	Panel Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/R, WT/DS169/R, adopted 10 January 2001, as modified by Appellate Body Report WT/DS161/AB/R, WT/DS169/AB/R, DSR 2001:I, p. 59
Thailand – Cigarettes (Philippines)	Appellate Body Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/AB/R, adopted 15 July 2011, DSR 2011:IV, p. 2203
Thailand – Cigarettes (Philippines)	Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/R, adopted 15 July 2011, as modified by Appellate Body Report WT/DS371/AB/R, DSR 2011:IV, p. 2299
US – 1916 Act (EC)	Panel Report, *United States – Anti-Dumping Act of 1916, Complaint by the European Communities*, WT/DS136/R and Corr.1, adopted 26 September 2000, upheld by Appellate Body Report WT/DS136/AB/R, WT/DS162/AB/R, DSR 2000:X, p. 4593
US – Clove Cigarettes	Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012
US – Clove Cigarettes	Panel Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/R, adopted 24 April 2012, as modified by Appellate Body Report WT/DS406/AB/R
US – Continued Zeroing	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291
US – Continued Zeroing	Panel Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/R, adopted 19 February 2009, as modified as Appellate Body Report WT/DS350/AB/R, DSR 2009:III, p. 1481
US – COOL	Appellate Body Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R / WT/DS386/AB/R, adopted 23 July 2012
US – COOL	Panel Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R / WT/DS386/R, adopted 23 July 2012, as modified by Appellate Body Reports WT/DS384/AB/R / WT/DS386/AB/R
US – Gambling	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, p. 5663 (Corr.1, DSR 2006:XII, p. 5475)
US – Gambling	Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, adopted 20 April 2005, as modified by Appellate Body Report WT/DS285/AB/R, DSR 2005:XII, p. 5797
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3
US – Gasoline	Panel Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, adopted 20 May 1996, as modified by Appellate Body Report WT/DS2/AB/R, DSR 1996:I, p. 29
US – Large Civil Aircraft (2nd complaint)	Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, adopted 23 March 2012
US – Large Civil Aircraft (2nd complaint)	Panel Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/R, adopted 23 March 2012, as modified by Appellate Body Report WT/DS353/AB/R
US – Section 337 Tariff Act	GATT Panel Report, *United States Section 337 of the Tariff Act of 1930*, L/6439, adopted 7 November 1989, BISD 36S/345
US – Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, p. 2755
US – Shrimp	Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R and Corr.1, adopted 6 November 1998, as modified by Appellate Body Report WT/DS58/AB/R, DSR 1998:VII, p. 2821

Short Title	Full Case Title and Citation
US – Shrimp (Article 21.5 – Malaysia)	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, adopted 21 November 2001, DSR 2001:XIII, p. 6481
US – Shrimp (Article 21.5 – Malaysia)	Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/RW, adopted 21 November 2001, upheld by Appellate Body Report WT/DS58/AB/RW, DSR 2001:XIII, p. 6529
US – Tuna II (Mexico)	Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012
US – Tuna II (Mexico)	Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, adopted 13 June 2012, as modified by Appellate Body Report WT/DS381/AB/R
US – Upland Cotton	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, p. 3
US – Upland Cotton	Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, Corr.1, and Add.1 to Add.3, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R, DSR 2005:II, p. 299
US – Zeroing (EC) (Article 21.5 – EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/AB/RW and Corr.1, adopted 11 June 2009, DSR 2009:VII, p. 2911
US – Zeroing (EC) (Article 21.5 – EC)	Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/RW, adopted 11 June 2009, as modified by Appellate Body Report WT/DS294/AB/RW, DSR 2009:VII, p. 3117

LIST OF FREQUENTLY CITED EXHIBITS

Exhibit	Short Title	Full Title
JE-1	Basic Regulation	Regulation (EC) No. 1007/2009 of the European Parliament and of the Council on trade in seal products, adopted on 16 September 2009
JE-2	Implementing Regulation	Commission Regulation (EU) No. 737/2010 laying down detailed rules for the implementation of the Basic Regulation, adopted on 10 August 2010
JE-20	COWI 2008 Report	COWI, *Assessment of the Potential Impact of a Ban of Products Derived from Seal Species* (April 2008)
JE-21	COWI 2010 Report	COWI, *Study on Implementing Measures for Trade in Seal Products*, Final Report (January 2010)
JE-22	EFSA Scientific Opinion	European Food Safety Authority ("EFSA"), Panel on Animal Health and Welfare, *Scientific Opinion on Animal Welfare Aspects of the Killing and Skinning of Seals*, The EFSA Journal (2007) 610, pp. 1-122 (6 December 2007)
JE-24	NAMMCO Report (2009)	NAMMCO Expert Group, *Report on the Meeting on Best Practices in the Hunting and Killing of Seals* (February 2009)
JE-31	VKM Scientific Opinion	Norwegian Scientific Committee for Food Safety ("VKM"), Panel on Animal Health and Welfare, *Scientific Opinion on Animal Welfare Aspects of the Killing and Skinning in the Norwegian Seal Hunt* (8 October 2007)
CDA-33	IVWG Report (2005)	Smith, B. et al., "Improving Humane Practice in the Canadian Harp Seal Hunt: A Report of the Independent Veterinarians' Working Group on the Canadian Harp Seal Hunt" (August 2005)
CDA-34	Daoust (2012)	Daoust, P-Y., and Caraguel, C., "The Canadian harp seal hunt: observations on the effectiveness of procedures to avoid poor animal welfare outcomes", *Animal Welfare*, vol. 21, pp. 445-455 (2012)
EU-31	Burdon (2001)	Burdon, R.L. et al., "Veterinary report: Canadian commercial seal hunt, Prince Edward Island" (March 2001)
EU-32	Daoust (2002)	Daoust, P.-Y., Crook, A., Bollinger, T.K., Campbell, K.G. and Wong G., "Animal Welfare and the harp seal hunt in Atlantic Canada", *Canadian Veterinary Journal*, vol. 43, pp. 687-694 (2002)
EU-34	Butterworth (2007)	Butterworth, A. et al., "Welfare aspects of the Canadian seal hunt" (31 August 2007)
EU-36	Richardson (2007)	Richardson, M., Inherently Inhumane (August 2007)
EU-37	Butterworth (2012)	Butterworth A., Richardson M., "A Review of animal welfare implications of the commercial Canadian seal hunt", *Marine Policy* (2012)
EU-43	NOAH Report (2012)	Martinsen, S., *Sealing in Norway – Welfare Aspects, report for NOAH*, (6 December 2012)

ABBREVIATIONS USED IN THESE REPORTS

Abbreviation	Description
3PCAP	Third party conformity assessment
CAP	Conformity assessment procedure(s)
CN	Combined Nomenclature
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EFSA	European Food Safety Authority
EU Seal Regime	The Basic Regulation and the Implementing Regulation combined together
GATT 1994	General Agreement on Tariffs and Trade 1994
IC	Inuit or other indigenous communities
NGOs	Non-governmental organizations
MFN	Most-favoured nation
MRM	Marine resource management
OIE	Office International des Epizooties
PPMs	Processes and production methods
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT Agreement	Agreement on Technical Barriers to Trade
TAC	Total allowable catch
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
WTO	World Trade Organization

1 INTRODUCTION

1.1 Complaints by Canada and Norway

1.1. On 2 November 2009, Canada requested consultations with the European Union[1] pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII of the General Agreement on Tariffs and Trade (GATT 1994), and Article 14.1 of the Agreement on Technical Barriers to Trade (TBT Agreement), with respect to the measures and claims set out below.[2] On 18 October 2010, Canada requested supplementary consultations with the European Union.[3]

1.2. On 5 November 2009, Norway requested consultations with the European Union pursuant to Article 4 of the DSU, Article XXII of the GATT 1994, Article 14 of the TBT Agreement, and Article 19 of the Agreement on Agriculture, with respect to the measures and claims set out below.[4] On 20 November 2009, Canada requested, pursuant to Article 4.11 of the DSU, to join in the consultations requested by Norway on 5 November 2009.[5] On 19 October 2010, Norway requested supplementary consultations with the European Union.[6]

1.3. On 28 and 29 October 2010, respectively, Canada and Norway requested to join each other's supplementary consultations.[7]

1.4. Consultations were held on 15 December 2009, and supplementary consultations were held on 1 December 2010. None of these consultations led to a mutually satisfactory resolution.[8]

1.2 Panel establishment and composition

1.5. On 11 February and 14 March 2011, respectively, Canada and Norway requested the establishment of a panel pursuant to Article 6 of the DSU with standard terms of reference.[9]

1.6. At its meeting 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 DSU.[10] At its meeting on 21 April 2011, the DSB established a panel pursuant to the request of Norway in document 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.[11]

1.7. The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Canada in document WT/DS400/4, and by Norway in document WT/DS401/5, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[12]

1.8. On 24 September 2012, Canada and Norway requested the Director-General to determine the composition of the panel, pursuant to Article 8.7 of the DSU.

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[1] For consistency and ease of reference, these Reports will refer to "the European Union" or "EU" for all events regardless of their date of occurrence.

[2] WT/DS400/1, Canada's request for consultations.

[3] WT/DS400/1/Add. 1, Canada's request for consultations. Canada made its supplemental request pursuant to the same provisions as its original request for consultations with the addition of Article 1 of the DSU, and Article 14.1 of the TBT Agreement instead of Article 14 of the TBT Agreement.

[4] WT/DS401/1, Norway's request for consultations.

[5] WT/DS401/3.

[6] WT/DS401/1/Add. 1, Norway's request for consultations.

[7] WT/DS400/3 and WT/DS401/4.

[8] WT/DS400/4, Canada's request for the establishment of a panel; WT/DS401/5, Norway's request for the establishment of a panel.

[9] Canada's request for the establishment of a panel; Norway's request for the establishment of a panel.

[10] See WT/DSB/M/294, para. 73.

[11] See WT/DSB/M/295, para. 73, WT/DS400/5 and WT/DS401/6.

[12] WT/DS400/5 and WT/DS401/6.

1.9. On 4 October 2012, the Director-General accordingly composed the Panel as follows:

Chairperson:	Mr Luzius Wasescha
Members:	Ms Elizabeth Chelliah Ms Patricia Holmes

1.10. Argentina, Canada (for WT/DS401), China, Colombia, Ecuador, Iceland, Japan, Mexico, Namibia (for WT/DS401), Norway (for WT/DS400), the Russian Federation[13], and the United States notified their interest in participating in the Panel proceedings as third parties.

1.3 Panel proceedings

1.3.1 General

1.11. After consultation with the parties, the Panel adopted its Working Procedures[14] and timetable on 23 October 2012. Upon request of the parties, the Panel modified the timetable on 4 March 2013 and 8 May 2013.

1.12. The Panel held a first substantive meeting with the parties on 18-20 February 2013. A session with the third parties took place on 19 February 2013. The Panel held a second substantive meeting with the parties on 29-30 April 2013.

1.13. On 19 June 2013, the Panel issued the descriptive part of its Reports to the parties. The Panel issued its Interim Reports to the parties on 3 September 2013. The Panel issued its Final Reports to the parties on 8 October 2013.

1.3.2 Procedures for open hearings

1.14. At the organizational meeting held on 15 October 2012, the parties requested and the Panel agreed that the substantive meetings with the Panel would be open to public viewing subject to additional procedures to ensure the security and orderly conduct of the proceedings. On 4 December 2012, the Panel submitted proposed additional working procedures to the parties for comment. After it had received comments from the parties, the Panel adopted on 20 December 2012 additional Working Procedures for its open hearings at the first and second substantive meetings of the Panel, providing for public viewing by means of simultaneous closed-circuit television broadcasting of the proceedings to a separate room.

1.3.3 Requests for enhanced third-party rights

1.15. At the organizational meeting held on 15 October 2012, Canada made a request for enhanced third-party rights to allow third-party access to both substantive meetings and all written submissions. The European Union objected to Canada's request on the grounds that no third party had submitted such a request. After considering Canada's request and the views of the other parties, the Panel informed the parties on 23 October 2012 that it had decided to decline Canada's request. In reaching its decision, the Panel took particular note of the fact that Canada's request was made by a party to the dispute, and that no third party had made a request for enhanced rights. Furthermore, because the substantive meetings were to be open to public viewing and thus would serve to provide third-party access to the Panel's substantive meetings, the Panel did not consider it necessary to grant the enhanced third-party rights requested by Canada.

1.16. Following the first substantive meeting with the parties on 18-20 February 2013, the Panel received on 6 March 2013 a request from Namibia "to participate in the second substantive meeting" in order to rebut comments made by the European Union at the first substantive meeting regarding the Namibian seal hunt. After consulting the parties on Namibia's request, the Panel

[13] On 18 October 2012, the Russian Federation notified its interest to participate as a third party in the dispute. After receiving the parties' views on this notification, the Panel indicated on 5 November 2012 that the Russian Federation would be added to the list of third parties. See also WT/DS400/5/Rev.1 and WT/DS401/6/Rev.1, para. 5.

[14] See the Panel's Working Procedures in Annex A-1.

informed Namibia that it had considered Namibia's request, taking into account Namibia's status as a developing country and the material on the record relating to Namibia, which included Namibia's third-party written submission, oral statement at the first substantive meeting and its written responses to the Panel's questions. On the basis of its review and in light of the parties' comments, the Panel decided that there was no need to provide Namibia with an opportunity for further rebuttal and therefore declined Namibia's request to participate in the second substantive meeting.

1.3.4 *Amicus curiae* submissions

1.17. On 25 January 2013, the Panel received an unsolicited *amicus curiae* submission from a group of non-governmental organizations (NGOs).[15] On 29 January 2013, the Panel notified the parties of the unsolicited *amicus curiae* submission and advised the parties that any *amicus curiae* submission it received would be immediately forwarded to the parties. The parties would be invited to provide their views on the admissibility and relevance of any *amicus curiae* submission either at the first or second substantive meeting. The Panel further informed the parties that any *amicus curiae* brief submitted to the Panel after the second substantive meeting would be automatically rejected, as the Panel was of the view that the consideration of any new information at that stage of the proceedings would risk causing undue delays.

1.18. Subsequently, the Panel received four additional unsolicited *amicus curiae* submissions prior to the second substantive meeting with the parties.[16]

1.19. During the first substantive meeting with the parties, the European Union indicated that it had incorporated the *amicus curiae* submission provided by the group of NGOs on 25 January 2013 as an integral part of its written submissions to the Panel.[17]

1.3.5 Preliminary ruling

1.20. On 19 December 2012, the European Union filed a request for a preliminary ruling to remove two exhibits from the record. On 16 January 2013, both Canada and Norway responded to the European Union's preliminary ruling request. In addition, the United States provided comments on the European Union's request in its third-party written submission pursuant to the Panel's invitation to all third parties to do so.

1.21. The Panel issued its preliminary ruling to the parties, with a copy to third parties, on 29 January 2013, granting the European Union's request to remove the exhibits from the record and inviting the complainants to submit replacement exhibits. After consulting with the parties, the Panel requested the Chairperson of the DSB to circulate its preliminary ruling to all WTO Members. The Panel further decided that the circulated ruling would be incorporated as an integral part of the Panel's findings in its Reports.[18] The Panel's preliminary ruling was circulated on 5 February 2013 in documents WT/DS400/6 and WT/DS401/7.

[15] This submission was made jointly by a group of the following organizations: Anima, Animal Rights Action Network (ARAN), Animalia, Bont Voor Dieren (BVD), Change for Animals Foundation (CFAF), Compassion in World Farming (CIWF), Djurens Rätt (Animal Rights Sweden), Eurogroup for Animals, Fondation Brigitte Bardot (FFB), Fondation Franz Weber (FFW), Four Paws, Global Action in the Interest of Animals (GAIA), Humane Society of the United States/Humane Society International (HSUS/HSI), International Fund for Animal Welfare (IFAW), Lega Anti Vivisezione (LAV), Prijatelji životinja (Animal Friends Croatia), Respect for Animals, Royal Society for the Prevention of Cruelty to Animals (RSPCA), Svoboda zvířat and World Society for the Protection of Animals (WSPA).

[16] The Panel received submissions from Robert Howse, Joanna Langille, and Katie Sykes, dated 11 February 2013; Pamela Anderson on behalf of People for the Ethical Treatment of Animals (PETA), dated 12 February 2013; the International Fur Trade Federation, dated 28 March 2013; and Jude Law, received 20 April 2013.

[17] This submission is included on the record as Exhibit EU-81.

[18] In its preliminary ruling, the Panel reserved the right to modify its ruling and observed that the ruling would be incorporated as an integral part of the Panel's findings in its modified form if any modifications were made.

1.3.6 Request under Article 13 of the DSU

1.22. On 16 January 2013, the same day that the complainants provided their comments on the European Union's request for preliminary ruling, Norway requested the Panel to exercise its power under Article 13 of the DSU to seek copies of the two documents that were the object of the European Union's request for removal from the record. Further to the Panel's invitation, the Panel received on 8 February 2013 comments from the European Union and Canada on Norway's request, as well as third-party comments from the United States. On 8 April 2013, the Panel informed the parties that the Panel did not consider it necessary to seek the information requested by Norway. Consequently, the Panel denied Norway's request for the Panel to exercise its authority under Article 13 of the DSU and indicated that the Panel would provide the reasons for its decision in its Reports.[19]

2 FACTUAL ASPECTS

2.1 Measures at issue[20]

2.1. The claims brought by Canada and Norway concern the European Union's measures relating to seal products.

2.2. Canada submits that the measures at issue are the following[21]:

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

b. Regulation (EU) No 737/2010 laying down detailed rules for the implementation of Regulation (EC) No. 1007/2009 of the European Parliament and of the Council on trade in seal products; and

c. For each of the measures referred to above, any amendments, replacements, extensions, implementing measures or other related measures, administrative orders, directives, or customs guidelines including those issued by individual European Union member States.

2.3. Canada refers to the Basic Regulation and the Implementing Regulation together as the "EU Seal Regime".

2.4. Norway submits that the measures at issue are the following[22]:

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

b. Commission Regulation (EU) No. 737/2010, laying down detailed rules for the implementation of the Basic Regulation, adopted on 10 August 2010 (the "Implementing Regulation");

c. Omissions to adopt adequate procedures for establishing that seal products conforming to the relevant conditions, set forth in exceptions in the EU seal regime, may be placed on the EU market; and

d. Any other related measures adopted by the EU or its member States that provide guidance on, amend, supplement, replace, and/or implement the rules set forth in the Basic Regulation and Implementing Regulation, whether adopted pursuant to these regulations or otherwise.

[19] The reasoning for the Panel's decision is provided in section 7 of these Reports.
[20] The Panel's use of the term "measures" in this Section does not prejudge any disputed factual or legal issues relating to that term.
[21] Canada's request for the establishment of a panel.
[22] Norway's request for the establishment of a panel.

2.5. Norway refers to the Basic Regulation and the Implementing Regulation together as the "EU Seal Regime".

2.2 Products at issue

2.6. This dispute concerns 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.[23]

2.7. In accordance with Article 3(3) of Regulation (EC) No. 1007/2009 of the European Parliament and of the Council, the EU Commission issued a "Technical Guidance Note Setting Out an Indicative List of the Codes of the Combined Nomenclature that May Cover Prohibited Seal Products" (Technical Guidance Note).[24] The Technical Guidance Note includes products listed according to their Combined Nomenclature (CN) codes. In its foreword, the Note explains that only "those CN codes with the greatest likelihood of covering products subject to prohibition" are included therein, and those listed are indicative.[25] For example, it includes the following sections of the CN codes:

- "live animals, animal products" (Section I);
- "animal or vegetable fats and oils and their cleavage products …" (Section III);
- "prepared foodstuffs, beverages, spirits and vinegar …" (Section IV);
- "products of the chemical or allied industries" (Section VI);
- "rawhides and skins, leather, fur skins and articles thereof; … handbags and similar containers" (Section VIII);
- "textiles and textile articles" (Section XI);
- "footwear, headgear …" (Section XII);
- "… precious metals, metals clad with precious metal, and articles thereof; imitation jewellery …" (Section XIV);
- "optical, photographic, … , medical or surgical instruments and apparatus; clocks and watches; musical instruments; parts and accessories thereof" (Section XVIII);
- "miscellaneous manufactured articles" (Section XX); and
- "works of art, collectors' pieces and antiques" (Section XXI).

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1 Canada

3.1. Canada requests that the Panel find that the "EU Seal Regime":

a. is a technical regulation in the sense of Annex 1.1 of the TBT Agreement;

b. is inconsistent with the European Union's obligations under the TBT Agreement, in particular Articles 2.1, 2.2, 5.1.2, and 5.2.1;

[23] See Article 2(2) of the Regulation (EC) No. 1007/2009 of the European Parliament and of the Council; Canada's first written submission, paras. 61-70; Norway's first written submission, paras. 86-102.

[24] Technical guidance note setting out an indicative list of the codes of the combined nomenclature that may cover prohibited seal products, Official Journal of the European Union, C Series, No. 356 (29 December 2010), (Exhibit JE-3).

[25] Ibid. p. 44.

c. is inconsistent with the European Union's obligations under the GATT 1994, in particular Articles I:1, III:4, and XI:1; and

d. is not justified by Article XX(a) or XX(b) of the GATT 1994.[26]

3.2. Canada requests, pursuant to Article 19.1 of the DSU, that the Panel recommend to the DSB that it request the European Union to bring its measures into conformity with its obligations under the TBT Agreement and the GATT 1994.[27]

3.3. In the event that the European Union's measures are not found to violate the European Union's obligations under the TBT Agreement or the GATT 1994, Canada requests that the Panel find that the EU Seal Regime has nullified and impaired benefits accruing to Canada in the sense of Article XXIII:1(b) of the GATT 1994, and that the Panel recommend to the DSB that it request the European Union to make a mutually satisfactory adjustment as required by Article 26.1 of the DSU.[28]

3.2 Norway

3.4. Norway requests that the Panel find that the "EU Seal Regime":

a. violates Articles I:1, III:4 and XI:1 of the GATT 1994;

b. is not justified by Article XX(a) or (b) of the GATT 1994;

c. violates Article 4.2 of the Agreement on Agriculture;

d. is a technical regulation in the sense of Annex 1.1 of the TBT Agreement;

e. violates Articles 2.2, 5.1.2 and 5.2.1 of the TBT Agreement; and

f. nullifies or impairs benefits accruing to Norway in the sense of Article XXIII:1(b) of the GATT 1994, whether or not it conflicts with relevant provisions.[29]

3.5. Norway therefore requests the Panel, pursuant to Article 19.1 of the DSU, to recommend that the DSB request that the European Union bring the EU Seal Regime into conformity with the European Union's obligations under the GATT 1994, the TBT Agreement and the Agreement on Agriculture.[30]

3.6. If, and to the extent, that the Panel finds that the EU Seal Regime does not conflict with relevant WTO provisions, but nonetheless finds that the measures nullify or impair benefits accruing to Norway in the sense of Article XXIII:1(b) of the GATT 1994, Norway requests the Panel to recommend that the DSB request the European Union to make a mutually satisfactory adjustment as required by Article 26.1 of the DSU.[31]

3.3 European Union

3.7. The European Union requests the Panel to reject all the claims submitted by Canada and Norway against the "EU Seal Regime".[32]

[26] Canada's first written submission, para. 752; Canada's second written submission, para. 359.
[27] Canada's first written submission, para. 753; Canada's second written submission, para. 360.
[28] Canada's first written submission, para. 754; Canada's second written submission, para. 361.
[29] Norway's first written submission, para. 1039; Norway's second written submission, para. 439.
[30] Norway's first written submission, para. 1040; Norway's second written submission, para. 440.
[31] Norway's first written submission, para. 1041; Norway's second written submission, para. 441.
[32] European Union's first written submission, para. 628; European Union's second written submission, para. 387. The European Union refers to its regulations at issue in this dispute as the "EU Seal Regime". (See European Union's first written submission, para. 1).

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 19 of the Working Procedures adopted by the Panel (see Annexes B-1, B-2 and B-3).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Colombia, Iceland, Japan, Mexico, Namibia and the United States are reflected in their executive summaries, provided in accordance with paragraph 20 of the Working Procedures adopted by the Panel (see Annexes C-1, C-2, C-3, C-4, C-5, and C-6). Argentina, China, Ecuador and the Russian Federation did not submit written or oral arguments to the Panel.

6 INTERIM REVIEW

6.1. On 3 September 2013, the Panel submitted its Interim Panel Reports to the parties. On 17 September 2013, Canada, Norway, and the European Union each submitted written requests for the review of precise aspects of the Interim Reports. On 24 September 2013, Canada, Norway, and the European Union submitted comments on a number of requests for review presented by the other parties. None of the parties requested an interim review meeting.

6.2. In accordance with Article 15.3 of the DSU, this section of the Panel Reports sets out the Panel's response to the arguments made at the interim review stage, providing explanations where necessary. The Panel has modified aspects of its reports in light of the parties' comments where it considered it appropriate to do so, as explained below. The Panel has also made certain technical and editorial corrections and revisions to the Interim Panel Reports for the purposes of clarity and accuracy. References to sections, paragraph numbers, and footnotes in this section relate to the Interim Panel Reports, except as otherwise noted.

6.1 General comments

Reference to "Greenland"

6.3. The complainants observed that the Interim Reports variously refer to "Greenland", "Greenland (Denmark)", and "Denmark (Greenland)" and requested that the Panel follow a consistent approach. Specifically, Canada proposed that the Panel uniformly refer to "Greenland (Denmark)" in the Reports. For its part, the European Union noted that the term "Denmark (Greenland)" does not accurately describe the constitutional relationship between Denmark and Greenland and requested that "Greenland" be used instead.

6.4. The Panel has used the term "Greenland" consistently throughout the Reports.

6.2 Preliminary question on commercial seal hunts (Section 7.3.2.3.2)

6.5. Norway made both general and specific comments regarding the emphasis given to certain aspects of its hunting practices and regulations as well as practices in other seal hunts. Norway expressed concern with the Panel's portrayal and characterization of the risks of inhumane killing in seal hunts. In particular, Norway stated that evidence from the Norwegian hunt of "compliance with humane seal hunting … is omitted or downplayed" and that, conversely, aspects of other hunts "that demonstrate a failure to mitigate risks of inhumane killing … are underrepresented".[33]

6.6. The Panel addresses below the parties' comments on section 7.3.2.3.2 of the Panel Reports, additionally addressing comments made with respect to similar subjects in other parts of the Reports where relevant to the Panel's review.

Use of the term "commercial hunts"

6.7. Norway requested the Panel to review the nomenclature that it adopts to distinguish seal hunts conforming to the IC and MRM exceptions and those that do not. Norway argued that the

[33] Norway's comments on the Interim Panel Reports, para. 40.

use of the terms "commercial hunts" and "IC and MRM hunts" could be taken "to reflect a moral judgment with respect to the different hunts".[34] Norway further argued that "the Panel's own findings demonstrate the falseness of the distinction created by the Panel between 'commercial' and the other types of hunts".[35] Norway suggested that the Panel adopt neutral language to reflect the basis for its distinction, such as "non-conforming hunts", or the "Canadian East Coast hunt" and "Norwegian West Ice hunt". Canada suggested that the phrase "non-conforming hunts" be used instead of the term "commercial hunts".

6.8. The European Union disagreed with this request and submitted that, based on the Panel's usage of terms in different parts of its analysis, the use of the term "commercial hunts" is not confusing.

6.9. The Panel determined that "commercial hunts" are those having commercial profit (rather than direct use or consumption of seal products) as the sole or primary objective, along with various other factual characteristics described in section 7.3.2.3.2.2 of the Reports. The Panel further took note of evidence that such hunts are distinctly designated by a variety of sources as "commercial", including within Canada and Norway. Where appropriate and as relevant to its analysis, the Panel noted the existence of a commercial element in IC and MRM hunts. This does not negate other relevant factual characteristics of hunts that conform to the IC and MRM exceptions (such as the identity of the hunter or scale of the hunt). We therefore decline to revise the terminology used in these Reports to distinguish different seal hunts.

Paragraph 7.184

6.10. Norway disputed the assertion that "relatively little information is provided regarding the actual seal hunting conducted in … sealing countries" other than Norway and Canada. Norway contended that substantial evidence is available dealing with seal hunting in Greenland, and requested that this evidence be noted and fully reflected by the Panel.

6.11. The European Union considered that the referenced passage deals with scientific information concerning the animal welfare aspects of seal hunting. According to the European Union, the documents cited by Norway provide some limited information on certain aspects of seal hunting in Greenland, but the European Union maintained that there is "hardly any scientific evidence concerning the animal welfare outcomes of the IC hunts, including those conducted in Greenland".[36]

6.12. The Panel recalls EFSA's observations that "[v]ery little robust information is available … on the efficacy of" different killing methods employed in seal hunts around the world[37] and that "the vast majority of available data is from commercial hunts".[38] The Panel observes that it was provided with a proportionally greater amount of information in the form of scientific and empirical studies on the Canadian and Norwegian hunts.[39] Further, the Panel referred to available material on seal hunting in Greenland *inter alia* in the context of its assessment of the characteristics of IC hunts and the occurrence of struck and lost seals. In light of the parties' comments, the Panel made slight amendments to this paragraph for clarity.

Paragraph 7.188

6.13. Canada requested that the Panel clarify if its conclusion in paragraph 7.188 is that the physical conditions of seal hunting are not only distinct from other wildlife hunts and the commercial slaughter of farmed animals, but also pose challenges that are not present in these other types of hunts. In particular, Canada inquired whether seal hunting is more challenging than other types of wildlife hunts because of the physical conditions in which it is carried out.

[34] Norway's comments on the Interim Panel Reports, para. 37.
[35] Norway's comments on the Interim Panel Reports, para. 38.
[36] European Union's comments on the Interim Panel Reports, para. 15.
[37] EFSA Scientific Opinion, p. 24.
[38] EFSA Scientific Opinion, p. 13.
[39] See, e.g. IVWG Report (2005), (Exhibit CDA-33); Daoust (2012), (Exhibit CDA-34); VKM Scientific Opinion, (Exhibit JE-31); Burdon (2001), (Exhibit EU-31); Daoust (2002), (Exhibit EU-32); and NOAH Report (2012), (Exhibit EU-43).

6.14. The Panel addressed characteristics of the physical environment of seal hunts in connection with the risks of poor animal welfare arising in that specific context. The Panel also explained the limitations on comparing the risks of poor animal welfare in seal hunts, which have been examined in detail, to those in other wildlife hunts and commercial abattoirs. Therefore, the Panel considers further comparison to the killing of other animals to be unnecessary.

Paragraph 7.191

6.15. Norway commented that other evidence indicating reasons for targeting the seal's head may be more fully reflected in this paragraph, including for purposes of effective stunning and preservation of pelt value. Canada took issue with the citation to the length of the limbs as a reason for targeting the seal's head.

6.16. The reasons mentioned in paragraph 7.191 for targeting the seal's head are not exhaustive, and correspond to the distinct characteristics of seals. The targeting of the head for purposes of effective stunning and preservation of the value of skins is addressed elsewhere in the Reports where appropriate. The Panel slightly amended this paragraph to reflect the referenced material in light of the parties' comments.

Use of the term "clubbing instrument" (Paragraphs 7.193, footnote 262, 7.200, and 7.204)

6.17. Norway requested that the Panel not use the term "clubbing instrument" to describe a wide category of tools including both simple clubs and the hakapik prescribed by Norwegian regulations for the effective stunning of seals. Norway considered that this term does not convey the different features, animal welfare implications, and regulatory treatment of distinct instruments to which it is applied. Accordingly, Norway requested the Panel to replace the term "clubbing instrument" with a more specific reference to the type of instrument to which the Panel refers.

6.18. The Panel employed the term "clubbing" to refer to the physical act of striking, notwithstanding different dimensions and specific features of the tools used, in the same fashion that "shooting" is a general term for the action of employing a firearm, notwithstanding the use of rifles and ammunition of different power. The Panel therefore used the general designation "clubbing instrument" to address those tools with which the action of "clubbing" is carried out, without prejudice to the Panel's observation of the different features of hakapiks and clubs. Relevant sections (e.g. regarding the application of stunning methods) address factors and risks that pertain to the action of clubbing, including the use of hakapiks and slagkroks. The Panel made revisions to clarify that clubs are not permitted as a stunning instrument in Norway, and considers that further changes are not necessary.

Paragraphs 7.197-7.198 and 7.222

6.19. Norway proposed noting that not all seal hunting occurs under regulatory conditions that require application of a humane killing method, specifically referring to the practice of trapping or netting in Greenland, and requested reference to its regulatory efforts to minimize poor animal welfare in seal hunts.

6.20. The European Union argued that it has shown that neither Canada's nor Norway's regulations prescribe genuinely humane killing methods. Therefore, the European Union contended that the Panel should reject Norway's request.

6.21. The Panel notes that, as indicated in the heading preceding paragraphs 7.197-7.198, this sub-section concerns the application of humane killing methods in seal hunts. Consistent with this focus, the Panel considered evidence relating to sealing regulations insofar as it provides insight into the conduct of seal hunts, especially regarding the challenges of applying humane killing methods and the risks of poor animal welfare. The Panel additionally points out that it addressed the history and framework of Norway’s seal hunting regulations under the organization and control of commercial seal hunts, which includes reference to Norway’s mandatory training of hunters and inspectors. The practice of trapping seals underwater in certain hunts as well as the implications of such practice for animal welfare have been noted in other parts of the Reports as appropriate. Therefore, the Panel does not consider additional references to this evidence to be necessary.

Paragraphs 7.216, 7.236, 7.268, 7.273, and 7.333

6.22. Norway made various comments concerning hunting regulations and practices within Norway and elsewhere. Norway requested that the Panel include reference in paragraph 7.216 to the prohibition in its regulations of shooting seals in water, and further requested the Panel to clarify the link between shooting seals in open water and the struck and lost rates in the Greenlandic hunt. Norway also requested clarification of its regulatory scheme in paragraph 7.236, particularly the prohibitions against the use of clubs, nets, as well as the shooting of seals in water. Norway requested explicit reference in paragraph 7.268 to the animal welfare problems related to open water hunting and trapping and netting. Norway requested revision of paragraph 7.273, which it considered to imply that "the IC hunts described by the Panel are 'no different' than other seal hunts such as the Norwegian West Ice hunt".[40] Norway also contended that the hunting methods used in the Norwegian and Canadian commercial hunts are not "similar", specifically citing its prohibition against the use of nets and shooting seals in water. Finally, Norway requested modification of paragraph 7.333 to reflect that clubs are prohibited in Norway.

6.23. The European Union commented that the fact that Norway's regulations prohibit shooting seals in water does not imply that struck and lost is not a problem in the Norwegian hunt. The European Union added that shooting seals near water is not prohibited, and that the Panel should specify that shooting seals in water is allowed in Canada's commercial hunt. With respect to paragraph 7.273, the European Union considered that the difference highlighted by Norway is already mentioned and therefore no amendment is needed.

6.24. The Panel explained its reference to and assessment of seal hunting regulations in connection with Norway's comments on paragraphs 7.197-7.198 and 7.222. In light of the parties' comments, the Panel added reference to the Norwegian prohibition on shooting seals in water in footnote 324 of the Panel Reports as well as a cross-reference in footnote 329 of the Panel Reports to the Panel's discussion of hunting methods in Greenland. The Panel has also modified paragraphs 7.236 and 7.333 to reflect the use of different instruments in different countries. Finally, the Panel does not consider revision to paragraph 7.273 to be necessary.

Footnote 308 to paragraph 7.216 (as well as footnote 259 to paragraph 7.196; footnote 304 to paragraph 7.214; and footnote 324 to paragraph 7.221)

6.25. Norway requested that these references to the inspector's report in Appendix K of the NOAH Report (2012) be supplemented to mention that the referenced voyage "involved exceptional conduct" that resulted in criminal prosecutions.[41] The European Union submitted that it rebutted Norway's assertion that the inspection report in question "involved exceptional conduct" and therefore called on the Panel to reject Norway's request.

6.26. The Panel notes that Norway's comments concern footnote references to an inspection report from a Norwegian hunting expedition of the Kvitungen vessel. The principal statements to which each footnoted reference corresponds explain the nature of the reference being made. Thus, paragraph 7.216 states that "there are varying indications from sealing inspectors of the extent to which struck and lost is a problem in the Norwegian hunt", citing the inspection report in question along with the report of another sealing inspector. In the footnote to paragraph 7.196, the Kvitungen report is cited amongst several others after the statement that "[i]ndications from both participants in the hunts and veterinary experts recognize the heavy demands and difficult conditions of seal hunts". Similarly, in paragraphs 7.214 and 7.221, reference to the Kvitungen report corresponds to statements for which the report provides support and is made in conjunction with multiple other cited sources of evidence. Therefore, the Panel does not consider it necessary to supplement these references.

Footnote 317 to paragraph 7.218

6.27. With respect to hooking/gaffing seals aboard vessels, Norway requested that the Panel refer to the specific conditions under which this practice may occur according to Norwegian regulations.

[40] Norway's comments on the Interim Panel Reports, para. 63.
[41] Norway's comments on the Interim Panel Reports, para. 53.

Norway also requested inclusion of its explanation of the conclusion of the Ministry of Fisheries and Coastal Affairs referenced in this footnote.

6.28. The European Union submitted that it had rebutted Norway's alleged motivation for not amending the provisions of its hunting regulations on the practices of hooking/gaffing seals. The European Union requested that, should the Panel accede to Norway's request, it also reflect the European Union's submissions in this regard.

6.29. The Panel referred to the relevant conditions under which seals may be hooked aboard vessels prior to exsanguination under Norwegian regulations and made a minor amendment on the basis of Norway's comments. Further, the Panel referred to the conclusion of the Norwegian Ministry of Fisheries and Coastal Affairs to indicate the ultimate disposition of this matter. The Panel therefore does not find it necessary to revise this footnote.

Paragraphs 7.219-7.221

6.30. Norway requested revision of these paragraphs to reflect "the distinct approach taken to monitoring under Norway's sealing regulations".[42] Norway also requested reference to evidence that greater oversight leads to a lower likelihood of animal welfare problems. Finally, Norway requested replacement of the term "government inspector" in paragraph 7.220 with the term "independent veterinary inspector".

6.31. The European Union argued that the inspectors on board Norwegian vessels are government employees who represent the Norwegian government and take direct orders from the Fisheries Directorate. According to the European Union, therefore, such inspectors cannot be considered "independent".

6.32. The Panel added reference in these paragraphs regarding the animal welfare benefit of monitoring and enforcement as well as monitoring in Greenland. The Panel notes that these paragraphs primarily concern the feasibility and/or difficulty of monitoring and enforcement of the application of humane killing methods, and specifically draw upon evidence pertaining to the Norwegian hunt with added reference to the comments of Mr Danielsson. The Panel therefore does not consider further revision of these paragraphs to be necessary.

6.33. Additionally, as a factual matter, inspectors are "government-mandated" and report to the Norwegian Directorate of Fisheries.[43] Apart from its factual accuracy, the current wording conveys the authority of the inspector (as distinct from, for instance, an independent observer[44]). Therefore, no change was made in this respect.

6.3 Specific comments on other parts of the Reports

Paragraphs 7.154, 7.597, and 7.608

6.34. The complainants requested the Panel to review paragraph 7.154 of the Interim Reports to note explicitly that the groups of products to be compared in Table 1 are those contained in cells C+H (*all* Canadian seal products), cells A+F (*all* domestic seal products) and cells D+I (*all* seal products from Greenland). Norway requested that appropriate references also be made to the cells in Table 1 in the context of the Panel's analysis of its claims under Articles I:1 and III:4 of the GATT 1994.

6.35. Further to the complainants' comments, the Panel made modifications in paragraphs 7.154, 7.597, and 7.608 of its Reports.

Paragraphs 7.159, 7.161, and footnotes 195, 891

6.36. The complainants noted that different figures were used in the Panel Reports to describe the proportion of seal products originating in Canada that could qualify under the IC exception.

[42] Norway's comments on the Interim Panel Reports, para. 56.
[43] See Norway's second written submission, para. 297.
[44] See Norway's response to Panel question No. 61.

In particular, Canada requested the Panel to refer to its submissions and evidence referencing Canada's official statistical data. The European Union expressed reservations regarding the revision of the figures in the Interim Reports but did not object to the Panel adding a reference to Canada's submission to provide a more complete description of Canada's arguments.

6.37. As the figures at issue relate to the proportion of IC hunts in Canada, the Panel modified the above-mentioned paragraphs and footnotes of its Reports to make specific reference to the data provided by Canada.

Paragraph 7.164

6.38. Norway requested the Panel to complete its findings in paragraph 7.164 with additional evidence, in particular regarding how the IC requirements apply specifically to Greenland. The European Union requested the Panel to reject Norway's request because the conditions of the IC exception are origin-neutral and do not apply specifically to Greenland; it is therefore unnecessary for the Panel to make more factual findings on an issue that is not disputed by the European Union.

6.39. The Panel notes that evidence on Greenland is referenced in a number of paragraphs of the Reports. Moreover, given our finding that all, or virtually all, seal products from Greenland may be eligible under the IC exception, we decline Norway's request to add references to evidence on Greenland in paragraph 7.164 of the Interim Reports.

Paragraph 7.275

6.40. Norway suggested replacement of the word "can" with the word "do" in the third line of this paragraph. The European Union considered that using the verb "do" would convey the impression that all IC hunts, by definition, cause the pain and suffering referenced in paragraph 7.275. The European Union argued that the fact that some hunting methods used by Inuit communities are not consistent with humane killing methods does not mean that all IC hunts in every single case result in poor animal welfare.

6.41. The Panel agrees with the European Union that Norway's suggested revision would alter the meaning of the sentence as currently phrased. The Panel therefore declines to make the requested change.

Paragraphs 7.358, 7.363, 7.366, 7.376, 7.421, and 7.629

6.42. Norway made various comments relating to the characterization and summarization of its arguments, in particular with respect to the objective pursued by the EU Seal Regime.

6.43. The Panel made modifications to paragraphs 7.363, 7.366, 7.421, and accompanying footnotes to reflect Norway's comments.

Paragraph 7.386

6.44. Norway drew attention to recital (21) of the preamble of the Basic Regulation and requested reflection of the text of this recital in the Panel's analysis. The European Union submitted that the passage of recital (21) cited by Norway has a limited purpose of setting out the justification of the Basic Regulation in light of the principle of subsidiarity under EU law. According to the European Union, the recital does not purport to explain why the EU legislators chose the harmonizing measures provided in the Basic Regulation, rather than other possible harmonizing measures.

6.45. The Panel notes that the objective of internal market harmonization is addressed in paragraph 7.371, as amended by the Panel in the course of the interim review. Therefore, the Panel does not consider further reference to this objective to be necessary.

Section 7.3.3.1.2 (paragraphs 7.372-7.411)

6.46. Norway sought inclusion of a reference to the European General Court decision in *Inuit Tapiriit Kanatami and others v. Commission* with respect to the objective of the EU Seal Regime. The European Union considered this judgment of the European General Court to be of very limited relevance for this dispute and, in particular, with regard to the issue raised by Norway.

6.47. In *Inuit Tapiriit Kanatami and others v. Commission* (Case T-526/10), the European General Court addressed claims as to the alleged "illegality" of the Basic Regulation under EU law. More particularly, the Court examined the sufficiency of the Basic Regulation's legal basis under a specific provision of EU law and whether the objective of the Basic Regulation was such that it could legitimately be adopted on the basis of that provision.[45] Because the European General Court examined the objective of the Basic Regulation in the context of a substantively distinct inquiry with different claims and legal provisions at issue than those in the present case, the Panel declines to accept Norway's request.

Paragraphs 7.458 and 7.478

6.48. Canada noted in its comments that the last sentences of paragraphs 7.458 and 7.478 were in its view contradictory. Canada requested the Panel to harmonize the two paragraphs and indicated its preference for the formulation in paragraph 7.458. The European Union argued that there is no contradiction between the sentence in 7.458 and the findings reported in paragraphs 7.459, 7.460, and 7.478.

6.49. The Panel does not consider the statements in these paragraphs to be contradictory; the Panel made minor revisions to paragraph 7.458 for clarity.

Paragraphs 7.588-7.609 (Sections 7.4.2 and 7.4.3)

6.50. Norway argued that the Panel's decision to address Canada's claim under Article 2.1 of the TBT Agreement before addressing the complainants' claims under Articles I:1 and III:4 of the GATT 1994 resulted in Norway's position being overlooked in both parts of the Reports. Specifically, Norway expressed concern regarding the Panel's treatment and disposition of its discrimination claims under Articles I:1 and III:4 of the GATT 1994 in view of the cross-referencing made in paragraphs 7.594 and 7.597 to the Panel's analysis of Canada's claim under Article 2.1 of the TBT Agreement.

6.51. The Panel added references to the arguments and evidence submitted by Norway in support of its claims under Articles I:1 and III:4 of the GATT 1994 in paragraphs 7.594 and 7.597 of the Reports, and deleted some of the cross-references to Section 7.3.2 of the Reports.

Other paragraphs and footnotes

6.52. Finally, the Panel made a number of additional modifications to its Reports further to the comments by Canada[46] and Norway[47], in cases where the Panel considered that the proposed changes improved the clarity of the parties' arguments or the overall accuracy of the Reports.

6.4 Additional documents submitted by the European Union with its comments on the Interim Reports

6.53. The European Union submitted with its comments on the Interim Reports additional documents consisting of letters between officials from the European Commission on the one hand,

[45] See, e.g. paras. 22 and 64 of the General Court Judgment.

[46] Changes were made in paragraphs 1.3, 1.15, 1.16, 7.2, 7.4, 7.11, 7.30, 7.31, 7.51, 7.90, 7.91, 7.130, 7.144, 7.154, 7.168, 7.191, 7.200, 7.206, 7.216, 7.220, 7.229, 7.248, 7.266, 7.272, 7.275, 7.285, 7.294, 7.311, 7.331, 7.335, 7.336, 7.342, 7.381, 7.400, 7.408, 7.423, 7.425, 7.463, 7.518, 7.522, 7.587, 7.588, 7.594, 7.597, 7.608, 7.612, 7.616, 7.622, 7.650, 7.658, and 7.668; and footnotes 44, 58, 70, 75, 76, 99, 109, 111, 113, 157, 158, 163, 201, 222, 240, 254, 264, 276, 321, 350, 356, 415, 420, 462, 517, 535, 536, 547, 624, 655, 711, 765, 808, 918, 919, and 964.

[47] Changes were made in paragraphs 7.4, 7.40, 7.166, 7.192, 7.194, 7.331, 7.363, 7.366, 7.371, 7.421, 7.470, and 7.617; and footnotes 53, 202, 598, 604, and 960.

and the Canadian Government as well as the authorities of Nunavut on the other hand. The European Union noted that these documents reflected recent developments of relevance to the state of the requests made by entities to become recognized bodies entitled to deliver attesting documents for placing seal products on the EU market. The European Union requested the Panel to make reference to these new documents in its reports.[48]

6.54. The complainants objected to the European Union's request on the grounds that the information provided by the European Union constituted new evidence that should have been introduced earlier in the proceedings in accordance with the Panel's working procedures. The complainants further argued that the submission of evidence at this late stage of the proceedings was inconsistent with the requirements of due process, and that the European Union's failure to abide by such requirements could not be remedied at the interim review stage.

6.55. The Panel considers that the documents attached to the European Union's comments on the Interim Reports constitute new evidence. The letters submitted by the European Union are dated May 2013 and, as such, they could have been introduced at an earlier time in the proceedings in accordance with the Panel's working procedures.[49] Further, the Panel recalls that in *EC - Sardines*, the Appellate Body stated that "[t]he interim review stage is not an appropriate time to introduce new evidence".[50] For these reasons, the Panel declines to amend relevant parts of its Reports to reflect the aforementioned information submitted by the European Union.

7 FINDINGS

7.1 Overview of the dispute

7.1. This dispute concerns a 2009 European Union measure relating to the sale of seal products (EU Seal Regime). Under the measure, the placing of seal products on the market is prohibited in the European Union unless they satisfy certain conditions. One such condition applies to seal products obtained from seals hunted by Inuit or indigenous communities (IC condition). The other applies to seal products obtained from seals hunted for marine resource management (MRM condition). Travellers may also be able to bring seal products into the European Union in limited circumstances (Travellers condition). The Regime lays down specific requirements for all three conditions.

7.2. Canada and Norway claim that the EU Seal Regime violates the European Union's various obligations under the GATT 1994 and the TBT Agreement. First, the complainants allege that the IC and MRM conditions of the EU Seal Regime violate the non-discrimination obligations under Articles I:1 and III:4 of the GATT 1994. Canada also presented a claim under Article 2.1 of the TBT Agreement with respect to the IC and MRM conditions. The complainants argue that the IC and MRM conditions accord seal products from Canada and Norway (imported products) treatment less favourable than that accorded to like seal products of domestic origin, mainly from Sweden and Finland (domestic products) as well as those of other foreign origin, particularly from Greenland (other foreign products). Second, the complainants argue that the EU Seal Regime creates an unnecessary obstacle to trade that is inconsistent with Article 2.2 of the TBT Agreement because it is more trade restrictive than necessary to fulfil a legitimate objective. Third, the complainants argue that certain procedural requirements under the EU Seal Regime violate the requirements for conformity assessment under Article 5 of the TBT Agreement. Fourth, the complainants claim that each of the IC, MRM, and Travellers conditions of the EU Seal Regime impose quantitative restrictions on trade inconsistently with Article XI:1 of the GATT 1994. Finally, the complainants submit 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.

[48] The European Union proposed that a reference to the new documents be added for instance in footnote 198 to paragraph 7.162 of the Interim Reports.

[49] According to Rule 7 of the Panel's working procedures, "[e]ach party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party(ies). Exceptions to this procedure shall be granted upon a showing of good cause."

[50] Appellate Body Report, *EC – Sardines*, para. 301.

7.3. The European Union asserts that the measure is fully consistent with its WTO obligations. The European Union claims that the EU Seal Regime is aimed at addressing public moral concerns on the welfare of seals. The EU Seal Regime is thus not based on conservation concerns. The complainants contest the objective of the measure as put forward by the European Union. According to the complainants, the measure pursues a multiplicity of objectives such as the protection of seal welfare; the protection of the social and economic interests of Inuit or indigenous communities; and the promotion of sustainable marine resource management. Based on its identified objective, the European Union argues that any inconsistencies of the measure under the GATT 1994 should be justified under the general exceptions provisions of the GATT 1994, namely Articles XX(a) and XX(b), because the measure is necessary to protect public morals (regarding the welfare of seals) and to protect seals' health, respectively. Further, the European Union argues that any distinction made under the EU Seal Regime, for instance a distinction based on the type and purpose of the hunt, is legitimate within the meaning of Article 2.1 of the TBT Agreement. The European Union also contends that no other measure can protect its public moral concerns on seals at the same level as does the current Regime.

7.4. Factually, the parties debated extensively whether humane killing methods can be applied, monitored, and enforced in seal hunts. The European Union's justification of its measure is based on the premise that the application and enforcement of humane killing methods in seal hunting are not always feasible because of *inter alia* the unique environmental conditions in which the hunting takes place. The European Union asserts that due to the "inherent" inhumane nature of the hunts, particularly hunts conducted for commercial purposes, the European public is ethically and morally repelled by the presence on the EU market of seal products. Hence, a general ban as designed under the current measure is the only effective way to protect the public moral concerns. The complainants argue that humane killing methods can be properly enforced in seal hunts. Further, they underline that as the current measure does not condition market access on the humaneness with which seals are killed, seal products derived from seals killed inhumanely may be allowed on the EU market. This, in their view, proves that the current measure is not capable of protecting the welfare of seals. Both sides have submitted a voluminous amount of evidence, mostly based on scientific studies and expert statements, pertaining to whether the application and monitoring of humane killing methods can be enforced in seal hunting practices.

7.5. Legally, the Panel is presented with the task of *inter alia* examining the obligations under, as well as the relationship between, the GATT 1994 and the TBT Agreement. In the current dispute, the two complainants brought claims under both agreements, namely Articles I:1, III:4, and XI:1 of the GATT 1994 as well as Articles 2.2, 5.1.2 and 5.2.1 of the TBT Agreement. Canada also brought a claim under Article 2.1 the TBT Agreement.

7.6. These Reports are structured in the following order: (i) preliminary matters; (ii) the measure's qualification as a technical regulation; (iii) claims under the TBT Agreement; (iv) claims under the GATT 1994 and the Agreement on Agriculture; (v) non-violation claim under Article XXIII:1(b) of the GATT 1994; and (vi) our conclusions and recommendations.

7.2 Preliminary matters

7.2.1 Description of the measures at issue

7.7. As described in the Factual Aspects section above, Canada and Norway are challenging the following two EU legal instruments in this dispute:

a. 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)[51]; and

b. Commission Regulation (EU) No. 737/2010 of 10 August 2010 laying down detailed rules for the implementation of Regulation (EC) No. 1007/2009 of the European Parliament

[51] Exhibit JE-1.

and of the Council on trade in seal products, Official Journal of the European Union, L Series, No. 216 (17 August 2010).[52]

7.8. For the purpose of this dispute, the Panel will use the following terms: "the Basic Regulation" for Regulation (EC) No. 1007/2009, "the Implementing Regulation" for Commission Regulation (EU) No. 737/2010, and "the EU Seal Regime" for these two legal instruments combined together.[53]

7.9. We briefly describe the contents of the two Regulations below.

7.2.1.1 The Basic Regulation

7.10. The Basic Regulation consists of a preamble (21 recitals) and eight provisions ((1) "Subject matter"; (2) "Definitions"; (3) "Conditions for placing on the market"; (4) "Free movement"; (5) "Committee procedure"; (6) "Penalties and enforcement"; (7) "Reporting"; and (8) "Entry into force and application").

7.11. The preamble of the Basic Regulation refers to *inter alia* concerns and observations on seal hunting as well as seal products resulting from such hunts. The Panel will examine specific parts of the preamble in the context of its examination of the parties' claims and arguments.

7.12. Article 3 of the Basic Regulation lays down the rules regarding "conditions for placing on the market" of seal products:

> Article 3
>
> Conditions for placing on the market
>
> 1. 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. These conditions shall apply at the time or point of import for imported products.
>
> 2. By way of derogation from paragraph 1:
>
> (a) the import of seal products shall also be allowed where it is of an occasional nature and consists exclusively of goods for the personal use of travellers or their families. The nature and quantity of such goods shall not be such as to indicate that they are being imported for commercial reasons;
>
> (b) the placing on the market of seal products shall also be allowed where the seal products result from by-products of hunting that is regulated by national law and conducted for the sole purpose of the sustainable management of marine resources. Such placing on the market shall be allowed only on a non-profit basis. The 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.
>
> ...

7.13. Article 3(1) of the Basic Regulation prescribes that the *placing on the market* of seal products is allowed "*only* where the seal products result from hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence" (IC hunts). The provision also states that for imported products, these conditions are applied at the time or point of import.

[52] Exhibit JE-2.

[53] See section 3 above regarding the parties' usage of "EU Seal Regime" to refer to the measures at issue.

7.14. Article 3(2) describes two situations where the condition set out in paragraph 1 does not apply: first, the *import* of seal products is allowed where it is of an occasional nature and consists exclusively of goods for the personal use of travellers or their families (Travellers imports); second, the *placing on the market* of seal products is allowed where the seal products result from by-products of hunting that is regulated by national law and conducted for the sole purpose of the sustainable management of marine resources (MRM hunts).

7.15. Specific requirements for each of the three conditions for importing and/or placing seal products on the market are elaborated in the Implementing Regulation.

7.2.1.2 The Implementing Regulation

7.16. The Implementing Regulation comprises a preamble (13 recitals) and twelve provisions.

7.17. The preamble refers to the need to specify detailed requirements for the import and placing on the market of certain seal products and the principles to be applied in setting out procedures for adequate verification of compliance with such requirements, as well as for the control of attesting documents.

7.18. Unlike the Basic Regulation, a specific title is not assigned to each of the provisions in the Implementing Regulation. The purpose of the Implementing Regulation is set forth in Article 1: to "lay [] down detailed rules for the placing on the market of seal products pursuant to Article 3" of the Basic Regulation.

7.19. Articles 3, 4, and 5 of the Implementing Regulation address the specific requirements for each of the three conditions mentioned in Articles 3(1) and 3(2) of the Basic Regulation.

7.20. Specifically, Article 3 sets out that, to fall under the *IC hunts* category, seal products must originate from seal hunts that satisfy the following three conditions:

a. seal hunts conducted by Inuit[54] or other indigenous communities[55] which have a tradition of seal hunting in the community and in the geographical region;

b. seal hunts the products of which are at least partly used, consumed or processed within the communities according to their traditions; and

c. seal hunts which contribute to the subsistence of the community.

7.21. Article 4 sets out that, to fall under the *Travellers imports* category, one of the following three requirements must be fulfilled:

a. the seal products are either worn by the travellers, or carried or contained in their personal luggage;

b. the seal products are contained in the personal property of a natural person transferring his normal place of residence from a third country to the Union; or

c. the seal products are acquired on site in a third country by travellers and imported by those travellers at a later date, provided that … those travellers present to the customs authorities … the following documents:

    i. a written notification of import; and

[54] "Inuit" is defined as "indigenous members of the Inuit homeland, namely those arctic and subarctic areas where, presently or traditionally, Inuit have aboriginal rights and interests, recognised by Inuit as being members of their people and includes Inupiat, Yupik (Alaska), Inuit, Inuvialuit (Canada), Kalaallit (Greenland) and Yupik (Russia)". (Basic Regulation, Article 2(4)).

[55] "Other indigenous communities" is defined as "communities in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions". (Implementing Regulation, Article 2(1)).

ii. a document giving evidence that the products were acquired in the third country concerned.

7.22. Article 5 provides that, to fall under the *MRM hunts* category, seal products must originate from seal hunts that satisfy the following three conditions:

a. seal hunts conducted under a national or regional natural resources management plan which uses scientific population models of marine resources and applies the ecosystem-based approach;

b. seal hunts which does [*sic*] not exceed the total allowable catch quota established in accordance with the plan referred to in point (a); and

c. seal hunts the by-products of which are placed on the market in a non-systematic way on a non-profit basis.[56]

7.23. Articles 3(2) and 5(2) require that, at the time of placing on the market pursuant to Articles 3(1) and 3(2)(b) of the Basic Regulation and Articles 3 and 5 of the Implementing Regulation (i.e. products resulting from IC and MRM hunts), the seal product be accompanied by the attesting document referred to in Article 7(1) of the Implementing Regulation.

7.24. Articles 6 through 10 prescribe the procedural requirements that must be met to place seal products on the market. For a seal product to be placed on the market, it must be accompanied by an attesting document (Article 7) issued by a recognized body (Article 6). A reference to the attesting document number must be included in any further invoice (Article 7(4)). A model attesting document is attached as an annex to the Implementing Regulation.

7.2.2 Consideration of the measures at issue

7.2.2.1 Single or multiple measure(s)

7.25. As noted above, the EU Seal Regime consists of the Basic Regulation and the Implementing Regulation. The Basic Regulation was adopted by the European Parliament and Council of the European Union on 16 September 2009; it sets forth the "conditions for placing on the market" of seal products. Pursuant to Article 3(4) of the Basic Regulation, the Implementing Regulation was subsequently adopted by the European Commission on 10 August 2010. The Implementing Regulation lays down the specific requirements necessary for implementing the rules in the Basic Regulation.

7.26. Therefore, the Basic Regulation and the Implementing Regulation operate in conjunction with each other in governing the importation and the placing of seal products on the EU market. In particular, the Implementing Regulation does not operate on its own as it is a regulation adopted to "implement" the rules in the Basic Regulation. The parties agree that the EU Seal Regime should be treated as a single measure.[57] Accordingly, we consider that these two legal instruments must be examined as an integrated whole.

7.27. Treating both the Basic and Implementing Regulations as a single measure does not mean that different aspects of the EU Seal Regime cannot be challenged under different provisions of the WTO covered agreements. In fact, we note that in presenting their claims that the EU Seal Regime is inconsistent with several provisions of the GATT 1994 and the TBT Agreement, the complainants focus at times on specific aspects of the EU Seal Regime and at other times on the EU Seal Regime as a whole.[58]

[56] "Placing on the market on a non-profit basis" is defined as "placing on the market for a price less than or equal to the recovery of the costs borne by the hunter reduced by the amount of any subsidies received in relation to the hunt". (Implementing Regulation, Article 2(2)).

The Regulations do not provide a definition for "placing on the market in a non-systematic way".

[57] Parties' responses to Panel question No. 2.

[58] For example, the complainants focus on the IC hunts category under the measure with respect to their claim under Article I:1 of the GATT 1994 and on the MRM hunts category with respect to their claim under

7.2.2.2 Characterization of the measure at issue

7.28. Despite their common understanding that the EU Seal Regime should be treated as a single measure, the parties disagree on how the EU Seal Regime should be characterized for the purpose of this dispute. Briefly stated, the complainants argue that the EU Seal Regime provides for three sets of specific requirements concerning the importation and/or the placing on the market of seal products. The respondent submits that the EU Seal Regime consists of a general ban on seal products with certain exceptions.

7.29. As it is important for the Panel to start its analysis with the proper understanding of the measure at issue, we now turn to the question of how the EU Seal Regime must be characterized.

7.2.2.2.1 Main arguments of the parties

7.2.2.2.1.1 Complainants

7.30. Canada argues that the EU Seal Regime should be viewed as setting out requirements concerning the importation of seal products.[59] Article 3 of the Basic Regulation and Articles 3, 4, and 5 of the Implementing Regulation establish a comprehensive regime of conditions that is simultaneously restrictive and permissive and determines when seal products may be imported and placed on the market in the European Union, or are prevented from accessing it. According to Canada, these provisions, when read together based on their design, structure, and expected operation, lead to the conclusion that the EU Seal Regime is accurately described as "requirements concerning the importation of seal products".[60] The texts of the Regulations do not support the characterization of the measure as a general ban with certain exceptions as the term "prohibition" or "ban" is not used.[61]

7.31. Canada submits that the conditions under the EU Seal Regime are divided into three categories or sets of requirements: seal products derived from IC hunts; seal products derived from MRM hunts; and seal products imported as Travellers imports.[62] Seal products that satisfy the conditions pertaining to the Travellers imports are eligible to be imported; in the case of IC hunts and MRM hunts, seal products are eligible to be imported and placed on the market. Seal products that do not fall within any of these categories are not eligible to be imported or placed on the market, although neither the Basic Regulation nor the Implementing Regulation states expressly that such products are prohibited from importation or from being placed on the market.

7.32. Norway submits that the EU Seal Regime does not comprise a ban (on the sale or import of seal products) with separate exceptions.[63] Rather, the Regulations combine permissive and prohibitive elements both formally and in substance, laying down three sets of market access conditions that constitute restrictive gateways for the sale and importation of seal products. Particularly, neither the Basic Regulation nor the Implementing Regulation contains the term "General Ban" as distinct from "exceptions".

7.33. Norway submits that, in assessing whether a measure imposes a trade "restriction", neither the generality of a rule nor its association with an exception is important.[64] Rather, what matters is whether a measure imposes conditions that, by nature or effect, place limits on trade.[65] Hence, in characterizing a measure for purposes of WTO obligations addressing trade restrictions, a panel must ascertain whether a measure imposes a "limiting condition" and, if so, assess whether that condition is WTO-consistent. Each of the three requirements in the EU Seal Regime includes a

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Article III:4 of the GATT 1994. As regards their claim under Article 2.2 of the TBT Agreement, the complainants focus on the EU Seal Regime as a whole.

[59] Canada's response to Panel question No. 1.

[60] Canada's response to Panel question No. 1, para. 24

[61] Canada's response to Panel question No. 1.

[62] The parties use different terms for these three conditions contained in the Regulations. For the purpose of these Reports, the Panel will use the terms set out in paras. 7.13-7.14 and 7.56 for these conditions.

[63] Norway's first written submission, paras. 158-170; response to Panel question No. 1; opening statement at the first meeting of the Panel, paras. 7-16.

[64] Norway's opening statement at the first meeting of the Panel, paras. 14-15.

[65] Norway's opening statement at the first meeting of the Panel, para. 14 (referring to Appellate Body Reports, *China – Raw Materials*, para. 319; *US – Tuna II (Mexico)*, para. 319).

series of specific requirements that place limits on EU market access with respect to both the placing on the market and the import of products. According to Norway, the subject matter of this dispute is these specific limiting conditions, which are the legal source of the market access restrictions on Norwegian seal products.

7.34. In response to a question from the Panel on their understanding of the measure as described in their respective panel requests, the complainants submit that their position on the characterization of the measure does not substantively differ from that contained in the panel requests.[66]

7.2.2.2.1.2 Respondent

7.35. The European Union argues that the EU Seal Regime should be considered as a "General Ban coupled with three exceptions".[67] Article 3(1) of the Basic Regulation sets forth the "General Ban" on the placing on the market of seal products, applied at the point of importation in the case of imported products, together with the main exception (the IC exception) and two additional exceptions (the MRM exception and the Travellers' exception).

7.36. The European Union argues that the complainants' proposition (i.e. three trade-restrictive requirements) is overly formalistic. From a logical point of view, the Basic Regulation's conditional authorization ("the placing on the market of seal products shall be allowed only where") has the same meaning as other propositions such as "the placing on the market of seal products shall not be allowed unless" or "the placing on the market of seal products shall be prohibited except where". The European Union also refers to the legislative history and the recitals of the Basic Regulation, which in its view confirm that the EU legislators sought to enact a general ban subject to certain exceptions.[68]

7.37. The European Union asserts that the complainants' position is based on their belief that it allows them to claim that the EU Seal Regime makes no contribution to the overarching policy objective pursued by the European Union (addressing public moral concerns related to animal welfare). For the European Union, the complainants' argument is a "manifest *non sequitur*"[69] in that it suggests that the EU Seal Regime as a whole makes no contribution to its stated objective because none of the three requirements (in reality, exceptions) contributes to the objective. The European Union maintains that there can be no question that the EU Seal Regime has the effect of prohibiting the placing on the market of seal products where none of the three so-called "requirements" is met.

7.38. According to the European Union, the complainants' position is also at odds with the characterization of the measure included in the panel requests. If the EU Seal Regime did not provide for a ban subject to exceptions, but rather for three self-standing "requirements", both Norway's and Canada's panel requests were manifestly incorrect and deficient in that they failed to "present the problem clearly". Thus, were the Panel to decide that the EU Seal Regime cannot be characterized as a General Ban subject to three exceptions, the European Union requests the Panel to find that the complainants' panel requests do not meet the requirements of Article 6.2 of the DSU and to reject all the claims submitted by them.[70]

7.2.2.2.2 Analysis by the Panel

7.39. We begin our examination of the measure with a consideration of the text of the Basic Regulation and the Implementing Regulation.

7.40. Article 1 of the Basic Regulation, entitled "Subject matter", states that the Regulation "establishes harmonised rules concerning the placing on the market of seal products". Article 3, entitled "Conditions for placing on the market", starts with a paragraph prescribing that the *placing*

[66] Complainants' responses to Panel question No. 102.
[67] European Union's first written submission, paras. 1, 11, 35, and 357-358; response to Panel question Nos.1, 2, and 100.
[68] For example, the European Union refers to recital (10) of the Basic Regulation where the phrase "the placing on the market should … not be allowed" is used.
[69] European Union's response to Panel question No. 1.
[70] European Union's response to Panel question No. 1, para. 11.

on the market of seal products shall be allowed *only* where the seal products result from IC hunts. It also explains that the conditions in the first paragraph shall apply at the time or point of *import* for imported products.[71] The wording of the first paragraph of Article 3 thus indicates that this is the only situation where seal products can be placed on the EU market.[72]

7.41. The second paragraph of Article 3 begins with the phrase "by way of derogation from paragraph 1" and provides for two situations where derogation from paragraph 1 is allowed. First, the *placing on the market* of seal products on a non-profit basis is allowed where a seal product is derived from MRM hunts and is *not* being placed on the market for "commercial reasons" (Article 3(2)(b)).[73] Second, the *import* by travellers of a seal product is allowed (Article 3(2)(a)) to the extent that it is not "for commercial reasons".[74] The Regulations do not define the term "commercial reasons".[75]

7.42. Based on the text of Article 3 of the Basic Regulation, therefore, we understand that the measure operates as follows:

- seal products derived from IC hunts may be imported and/or placed on the EU market;
- seal products derived from MRM hunts may be placed on the EU market when it is on a non-profit basis and is not for commercial reasons; the text does not indicate whether the conditions also apply to imported products; and
- seal products for personal use of travellers or their families may be imported for non-commercial reasons; however, the placing on the market of such products is prohibited.

7.43. Therefore, although seal products of both Travellers imports and IC hunts, along with seal products allowed for transit and other commercial activities under the measure[76], may be *imported* into the European Union (i.e. enter "the customs territory of the Community")[77], only the products of IC hunts may also be placed on the EU market.

7.44. Further, despite the absence of any reference to imported products, the complainants consider that, like in the case of seal products obtained from IC hunts, the conditions governing the placing on the market of seal products of MRM hunts also apply at the point or time of

[71] The Basic Regulation defines "import" as "any entry of goods into the customs territory of the Community". (Basic Regulation, Article 2(5).

The European Union explained further the scope and meaning of "import" as defined by Article 2(5): "The Basic Regulation is being interpreted by the customs authorities of the Member States as applying to goods which have been released for free circulation in the customs territory of the European Union after payment of the duties to which they are liable. The EU Commission has not taken any official position on this issue. Nor has this matter been resolved by the EU Court of Justice." (European Union's response to Panel question No. 79, para. 231). The European General Court had occasion to address the meaning of the term "import" under the Basic Regulation in its decision of 25 April 2013 in *Inuit Tapiriit Kanatami and others v. Commission*, observing that the Basic Regulation "does not prevent the entry, warehousing, processing or manufacture of seal products in the Union, if they are intended for export and are never released for free circulation in the Union". (European General Court, Case T-526/10, Inuit Tapiriit Kanatami and others v. Commission (2013), para. 70).

[72] The Basic Regulation defines "placing on the market" as "introducing on the Community market, thereby making available to third parties, in exchange for payment". (Basic Regulation, Article 2(3)).

[73] Article 3(2)(b) of the Basic Regulation states at the end, "The 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."

[74] More specifically, the import of seal products is allowed "where it is of an occasional nature and consists exclusively of goods for the personal use of travellers or their families". (Basic Regulation, Article 3(2)(a)). It further adds that the nature and quantity of such goods shall not be such as to indicate that they are being *imported* for commercial reasons.

[75] In response to a question from the Panel regarding the MRM requirements, the European Union explained that "[t]he systematic and repeated way in placing those products on the EU's market would indicate that the *purpose of the hunt in question was commercial*. Indeed, if seal products are repeatedly and systematically placed on the EU's market, e.g. in certain periods of the year or through the same channels of commerce, this would indicate that they are being *sold for a commercial purpose*." (European Union's response to Panel question No. 123, para. 84) (emphasis added)

[76] See para. 7.53.

[77] Article 2(5) of the Basic Regulation.

importation for seal products of foreign origin.[78] The European Union has also confirmed that this is a correct understanding.[79]

7.45. Overall, the practical implication of Article 3 is that seal products derived from hunts other than IC or MRM hunts cannot be imported and/or placed on the EU market. Canada and Norway claim, and the European Union does not dispute, that most of the seal products from Canada and Norway are derived from hunts that are *not* IC or MRM hunts as defined by the measure and are consequently prevented from accessing the EU market.[80]

7.46. We note that the operative part of the Basic Regulation does not use words such as "prohibit" or "ban". Rather, as described in the preceding paragraphs, it prescribes the specific conditions under which the import or placing on the EU market of seal products is *allowed*. Nevertheless, the use of the word "only" in the first paragraph of Article 3, combined with the phrase "by way of derogation" in the second paragraph, signifies that the import and placing on the EU market of seal products are *not allowed* other than in the situation specified in the first paragraph, plus two further circumstances set out in the second paragraph of Article 3. In other words, having regard to the design and structure of the Basic Regulation, and in the light of the text of that Regulation, the measure effectively operates as a prohibition on seal products that do not meet the conditions under the measure.

7.47. The preamble of the Basic Regulation, however, refers explicitly to the notion of a ban, particularly an import ban, on seal products in several places. For example, recital (1) mentions the European Parliament's 2006 declaration on banning seal products in the European Union, which led to the current EU Seal Regime, and the Parliament's request to the Commission to draft a regulation to ban the import, export and sale of all harp and hooded seal products. Recital (5) references several EU member States' adoption or intention to adopt legislation regulating trade in seal products by prohibiting the import and production of such products, and recital (21) refers to "harmonising national bans concerning trade in seal products". Recital (10) makes clear that "as a general rule", seal products would "not be allowed":

> In order to counter barriers to the free movement of products concerned in an effective and proportionate fashion, *the placing on the market of seal products should, as a general rule, not be allowed* in order to restore consumer confidence while, at the same time, ensuring that animal welfare concerns are fully met. … In order to ensure effective enforcement, the harmonised rules should be enforced at the time or point of import for imported products. (emphasis added)

7.48. Several recitals in the preamble also address the economic and social interests of Inuit communities engaged in seal hunting and the desire to empower the Commission to define the three conditions as currently reflected in the Basic Regulation for the placing on the market or import of seal products. The preamble thus describes *inter alia* the circumstances leading to the adoption of the Basic Regulation, the general rule under the measure not to allow seal products, and the need to define the three conditions under which seal products are allowed.

7.49. Turning to the Implementing Regulation, we note that it lays down detailed rules, including procedural requirements, for the placing on the market of seal products of both domestic and foreign origin under the three conditions specified in the Basic Regulation. Apart from that, the Implementing Regulation does not provide any further indication to assist us in understanding the character of the EU Seal Regime as a whole.

[78] Complainants' responses to Panel question No. 1.
[79] European Union's response to Panel question No. 77.
[80] In response to a question from the Panel, the European Union confirms that commercial imports are prohibited unless they qualify for the IC or MRM exceptions. (European Union's response to Panel question No. 78). We note that the term "commercial" in this context was used without any specific definition. Nevertheless, regarding the scope and meaning of the term "commercial hunting of seals" as referenced in recital (10) of the Basic Regulation, the European Union states that it "should be understood as referring to hunts which are conducted exclusively or primarily for the purpose of obtaining products, such as skins or oil, which are subsequently marketed for profit". (European Union's response to Panel question No. 76). Taken together, the term "commercial imports" appears to be referring to seal products obtained from "commercial hunting of seals" as defined by the European Union in its responses to questions from the Panel.

7.50. Having examined the texts of the Basic Regulation and the Implementing Regulation, we also observe that the respective panel requests of the complainants describe the EU Seal Regime as the "trade ban"[81] or "general prohibition"[82] on the importation and sale of seal products, with certain exceptions. This suggests to us that the complainants understood the Regime to function as a ban with exceptions. For the complainants, regardless of the form of the Regime, it operates as a ban with respect to their seal products, while it does not operate as such with respect to other seal products, in particular those from the European Union and Greenland.[83]

7.51. In their written submissions, both complainants emphasize that the EU Seal Regime combines permissive and prohibitive elements, laying down three sets of market access conditions that determine when seal products may or may not be imported and/or placed on the EU market.[84] In other words, for the complainants, the EU Seal Regime essentially allows certain seal products and prohibits all other seal products. Canada asserts that although the EU Seal Regime is on its face framed as a measure governing the placement of seal products on the EU market, in practical terms it does little more than impede imports of seal products from Canada, Norway, and other WTO Members, while continuing to allow seal products from favoured exporting countries such as Greenland and domestic seal products.[85] Similarly, Norway submits that it characterizes the measure in the same way the European Union did when notifying the Implementing Regulation, namely, the measure establishes three sets of requirements that specify conditions that must be fulfilled for seal products to be placed on the EU market. Norway notes that these "three sets of requirements simultaneously combine, both in form and in substance, the prohibitive and permissive elements of the measure".[86]

7.52. Like the complainants, we also consider that it is the three conditions set out in Article 3 of the Basic Regulation that, taken together, both allow and prohibit the placing on the market of seal products. By allowing seal products only under a defined condition complemented by two derogations, the measure effectively prohibits all seal products that do not fit into the specifications of those three requirements. For imported products that do not meet the conditions for one of the three requirements, therefore, the measure as a whole effectively works as an import ban. The fact that the measure is phrased in a positive form does not change the substantive character of the measure as both prohibiting seal products and allowing them upon meeting certain specific conditions.

7.53. Additionally, we observe that under the EU Seal Regime, seal products may also enter the territory of the Community in the following circumstances: (a) seal products may transit across the European Union; (b) seal products may be processed in the European Union for export under an inward processing scheme[87], using seal inputs regardless of their source; and (c) seal products may be sold for export at EU auction houses. Therefore, in addition to the *explicit exceptions* enshrined in the Regulations (i.e. IC, MRM, and Travellers exceptions), the EU Seal Regime also creates *implicit exceptions* for seal products for transit, inward processing, and importation for auction and re-export.[88]

7.54. To the extent that the complainants' contention about the nature of the measure is related to their view that the measure cannot be described as a "general" ban as described by the European Union because certain seal products are allowed under the measure, we recall the

[81] Canada's request for the establishment of a panel, p. 2.

[82] Norway's request for the establishment of a panel, p. 2.

[83] See, below sections 7.3.2; 7.4.2; and 7.4.3.

[84] For example, Canada submits that seal products that do not fall within any of these categories are, in effect, not eligible to be imported or placed on the market, although neither the Basic Regulation nor the Implementing Regulation states expressly that such products are prohibited.

[85] Canada also argues that the measure operates *de facto* as a border measure imposing a discriminatory restriction on the importation of seal products, in violation of Articles I:1 and XI:1 of the GATT 1994, rather than as an internal measure. (Canada's response to Panel question No. 1; see also Canada's response to Panel question No. 102).

[86] Norway's response to Panel question No. 102.

[87] The European Union notes that the EU Seal Regime does not allow the "processing" of seal products in general but only "inward processing", which it defines as "the processing under customs control of imported inputs into products intended for export". (European Union's response to Panel question No. 131; see also European Union's response to Panel question Nos. 75, 79, and 101; complainants' comments on the European Union's response to Panel question Nos. 100 and 101).

[88] See European Union's response to Panel question Nos. 75, 101, 131, and 177; and Canada's and Norway's comments on European Union's response to Panel question Nos. 75, 101, 131 and 177.

Appellate Body's finding in *EC-Asbestos* that the measure in that dispute was not a *total* prohibition on asbestos fibres because it also included provisions that permitted the use of asbestos in certain situations.[89] The Appellate Body stated further that to characterize the measure simply as a general prohibition, and to examine it as such, would overlook the complexities of the measure, which included both prohibitive and permissive elements. Similarly, given the exceptions under the EU Seal Regime, we do not consider the EU Seal Regime to constitute a "total" or "general" ban on seal products; rather, the Regime consists of both prohibitive and permissive components and should be examined as such.

7.55. The measure would have been clearer in expressing its intended purpose and function as a ban on seal products if it had explicitly prohibited the import and placing on the EU market of seal products.[90] However, insofar as we can discern the true character of the measure from its design, structure, and expected operation, we need not second-guess the precise reason why the measure was formulated in the present manner.

7.56. The considerations above, taken together, demonstrate that the EU Seal Regime in its entirety operates as a ban on seal products, combined with an exception and two derogations, forming three conditions prescribed in Article 3 of the Basic Regulation (i.e. seal products obtained from IC hunts, MRM hunts, and those imported under the Travellers imports category). In this connection, for ease of reference, these Reports will refer to these three conditions using the following terms: the "IC hunts/category/exception/requirements" (for the condition in Article 3(1) of the Basic Regulation and Article 3 of the Implementing Regulation); the "MRM hunts/category/exception/requirements" (for the condition in Article 3(2)(b) of the Basic Regulation and Article 5 of the Implementing Regulation); and the "Travellers imports/category/exception/requirements" (for the condition in Article 3(2)(a) of the Basic Regulation and Article 4 of the Implementing Regulation).[91]

7.2.3 Order of analysis

7.2.3.1 Main arguments of the parties

7.57. While acknowledging that panels should normally first examine the measure in relation to the agreement that deals specifically, and in detail, with the subject matter addressed by the measure at issue, the complainants suggest, for the reasons set out below, that it is open to the Panel to follow the sequence of claims and arguments set out in the complainants' first written submissions in this dispute.[92]

7.58. Both complainants have presented their claims and arguments under the GATT 1994 first, followed by their claims and arguments under the TBT Agreement. Nothing in these claims and arguments would require the Panel to examine the complainants' claims and arguments under the TBT Agreement before it examines their claims and arguments under the GATT 1994. Thus, a panel may begin with the claims that are common to both parties, therefore examining the GATT 1994 first in this dispute.

7.59. Moreover, Canada invites the Panel to examine the claims under the GATT 1994 first and, should it find that the EU Seal Regime violates Articles I:1 and III:4 of the GATT 1994 and that

[89] Appellate Body Report, *EC – Asbestos*, para. 64.

[90] For example, and in contrast to the EU Seal Regime, other EU measures in similar contexts include an explicit ban and exceptions in the text of the measure. (See, e.g. Council Directive 83/129/EEC of 28 March 1983 concerning the importation into Member States of skins of certain seal pups and products derived therefrom, Official Journal of the European Communities, L Series, No. 91 (9 April 1983), (Exhibit CDA-12), Articles 1 and 3; Regulation (EC) No. 1523/2007 of the European Parliament and of the Council of 11 December 2007 banning the placing on the market and the import to, or export from, the Community of cat and dog fur, and products containing such fur, Official Journal of the European Union, L Series, No. 343 (27 December 2007), (Exhibit EU-6), Articles 3 and 4).

We observe that the European Commission Services advised that the Regulation be framed in positive terms so as to make it an internal measure rather than a border measure as this would make a potential challenge at the WTO more difficult. (Non-paper of the Commission Services on the Proposed legislation on trade in seals – WTO Issues (17 April 2009), (Exhibit NOR-28)).

[91] Where appropriate, the Panel will also use these shorthand terms in the sections addressing the main arguments of the parties.

[92] Complainants' responses to Panel question No. 4; Norway's response to Panel question Nos. 5 and 6.

those violations cannot be justified under Article XX thereof, it may be possible for the Panel to exercise judicial economy with respect to Canada's claims under Article 2.1 of the TBT Agreement.[93]

7.60. The European Union suggests that the Panel start its analysis with the claims under the TBT Agreement followed by those under the GATT 1994, leaving the analysis under the Agreement on Agriculture for last.[94] The European Union does not consider that the Panel should take into account the difference in the scope of claims between the complainants in deciding the order of its analysis.[95]

7.2.3.2 Analysis by the Panel

7.61. The complainants in this dispute raised claims under both the GATT 1994 and the TBT Agreement. Specifically, both complainants brought claims under Articles I:1, III:4, and XI:1 of the GATT 1994 and Articles 2.2, 5.1.2, and 5.2.1 of the TBT Agreement. Additionally, Canada presented a claim under Article 2.1 of the TBT Agreement, and Norway a claim under Article 4.2 of the Agreement on Agriculture.

7.62. The complainants consider that, given the discrepancy in the scope of claims between the two complainants (i.e. Article 2.1 of the TBT Agreement invoked only by Canada), the Panel may wish to start with the GATT 1994 as this is the agreement under which most of the complainants' common claims are presented. Further, in their view, it could give the Panel the possibility to exercise judicial economy with respect to Canada's claim under Article 2.1 of the TBT Agreement.

7.63. The Appellate Body has stated that, as a general rule, panels are free to structure the order of their analysis as they see fit.[96] Based on this general approach, it is the "structure and logic" of the provisions at issue in each dispute that decide the proper sequence of steps in the panel's analysis, whether the panel's examination involves one provision, or more than one provision or WTO agreement.[97] In other words, unless there exists a mandatory sequence of analysis which, if not followed, would amount to an error of law and/or affect the substance of the analysis itself, panels have the discretion to structure the order of their analysis.

7.64. Here, the Panel is presented with no such mandatory sequence of analysis. We thus need to determine the order of our analysis by focusing on the "structure and logic" of the provisions at issue in this dispute. We are also mindful that it may be useful for panels to take account of the manner in which a claim is presented to them by a complainant Member.[98] However, as the Appellate Body has clarified, a panel may also depart from the sequential order suggested by a complaining party.[99]

7.65. First, turning to our analysis of the "structure and logic" of the provisions at issue, we recall the Appellate Body's statement in *EC-Asbestos*:

> We observe that, although the *TBT Agreement* is intended to "further the objectives of GATT 1994", it does so through a specialized legal regime that applies solely to a limited class of measures. For these measures, the *TBT Agreement* imposes obligations on Members that seem to be *different* from, and *additional* to, the obligations imposed on Members under the GATT 1994.[100] (emphasis original)

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[93] Canada's response to Panel question Nos. 4 and 6; Norway's response to Panel question No. 6.

[94] European Union's response to Panel question No. 4. The European Union refers to the Appellate Body's statement in *EC-Bananas III* that the provision from the agreement that "deals specifically, and in detail" with the measures at issue should "normally" be analysed first.

Canada also refers to this Appellate Body Report but adds that this discretion did not amount to an inflexible rule that must be followed without regard to the specific circumstances of a given dispute. (See Canada's response to Panel question No. 4, para. 36).

[95] European Union's response to Panel question No. 6.

[96] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, paras. 126-129.

[97] Appellate Body Reports, *Canada – Autos*, para. 151; and *Canada – Wheat Exports and Grain Imports*, para. 109.

[98] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, paras. 126-129.

[99] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, paras. 277-279.

[100] Appellate Body Report, *EC – Asbestos*, para. 80.

7.66. We thus consider that if a measure at issue is found to fall within the scope of the TBT Agreement, it is reasonable for such measure to be examined first under the obligations set out in that agreement. In previous disputes where claims were made under two WTO agreements, panels usually addressed first the claim under the more specific and detailed agreement, in accordance with the guidance from the Appellate Body in *EC – Bananas III*.[101] Following this guidance, in *EC – Sardines* where claims were made under both the GATT 1994 and the TBT Agreement, the panel considered that "if the [measure at issue] is a technical regulation, then the analysis under the TBT Agreement would precede any examination under the GATT 1994."[102] The same approach was followed in all three recent TBT disputes: all three panels addressed non-discrimination claims under the TBT Agreement first, exercising judicial economy on the complainants' non-discrimination claims under the GATT 1994 where considered appropriate.[103]

7.67. Second, the complainants' challenges against the measure at issue under the TBT Agreement extend to Articles 2.2, 5.1.2, and 5.2.1 and thus are as broad in scope as their common claims under the GATT 1994, which are Articles I:1, III:4, and XI:1. As such, it would not necessarily prove more efficient to proceed with one agreement rather than another because the claims under both agreements are extensive.

7.68. Finally, we are not persuaded of the possibility of exercising judicial economy with respect to Canada's claim under Article 2.1 of the TBT Agreement in this case. This is particularly so when there are several claims under each agreement and given that, as mentioned by the Appellate Body in *US – Tuna II (Mexico)*, the obligations under the non-discrimination provisions of the TBT Agreement and the GATT 1994 cannot be assumed to be the same.

7.69. In light of the above, we do not consider that starting with the complainants' claims under the GATT 1994 would be the most logical or economical order of analysis under the circumstances of this dispute. We therefore consider it appropriate to start our analysis with the complainants' claims under the TBT Agreement, followed by those under the GATT 1994.

7.70. Before turning to our examination of the claims made with respect to the EU Seal Regime, we address the preliminary matter of Norway's request to the Panel under Article 13 of the DSU.

7.2.4 Norway's request under Article 13 of the DSU

7.71. As described in Section 1, on 16 January 2013, Norway submitted a request for the Panel to exercise its authority under Article 13 of the DSU to seek copies of two legal opinions of the Legal Service of the Council of the European Union (the Opinions). These were also the documents at issue in the European Union's request for a preliminary ruling.[104] In its letter of 8 April 2013, the Panel informed the parties of its decision to deny Norway's request. As indicated in the letter, we are providing the reasons for our decision in these Reports.[105]

7.72. In its request, Norway contends that the legal opinions would "help complete the record"[106] in that publicly available material on the record refers to the Opinions and the original documents would allow the Panel to confirm attributed statements and provide proper context. Norway also argues that it is "fair"[107] to request the Opinions from the European Union because it is not seeking *public* disclosure but rather disclosure within *confidential* WTO proceedings.[108] In addition, Norway

[101] Appellate Body Report, *EC – Bananas III*, para. 204: "Although Article X:3(a) of the GATT 1994 and Article 1.3 of the Licensing Agreement both apply, the Panel, in our view, should have applied the Licensing Agreement first, since this agreement deals specifically, and in detail, with the administration of import licensing procedures. If the Panel had done so, then there would have been no need for it to address the alleged inconsistency with Article X:3(a) of the GATT 1994." See also Panel Reports, *EC – Sardines*, paras. 7.15-7.16; and *EC – Asbestos*, paras. 8.16-8.17.

[102] Panel Reports, *EC – Sardines*, para. 7.15-7.16; and *EC – Asbestos,* paras. 8.16-8.17.

[103] Panel Reports, *US – Clove Cigarettes*; *US – Tuna II (Mexico)*; and *US – COOL*.

[104] See, above Section 1, paras. 1.20-1.21. In the preliminary ruling, the Panel granted the European Union's request to remove the documents from the record as exhibits and directed the parties as to how to proceed in light of the rulings. (WT/DS400/6 and WT/DS401/7).

[105] See, above Section 1, para. 1.22.

[106] Norway's Request under Article 13 of the DSU, section III.A, paras. 10-11.

[107] Ibid. section III.B, paras. 12-33.

[108] In connection with this argument, Norway disputes the confidential nature of the Opinions under EU law and stresses the public circulation of the Opinions evidenced in other public documents.

asserts that the Opinions are in the possession of the European Union and that "the most reasonable means available to the Panel"[109] to access these documents would be to request them from the European Union. Finally, Norway contends that disclosure of the Opinions is necessary to ensure due process and proper adjudication of Norway's claims. Norway primarily claims that the Opinions are "evidence of certain facts relevant to Norway's claims"[110] and therefore are not being relied upon for their legal conclusions.

7.73. The European Union responds that the Council of the European Union had not authorized disclosure of the Opinions, and therefore persons or entities in possession of the Opinions had obtained them unlawfully.[111] Further, the European Union argues that the Opinions are not necessary for the proper adjudication of the dispute because the Council Legal Service, which prepared the Opinions, lacks both the authority and capacity to make factual findings. Although Norway portrays the Opinions as constituting factual evidence, the European Union counters that all factual material is derivative of information supplied to the Council Legal Service and already on the record before the Panel. Beyond this, the issues for which Norway cites factual relevance are in reality issues of legal characterization and conclusion rather than factual matters. The European Union also contends that it would be "unfair" to request the Opinions as it "could be required to take position against the legal advice received in confidence from one of its legal services"[112], which could risk undermining its right to a fair hearing.

7.74. Canada considers that Norway's request for information is well-founded and that "the designation or classification of that information as confidential by the party in possession of it is not a barrier to the Panel requesting it".[113]

7.75. Further to the Panel's invitation for comments from third parties, the United States emphasizes that a panel should not use its authority under Article 13 of the DSU to make a party's *prima facie* case and considers that Norway's statements regarding the Opinions' factual relevance to its claims would raise questions in this regard.[114] The United States also notes the very sensitive issues implicated by Norway's request, such as the relevance of domestic law and evidentiary status, and that under the present circumstances believes it neither necessary nor appropriate to address arguments or make findings on such issues.[115]

7.76. Article 13 of the DSU provides in relevant part:

> Article 13: Right to Seek Information
>
> 1. Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information.
>
> 2. Panels may seek information from any relevant source …

7.77. The Appellate Body has interpreted Article 13 of the DSU as "a grant of discretionary authority" for panels that enables them to seek information from any source, including from a Member who is party to a dispute.[116] Moreover, "a panel is vested with ample and extensive

[109] Norway's Request under Article 13 of the DSU, para. 37.
[110] Ibid. para. 39.
[111] European Union's comments on Norway's Request, dated 8 February 2013, paras. 3-10. The European Union also described the status of the documents in relation to the unauthorized disclosure and challenged various contentions by Norway with respect to EU law.
[112] Ibid. para. 28.
[113] Canada's comments on Norway's Request, dated 8 February 2013 (these comments contain no paragraph numbering).
[114] United States' comments on Norway's Request, dated 8 February 2013, para. 3.
[115] Ibid. para. 5.
[116] Appellate Body Report, *Canada – Aircraft*, paras. 184-185 (citing Appellate Body Report, *Argentina – Textiles and Apparel*, para. 84).

discretionary authority to determine *when* it needs information and *what* information it needs".[117] Thus, the exercise of authority under Article 13 of the DSU is to be made with regard to the particular facts and circumstances of each case, including "what information is needed to complete the record, whose possession it lies within, what other reasonable means might be used to procure it, why it has not been produced, whether it is fair to request the party in possession of the information to submit it, and whether the information or evidence in question is likely to be necessary to ensure due process and a proper adjudication of the relevant claim(s)".[118]

7.78. In assessing Norway's request, therefore, the Panel considered Norway's request in the light of the Appellate Body's guidance, finding particularly relevant in this case the considerations of the need for the requested information for the Panel's assessment of the matter before it and the consistency with due process for all parties.

7.79. Regarding the need for the information requested by Norway, we recall that Norway submitted replacement exhibits for the Opinions following the Panel's preliminary ruling expunging them from the record. Indeed, Norway noted prior to the Panel issuing its preliminary ruling that "the facts revealed by the relevant exhibits can also be demonstrated, albeit in a less direct and immediate manner, by other evidence".[119] Having reviewed the replacement exhibits filed by Norway in light of the claims before us, we did not consider that the requested information was needed to complete the record.[120] We also noted Norway's additional arguments that a proper adjudication of the relevant claims requires disclosure of these documents. While Norway highlighted various points concerning the factual relevance of the views of the Council Legal Service to Norway's claims, it did so by reference to publicly available information (including that found in its replacement exhibits) and specific arguments as to what it considered such public information to reveal. To the extent, if at all, that the views of the Council Legal Service may be factually relevant to Norway's claims, we did not consider that requesting the Opinions from the European Union was necessary for the Panel to make an objective assessment of the matter before it.

7.80. As to due process, we observed in our preliminary ruling that the complainants had agreed to withdraw the exhibits at issue and that their due process rights would not be affected by the removal of the exhibits from the record. We further determined that the complainants would have an opportunity to provide replacement evidence.[121] Norway specifically referred to its due process concerns when it requested that the Panel allow replacement of the evidence it had agreed to withdraw and "an opportunity to address the resulting incomplete sentences and paragraphs in its submission".[122] In our preliminary ruling, therefore, we invited the complainants to provide "a brief explanation of [the replacement exhibits'] relevance to the complainants' arguments, referring to the relevant paragraphs in their respective first written submissions".[123] Pursuant to this invitation, Norway filed its replacement exhibits and explanation of their relevance with cross-references to its first written submission. We therefore considered that Norway had been "permitted to make its case before the Panel"[124] and that the requirements of due process had been fully satisfied.

7.81. In light of the above, we did not consider the circumstances of Norway's request to warrant the exercise of authority under Article 13 of the DSU and thus decided to deny Norway's request.

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[117] Appellate Body Report, *Canada – Aircraft*, para. 192. (emphasis original)

The Appellate Body has also underscored the "comprehensive nature" of this authority and consistently affirmed that the grant of discretionary authority under Article 13 of the DSU is "indispensably necessary" to enable a panel to discharge the duty imposed by Article 11 of the DSU to "make an objective assessment of the matter before it". See Appellate Body Reports, *US – Shrimp*, paras. 104, 106; *Japan – Agricultural Products II*, para. 127; and *US – Continued Zeroing*, para. 345.

[118] Appellate Body Report, *US – Large Civil Aircraft (Second Complaint)*, para. 1140, cited in Norway's Request under Article 13 of the DSU, para. 6.

[119] Norway's letter of 16 January 2013 to the Panel.

[120] With specific regard to Norway's argument that disclosure would provide proper context and confirm attributed statements in public materials, we note that Norway has already explained the nature and relevance of its replacement exhibits and the contents thereof have not been called into question by any other party.

[121] WT/DS400/6 and WT/DS401/7, Preliminary Ruling of the Panel, para. 3.3.

[122] Norway's letter of 16 January 2013 to the Panel.

[123] WT/DS400/6 and WT/DS401/7, Preliminary Ruling of the Panel, para. 3.7.

[124] Norway's Request under Article 13 of the DSU, para. 38.

7.3 Claims under the TBT Agreement

7.82. In this section, the Panel examines the complainants' claims under the TBT Agreement. Both Canada and Norway presented claims under Articles 2.2, 5.1.2, and 5.2.1. Additionally, Canada presented a claim under Article 2.1.

7.83. Before considering the complainants' claims under the TBT Agreement , the Panel must first determine whether the EU Seal Regime constitutes a "technical regulation" within the meaning of Annex 1:1 of the TBT Agreement and thus falls within the scope of the Agreement.

7.3.1 Whether the EU Seal Regime is a technical regulation within the meaning of the TBT Agreement

7.84. The term "technical regulation" is defined in Annex 1.1 of the TBT Agreement as follows:

> Document which 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. (explanatory note omitted)

7.85. Based on this definition, the Appellate Body has developed a three-tier test to establish whether a document qualifies as a technical regulation:

> [There are] *three criteria* that a document must meet to fall within the definition of 'technical regulation' in the *TBT Agreement. First*, the document must apply to an identifiable product or group of products. The *identifiable* product or group of products need not, however, be expressly *identified* in the document. *Second*, the document must lay down one or more characteristics of the product. These product characteristics may be intrinsic, or they may be related to the product. They may be prescribed or imposed in either a positive or a negative form. *Third*, compliance with the product characteristics must be mandatory. … [T]hese three criteria are derived from the wording of the definition in Annex 1.1.[125] (emphasis original)

7.86. The parties do not contest that the EU Seal Regime meets the first and third criteria of the definition, i.e. that it applies to an identifiable group of products and that compliance with the measure is mandatory. The parties disagree, however, on the second criterion of the definition, namely whether the EU Seal Regime "lays down product characteristics or their related processes and production methods [(PPMs)], including applicable administrative provisions".

7.87. The criteria of the definition are cumulative, and there is no particular order of analysis that we need to follow in assessing whether the EU Seal Regime is a technical regulation.[126] Accordingly, we start our analysis with the second criterion of the definition, which is the main issue of contention as to whether the measure at issue qualifies as a technical regulation. We then address the two other elements of the three-tier test that are not disputed by the parties.

7.3.1.1 Whether the EU Seal Regime lays down one or more characteristics of the products or their related PPMs, including applicable administrative provisions

7.3.1.1.1 Main arguments of the parties

7.3.1.1.1.1 Complainants

7.88. The complainants argue that the EU Seal Regime lays down product characteristics in both positive and negative form. If a product meets the requirements of the IC, MRM, or Travellers categories (i.e. the exceptions), it may possess the characteristic of containing seal. Conversely, if

[125] Appellate Body Report, *EC – Sardines*, para. 176 (summarizing the Appellate Body's interpretation of the definition of "technical regulation" in *EC – Asbestos*, paras. 66-70). The same test was applied by the Appellate Body in *US – Clove Cigarettes*, *US – Tuna II (Mexico)*, and *US – COOL*.

[126] Panel Report, *US – COOL*, para. 7.149.

the product does not meet such requirements, then it may not contain seal.[127] In determining whether the EU Seal Regime lays down product characteristics, it is not necessary for the exceptions themselves to prescribe product characteristics. In the complainants' view, the issue is whether the exceptions, combined with other elements of the measure, lay down product characteristics.[128]

7.89. The complainants further argue that because products falling within one of the three categories must satisfy certain administrative requirements set out in the Implementing Regulation in order to be placed on the European Union market, the EU Seal Regime also sets forth "applicable administrative provisions" within the meaning of Annex 1.1 of the TBT Agreement.[129]

7.90. As an alternative to the argument that the measure lays down product characteristics, Norway argues that the EU Seal Regime prescribes related PPMs within the meaning of Annex 1.1. Based on the ordinary meaning of the terms of the definition[130], Norway asserts that a PPM is laid down through the IC and MRM exceptions.[131] In particular, with respect to the IC category, Norway argues that the IC requirements prescribe a "process" involving a particular course of action (a traditional hunt by specified persons) with a defined end (the production of seal products for community subsistence). Regarding the MRM category, Norway argues that the measure imposes a particular course of action relating to the purpose of the hunt (sustainable marine resource management); the way in which the hunt is conducted (regulated at national level pursuant to a resource management plan); and the way in which the seal products are marketed (not-for-profit, non-commercial nature and quantity). Furthermore, the action also has a defined end (the sale of MRM by-products).[132]

7.91. Canada argues for its part that the identity of the producers of a product could be a relevant factor in the identification of a PPM. In particular, Canada notes that "certain elements of the Inuit Communities category could be characterized as processes or production methods".[133]

7.3.1.1.1.2 Respondent

7.92. The European Union contests that the EU Seal Regime lays down product characteristics pursuant to the definition set out in Annex 1.1.[134] The European Union first argues that the EU Seal Regime prohibits the placing on the market of products which consist exclusively of seal, such as "pure" seal meat, oil, blubber, organs and fur skins, whether processed or not.[135] The European Union asserts that this prohibition under the EU Seal Regime is similar to the prohibition of asbestos fibres "as such" in the measure at issue in *EC – Asbestos*, which the Appellate Body found did not constitute a technical regulation.

7.93. As regards products containing seal and other ingredients ("mixed" products), the European Union argues that it would be inappropriate for the Panel to limit its analysis to the fact that the EU Seal Regime lays down intrinsic characteristics in the negative form, by providing that all products may not contain seal. The determination of whether the EU Seal Regime lays down product characteristics should also take into account the exceptions, because it is the permissive elements, *together* with the prohibition, that determine the situations where seal products may be placed on the European Union market.[136]

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[127] Canada's first written submission, para. 363; Norway's first written submission, para. 499; complainants' responses to Panel question No. 127.
[128] See, e.g. Norway's second written submission, para. 145.
[129] Canada's first written submission, paras. 364-365; Norway's first written submission, paras. 502-503.
[130] Norway defines the term "processes" as "a systematic series of actions or operations directed to some end". (Norway's second written submission, para. 161 (citing the Panel Report in *EC – Trademarks and Geographical Indications (Australia)*, para. 7.510)).
[131] Norway's opening statement at the first meeting of the Panel, para. 64; second written submission, para. 161.
[132] Norway's second written submission, para. 162.
[133] Canada's response to Panel question No. 21, para. 109.
[134] European Union's first written submission, para. 199.
[135] European Union's first written submission, para. 213.
[136] European Union's first written submission, para. 216.

7.94. According to the European Union, what is decisive for the characterization of the EU Seal Regime is that none of the three exceptions lays down product characteristics. The IC exception concerns the type of hunters, the traditions of their communities, and the purpose of the hunt, but not the intrinsic or related features of the products, such as their composition or presentation.[137] The MRM exception imposes requirements relating to the size of the hunt, the intensity and purpose of the hunt, and the marketing conditions of the products. In the European Union's view, none of these conditions sets out intrinsic or related features of the products.[138] The European Union argues that the EU Seal Regime differs in that sense from the measure in *EC - Asbestos*, where the exceptions themselves referred to particular characteristics intrinsic to the product.[139]

7.95. With respect to the question whether the EU Seal Regime prescribes applicable administrative provisions, the European Union contends that Annex 1.1 addresses only those administrative provisions that apply to "product characteristics or their related PPMs". Given that the procedural requirements set out in the Implementing Regulation are not related to any product characteristics or their related PPMs, such provisions, according to the European Union, do not constitute "applicable administrative provisions" within the meaning of Annex 1.1.[140]

7.96. Finally, the European Union argues that the EU Seal Regime does not regulate any PPMs.[141] The European Union contends that the measure does not set out methods for the production of seal products, compliance with which would allow their placing on the market. The ban, together with the exceptions, allows the placing on the market of seal products depending on the purpose of the hunt, which has nothing to do with methods for the production of seal products.[142] According to the European Union, to include the purpose of production within the meaning of "PPM" would improperly stretch the limit of the concept of "product characteristics and related PPMs".[143]

7.3.1.1.2 Analysis by the Panel

7.3.1.1.2.1 Aspects of the EU Seal Regime to be examined

7.97. The parties agree in principle that in determining whether the EU Seal Regime qualifies as a technical regulation, the Panel should consider the measure "as a whole".[144] However, the parties disagree on whether both the prohibition and the exceptions under the Regime must individually lay down product characteristics or their related PPMs in order for the measure to qualify as a technical regulation.

7.98. The complainants contend that the exceptions *per se* do not have to lay down product characteristics or their related PPMs, as long as the measure as a whole, i.e. through one of its components, meets the criterion. The European Union submits that a measure cannot be characterized as laying down product characteristics on the basis of its prohibitive element alone. If the measure contains not only a ban but also exceptions, these permissive elements should also be taken into account in determining whether the measure as a whole qualifies as a technical regulation.[145]

[137] European Union's first written submission, para. 220; response to Panel question No. 127.
[138] European Union's first written submission, para. 221.
[139] European Union's first written submission, para. 224.
[140] European Union's first written submission, paras. 229-234.
[141] The European Union observes that the European Commission's proposal would have allowed the placing on the market of seal products upon proof that these were obtained under conditions which ensured that the seals were killed and skinned "without causing avoidable pain, distress and any other form of suffering", which is not the case under the current Regime. (European Union's first written submission, paras. 226-227).
[142] European Union's second written submission, para. 190.
[143] European Union's response to Panel question No. 21.
[144] See, e.g. Canada's first written submission, para. 351; Norway's second written submission, para. 145; and European Union's first written submission, para. 208. See also Appellate Body Report, *EC - Asbestos*, para. 64.
[145] Norway's second written submission, para. 145; and European Union's first written submission, para. 208.

7.99. We recall that, in *EC – Asbestos*, the Appellate Body emphasized that the measure should be examined as a whole "taking into account, as appropriate, the prohibitive and the permissive elements that are part of it".[146] Based on that premise, the Appellate Body examined both the prohibitive and permissive aspects of the measure in that dispute and found:

> Viewing the measure as an integrated whole, we see that it lays down characteristics for all products that might contain asbestos, and we see also that it lays down the 'applicable administrative provisions' for certain products containing chrysotile asbestos fibres which are excluded from the prohibitions in the measure. For these reasons, we conclude that the measure constitutes a technical regulation under the *TBT Agreement*.[147]

7.100. In our view, the Appellate Body's analysis of the measure at issue in *EC – Asbestos* does not suggest that for a measure consisting of a ban and certain exceptions to qualify as a technical regulation, both the prohibition and the exceptions must individually lay down product characteristics or their related PPMs.

7.101. A panel may have to examine different components of a measure separately in order to make a holistic analysis of the measure's legal character. However, the final decision on the character of the measure must be based on the measure as a whole, "taking into account, as appropriate, the prohibitive and permissive elements that are part of it".[148]

7.102. With these considerations in mind, we proceed to examine the prohibitive and permissive aspects of the EU Seal Regime with a view to determining whether the EU Seal Regime, taken as a whole, lays down product characteristics or their related PPMs within the meaning of Annex 1.1.

7.3.1.1.2.2 Whether the EU Seal Regime lays down product characteristics or their related PPMs, including applicable administrative provisions

7.103. The Appellate Body defined the term "characteristics" in *EC – Asbestos* as "any objectively definable 'features', 'qualities', 'attributes', or other 'distinguishing mark' of a product".[149] Such "characteristics" include not only features and qualities that are intrinsic to the product itself, but also related characteristics, "such as the means of identification, the presentation and the appearance of a product".[150] The meaning of the phrase "their related PPMs" has not yet been examined in a WTO dispute.

7.104. In *EC – Asbestos*, the Appellate Body found that the prohibition on asbestos fibres as such did not, in itself, lay down any "characteristics" because it simply banned asbestos fibres in their natural state.[151] The prohibition on asbestos-containing products, however, was found to lay down a product characteristic in the negative form by requiring that all products must not contain asbestos.

7.105. As noted above, the EU Seal Regime prohibits all seal products, whether they are made exclusively of seal or contain seal as an input. The Regime makes an exception with regard to the import and/or placing on the market of seal products in three situations, namely when they result from IC hunts, MRM hunts, or in the case of Travellers imports.[152] The Implementing Regulation sets out the specific requirements that seal products must fulfil in each of these three situations.

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[146] Appellate Body Report, *EC – Asbestos*, para. 64. In reaching this conclusion, the Appellate Body took into account the content of Canada's request for the establishment of a panel (i.e. Canada's identification of the Decree concerned as "the measure at issue") as well as the content of the measure itself (consisting of prohibitions and limited exceptions). The Appellate Body then examined each component (i.e. prohibitions and exceptions) of the measure before making an overall assessment of whether the measure, viewed as an integrated whole, was a "technical regulation" within the meaning of Annex 1.1.

[147] Appellate Body Report, *EC – Asbestos*, para. 75.

[148] Canada's response to Panel question No. 126, paras. 77 and 83.

[149] Appellate Body Report, *EC – Asbestos*, para. 67.

[150] Appellate Body Report, *EC – Asbestos*, para. 67.

[151] Appellate Body Report, *EC – Asbestos*, para. 71.

[152] For instance, Article 3(1) of the Basic Regulation provides that "[t]he placing on the market shall be allowed only where …"; Article 3(2)(b) states that "the placing on the market shall also be allowed where …"; and Article 3(2)(a) provides that "the import of seal products shall be allowed where …".

7.106. Based on the text of the Regulations, and in light of the reasoning of the Appellate Body in *EC – Asbestos*, we believe that the prohibition on seal-containing products under the EU Seal Regime lays down a product characteristic in the negative form by requiring that all products not contain seal.[153]

7.107. Further, the Appellate Body considered that, through its exceptions, the measure in *EC - Asbestos* set out the "'applicable administrative provisions, with which compliance is mandatory' for products with certain objective 'characteristics'".[154] On this question, the Appellate Body relied on the panel's finding that the marketing criteria applying to products falling under the exceptions "relate to the characteristics of one or more given products or processes or production methods relating to them".[155] According to these criteria, products containing chrysotile asbestos could be marketed provided that there was no substitute fibre available (i) that presented less occupational health risk to workers than chrysotile fibre; and (ii) that met all technical guarantees of safety appropriate to the use. The panel noted that such requirements had to be read in conjunction with administrative provisions requiring a statement and supporting documents to attest that the criteria of the exceptions were satisfied.

7.108. Similarly, we find that the EU Seal Regime sets out, through its exceptions, the "applicable administrative provisions with which compliance is mandatory" for products with certain objective "characteristics". First, the exceptions define the scope of the prohibition in the EU Seal Regime, albeit implicitly. Second, the nature of the exceptions is to allow products containing seal on the EU market, subject to compliance with strict administrative requirements. Finally, the scope of the exceptions is determined under the Regime based on a set of criteria.

7.109. Specifically, in order to fall under the IC or MRM exceptions, products containing seal must meet *inter alia* the following criteria relating to seal hunts from which the seals used as their input are derived: the identity of the hunter (Inuit or indigenous); the type of hunt (traditional Inuit hunts); the purpose of the hunt (subsistence or marine resource management); and the way in which the products are marketed (non-systematically and on a non-profit basis).[156] Any person wishing to import and/or place seal products on the market under these exceptions must have such products certified by a recognized body as meeting the necessary criteria under each exception. Furthermore, the products must be accompanied by an attesting document at the time of placing on the market.[157] In addition, with respect to the particular unit of seal products for which it is issued, the attesting document indicates whether the products result from hunts conducted by Inuit or other indigenous communities, or from hunts for the sustainable management of marine resources.[158]

7.110. The criteria under the exceptions thus identify the seal products that are allowed to be placed on the European Union market. They do so by defining the categories of seal that can be used as an input for such products; only seals obtained from the specific type of hunter and/or the

[153] We note that such conclusion is not affected by the fact that the prohibition of seals "in their natural state" might not, in itself, prescribe or impose any "characteristics". In this regard, Norway argues that the appropriate analogues to the "raw mineral form" of asbestos in the context of the EU Seal Regime would be live seals or unprocessed seal carcasses. In Norway's view, the majority of seal products are in fact "mixed" products, i.e. they must be combined with other products derived from other sources. (Norway's second written submission, paras. 154-155).

[154] Appellate Body Report, *EC – Asbestos*, para. 74 (quoting Panel Report, para. 8.69). The panel in that dispute found that:

[A]rticle 2 of the Decree sets out the criteria for marketing the products identified in the Decree and not solely the criteria for excluding products from the market. The second sentence in Article 3.I of the Decree completes these criteria. In our view, the marketing criteria in Article 2.I of the Decree relate to the characteristics of one or more given products or processes or production methods relating to them. This is particularly true of the second subparagraph on the technical guarantees of safety appropriate to use … We also note that Article 2.II and Article 3 in particular cover the administrative provisions applicable to the technical regulations. (Panel Report, *EC – Asbestos*, paras. 8.68-8.69, (cross-referencing para. 8.1 of the Panel Report)).

[155] Panel Report, *EC – Asbestos*, para. 8.69.

[156] The conditions for a seal product to qualify under the IC and the MRM exceptions are described above in section 7.2.1.

[157] See Implementing Regulation, Articles 3(2), 5(2), and 7(1). A model form for the attesting document is annexed to the Implementing Regulation.

[158] European Union's response to Panel question No. 160, para. 245. See Annex of the Implementing Regulation, item 7.

qualifying hunts may be used in making final products. These criteria in our view constitute "objectively definable features" of the seal products that are allowed to be placed on the EU market and consequently lay down particular "characteristics" of the final products. Therefore, as was the case in *EC – Asbestos*, the exceptions under the EU Seal Regime identify a group of products with particular "characteristics" through a narrowly defined set of criteria.

7.111. In sum, the EU Seal Regime considered as a whole lays down characteristics for all products that might contain seal. The Regime also lays down the applicable administrative provisions for certain products containing seal inputs that are exempted from the prohibition under the measure.

7.112. We recall that in order to meet this criterion of the definition of technical regulation under Annex 1.1 of the TBT Agreement, the complainants must prove that the document lays down either "product characteristics" or "their related PPMs". Since we have found that the measure as a whole lays down product characteristics within the meaning of Annex 1.1 of the TBT Agreement, we do not find it necessary to examine whether the EU Seal Regime also lays down PPMs.

7.3.1.2 Whether the EU Seal Regime applies to an identifiable product or group of products

7.113. The parties do not contest that the EU Seal Regime applies to an identifiable group of products. The Regime determines whether products may or may not contain seal, depending on whether they meet the conditions of the IC, MRM, or Travellers imports exceptions.[159] The range of products covered by the European Union's measure is identifiable by virtue of the presence or absence of the characteristic of being derived or manufactured from, or of containing, seal.

7.114. The EU Seal Regime establishes rules concerning the placing on the market of seal products.[160] The term "seal products" is defined in the Basic Regulation as "all products, either processed or unprocessed, deriving or obtained from seals, including meat, oil, blubber, organs, raw fur skins and fur skins, tanned or dressed, including fur skins assembled in plates, crosses and similar forms, and articles made from fur skins".[161] As discussed in section 7.2.2.2 above, in order to be imported and/or placed on the European Union market, products may not contain seal, unless they meet the conditions under the IC, MRM, or Travellers' imports exceptions.

7.115. We note that in *EC – Asbestos*, the measure at issue also prescribed a characteristic that effectively applied to all products, namely that they must not contain asbestos. Although the prohibition applied to a large group of products which could not be determined from the terms of the measure itself, the Appellate Body found that the measure applied to an "identifiable" group of products. Like the measure in *EC – Asbestos*, the prohibition under the EU Seal Regime applies to an identifiable group of products by prescribing that all products may not contain seal.[162]

7.116. In addition, we note that numerous product categories to which the EU Seal Regime applies were identified in the European Commission's Technical Guidance Note.[163] In our view, this list of products, albeit indicative, is further evidence that the EU Seal Regime applies to an identifiable group of products.[164]

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[159] Canada's first written submission, para. 356; Norway's first written submission, para. 496.

[160] Basic Regulation, Article 1.

[161] Basic Regulation, Article 2(2).

[162] The subject matter of the Basic Regulation is to establish harmonized rules concerning the placing on the market of seal products. (See Basic Regulation, Article 1).

[163] Canada's first written submission, para. 358; Norway's first written submission, para. 497 (referring to Exhibit JE-3). The document submitted in Exhibit JE-3 was issued pursuant to Article 3(3) of the Basic Regulation. According to recital (18) of the preamble of the Basic Regulation, such technical guidance notes were to be issued by the Commission "[w]ith the aim of facilitating enforcement operations carried out by the relevant national authorities".

[164] As stated in the "Foreword" section of the document, the tariff codes identified in the list are those that have the "greatest likelihood of covering products subject to the prohibition". The European Commission also indicates in the document that more products than those covered by the tariff codes identified in the list are likely to be affected by the prohibition. (Technical Guidance Note, (Exhibit JE-3), p. 44).

7.117. In light of the above, the Panel considers that the EU Seal Regime applies to an "identifiable group of products" in accordance with Annex 1.1 to the TBT Agreement.[165]

7.3.1.3 Whether compliance with the EU Seal Regime is mandatory

7.118. The Appellate Body in *EC – Asbestos* clarified the concept of "mandatory" under Annex 1.1 as follows:

> A "technical regulation" must … regulate the "characteristics" of products in a binding or compulsory fashion. It follows that, with respect to products, a "technical regulation" has the effect of *prescribing* or *imposing* one or more "characteristics" – "features", "qualities", "attributes", or other "distinguishing mark".[166] (emphasis original)

7.119. The Appellate Body also found that enforceability through the application of sanctions indicated mandatory compliance.[167]

7.120. As we stated above in the section on Preliminary Matters, the combined effect of the Basic and Implementing Regulations is to prohibit seal products from the European Union market, except in cases where the products meet the conditions prescribed in Article 3 of the Basic Regulation and Articles 3 and 5 of the Implementing Regulation. These conditions are compulsory from the point of view of seal products being placed on the market; unless these conditions are met, seal products are denied access to the EU market.

7.121. We further note that the Basic Regulation contains language of a mandatory nature. For example, Article 3(1) provides that "[t]he placing on the market of seal products shall be allowed *only* where …".[168] By way of derogation from Article 3(1), Article 3(2) also sets out circumstances where the placing on the market of seal products "shall be allowed". The use of the words "shall" and "shall only" in the above-mentioned provisions indicate that the terms of the provisions are obligatory. Several provisions of the Implementing Regulation contain similar wording of a mandatory nature.[169]

7.122. The European Union's Regime is also supported by enforcement measures, as penalties may apply in case of infringement of the regulation. In particular, under Article 6 of the Basic Regulation, "[EU] Member States shall lay down the rules on penalties applicable to infringements of [the] Regulation".[170]

7.123. Finally, we note that both the Basic and Implementing Regulations state that "[the] Regulation shall be binding in its entirety and directly applicable in all Member States." The Appellate Body in *EC – Sardines* interpreted similar wording contained in the measure at issue in that case as meaning that compliance with the regulation was mandatory.[171]

7.124. In light of these considerations, the Panel is of the view that the EU Seal Regime is mandatory within the meaning of the definition in Annex 1.1 of the TBT Agreement.

7.125. Based on our analysis of the three criteria set out in Annex 1.1 of the TBT Agreement, we find that the EU Seal Regime is a document which "lays down product characteristics …

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[165] Appellate Body Report, *EC – Asbestos*, para. 70. See also Appellate Body Report, *EC – Sardines*, para. 180.

[166] Appellate Body Report, *EC – Asbestos*, para. 68.

[167] Appellate Body Report, *EC – Asbestos*, para. 72.

[168] Basic Regulation, Article 3(1). (emphasis added)

[169] For example, Articles 3(1) and 5(1) of the Implementing Regulation provide that "[s]eal products… may only be placed on the market where …", and Articles 3(2) and 5(2) provide that "the seal product shall be accompanied by the attesting document …". Article 4 also states that seal products for the personal use of European Union residents and their families "may only be imported where one of the following requirements is fulfilled". The use of the terms "may only" and "shall" in the above-mentioned provisions indicates that compliance with such provisions is obligatory rather than voluntary.

[170] According to this provision and as emphasized in recital (19) of the preamble of the Basic Regulation, it is for the European Union member States to lay down rules on penalties and to ensure their implementation.

[171] Canada's first written submission, para. 372; Norway's first written submission, para. 508 (referring to Appellate Body Report, *EC – Sardines*, para. 194).

including the applicable administrative provisions, with which compliance is mandatory". Accordingly, the EU Seal Regime constitutes a technical regulation within the meaning of Annex 1.1 of the TBT Agreement.

7.3.2 Canada's claim under Article 2.1[172]

7.126. We recall our finding in the previous section that the EU Seal Regime is a technical regulation within the meaning of Annex 1.1 of the TBT Agreement. As such, the EU Seal Regime is subject to the obligations set forth in Article 2.1 of the TBT Agreement.

7.127. Article 2.1 of the TBT Agreement provides that:

> With respect to their central government bodies … Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.

7.128. We note that Article 2.1 contains a most-favoured-nation (MFN) and a national treatment obligation. In the present dispute, Canada makes claims in respect of both obligations. With respect to the MFN treatment obligation, Canada contends that the EU Seal Regime gives less favourable treatment to Canadian imports of seal products than to like seal products originating from Greenland. Regarding the national treatment obligation, Canada argues that the EU Seal Regime gives less favourable treatment to its imports of seal products as compared to the treatment accorded to like domestic products.

7.129. In order to establish that the EU Seal Regime is inconsistent with Article 2.1 of the TBT Agreement, Canada must demonstrate the following: (a) the imported and domestic/other foreign products at issue are like products; and (b) the treatment accorded to imported products is less favourable than that accorded to like domestic and/or other foreign products (less favourable treatment).[173]

7.130. The Appellate Body explained the meaning of the term "less favourable treatment" under Article 2.1 of the TBT Agreement as follows: "[A] panel examining a claim of violation under Article 2.1 should seek to ascertain whether the technical regulation at issue modifies the conditions of competition in the market of the regulating Member to the detriment of the group of imported products *vis-à-vis* the group of like domestic products".[174] The Appellate Body added that "[h]owever … the context and object and purpose of the TBT Agreement weigh in favour of interpreting the "treatment no less favourable" requirement of Article 2.1 as not prohibiting detrimental impact on imports that stems exclusively from a legitimate regulatory distinction".[175]

7.131. Accordingly, once imported and domestic/other foreign products are found to be like, two elements must be examined to determine whether the measure at issue accords imported products less favourable treatment than that accorded to like domestic/other foreign products: (a) whether the measure causes a detrimental impact on competitive opportunities for the group of imported products *vis-à-vis* the group of domestic/other foreign products; and (b) whether the

[172] Although Norway did not put forward a claim under Article 2.1 of the TBT Agreement, to the extent that Norway holds the same view as Canada with respect to Canada's claim under Article 2.1 and presented its arguments and evidence in other parts of its claims, we also refer to them, as necessary and as appropriate, in this section. (See, for example, Norway's opening statement at the first substantive meeting of the Panel, paras. 103-105). In the context of its claim under Article 2.2 of the TBT Agreement (legitimacy of objective), Norway presents its view on the alleged legitimacy of the distinction between commercial and non-commercial seal hunting under the measure.

[173] Appellate Body Report, *US – Clove Cigarettes*, para. 87. The other element mentioned by the Appellate Body, i.e. that the measure at issue must be a technical regulation, was addressed in section 7.3.1 above.

[174] Appellate Body Report, *US – Clove Cigarettes*, para. 180.

[175] Appellate Body Report, *US – Clove Cigarettes*, para. 181.

detrimental impact on imports, if found to exist, stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products.[176]

7.132. In sum, to determine whether the EU Seal Regime violates the MFN and national treatment obligations under Article 2.1 of the TBT Agreement, we need to examine the following three elements:

a. whether the imported and domestic/other foreign seal products are like products;

b. whether the EU Seal Regime causes a detrimental impact on competitive opportunities for the group of imported seal products *vis-à-vis* the group of domestic/other foreign seal products; and

c. whether the detrimental impact on imports, if found to exist, stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products.

7.133. We examine these elements in turn.

7.3.2.1 Like products

7.134. The first element of Article 2.1 of the TBT Agreement that we examine is whether imported seal products are like domestic and/or other foreign seal products at issue.[177]

7.135. According to the Appellate Body, the interpretation of the concept of "likeness" in Article 2.1 of the TBT Agreement entails the following considerations:

> The interpretation of the concept of "likeness" in Article 2.1 has to be based on the text of that provision as read in the context of the *TBT Agreement* and of Article III:4 of the GATT 1994, which also contains a similarly worded national treatment obligation that applies to laws, regulations, and requirements including technical regulations. … [T]he determination of likeness under Article 2.1 of the TBT Agreement, as well as Article III:4 of the GATT 1994, is a determination about the nature and extent of a *competitive relationship between and among the products at issue*. To the extent that they are relevant to the examination of certain "likeness" criteria and are reflected in the products' competitive relationship, regulatory concerns underlying

[176] In setting out this analytical framework, the Appellate Body in *US – Clove Cigarettes* specifically referred to the situation "where the technical regulation at issue does not *de jure* discriminate against imports". (Appellate Body Report, *US – Clove Cigarettes*, para. 182).

[177] Canada submits that conforming and non-conforming seal products are like because the products falling within both categories are in a competitive relationship and thus substitutable on the EU market. (Canada's first written submission, paras. 311-321). Conforming and non-conforming seal oil or seal skins, for instance, have the same physical characteristics, end-uses, and tariff classification. According to Canada, the evidence points to the fact that consumers (e.g. producers of seal oil, tanners, or manufacturers of garments and accessories made of seal fur skins) valued the quality of the seal input rather than the fact that products were derived from Inuit, marine resource management, or commercial hunts. (Canada's first written submission, paras. 312-315 and 319-320, cross-referencing Norway's first written submission, paras. 301, 305, and 319-320 (referring to Statement of Ms Linn Elice Kanestrøm on behalf of Fortuna Oils AS (31 October 2012), (Exhibit NOR-46); Statement of Mr Anders Arnesen on behalf of GC Rieber Skinn AS (31 October 2012), (Exhibit NOR-53); and Statement of Mr Helge Reigstad on behalf of Topaz Arctic Shoes AS (30 October 2012), (Exhibit NOR-54)); Canada's response to Panel question No. 38, para. 148, and Exhibits CDA-88-90. See also Norway's first written submission, paras. 301-302, 305-307, and 319-320).

Furthermore, Canada notes that prior to the entry into force of the EU Seal Regime, consumers did not distinguish between seal products on the basis of whether they were derived from commercial, IC, or MRM hunts. (Canada's first written submission, para. 316 (referring to Seals and Sealing Network website information on Denmark (Greenland), (Exhibit CDA-69)). In support of its argument, Canada observes that seal skins derived from its commercial (non-Inuit) hunts were in fact imported by Greenland for the purpose of rendering them into various seal products.

The European Union acknowledges that all seal products are like regardless of the type and purpose of the hunt. (European Union's first written submission, para. 254).

technical regulations may play a role in the determination of likeness.[178] (emphasis added)

7.136. We thus assess the likeness of products based on *inter alia* the following criteria: (a) the properties, nature, and quality of the products; (b) the end-uses of the products; (c) consumers' tastes and habits; and (d) the tariff classification of the products.[179] As emphasized by the Appellate Body in *EC – Asbestos*, these four criteria provide a framework for analysing the likeness of particular products on a case-by-case basis and are meant to serve as tools to assist in the task of sorting and examining the relevant evidence.

7.137. The complainants' claims in this dispute relate to the treatment of seal products in general. As noted above, the EU Seal Regime covers a broad range of products falling under different chapters of the Combined Nomenclature.[180] The dispute between the parties is based on the distinction made between seal products that are prohibited under the EU Seal Regime (non-conforming) and seal products that are allowed because they meet the specific requirements under the exceptions (conforming).

7.138. We recall that the complainants argue that conforming and non-conforming seal products are like. The European Union does not contest that all seal products are like products, irrespective of the distinction drawn in the measure between non-conforming and conforming products.

7.139. The Panel shares the parties' view[181] that the type or purpose of the seal hunt does not affect in any way the final product's physical characteristics, end-use, or tariff classification. As regards the criterion of consumers' tastes and habits, the complainants presented evidence to demonstrate that, prior to the EU Seal Regime, consumers did not make any distinction between seal products based on the type or purpose of the hunt.[182] This evidence consists of statements by manufacturers and producers of seal products who maintain that the quality of the product, rather than the type or purpose of the hunt, was the main factor for consumers' choice. We note that the European Union has not contested this evidence.

7.140. Based on the above, we conclude that conforming and non-conforming seal products are like products within the meaning of Article 2.1 of the TBT Agreement.

7.3.2.2 Whether the EU Seal Regime causes a detrimental impact on imported products

7.3.2.2.1 Main argument of the parties

7.3.2.2.1.1 Canada

7.141. Canada claims that the EU Seal Regime *de facto* discriminates against the group of Canadian imports of seal products. Canada argues that a determination as to whether there has been less favourable treatment entails comparing the entire universe of like products (including both conforming and non-conforming seal products), as opposed to making a "category-to-category" comparison within the group of like products (i.e. comparing conforming to conforming, and non-conforming to non-conforming seal products), as suggested by the European Union.[183]

7.142. According to Canada, the purpose and scale of the hunt or the ethnic identity of the hunter are irrelevant for the purpose of establishing whether a measure accords less favourable treatment to certain products.[184] In Canada's view, to be able to justify differences in treatment between

[178] Appellate Body Report, *US – Clove Cigarettes*, para. 120. The Appellate Body also noted that "the concept of like products serves to define the scope of products that should be compared to establish whether less favourable treatment is being accorded to imported products." (Appellate Body Report, *US – Clove Cigarettes*, para. 116).
[179] Appellate Body Report, *EC – Asbestos*, para. 102.
[180] See section 2.2 above.
[181] See footnote 177 above.
[182] See Canada's first written submission, para. 316 and response to Panel question No. 38, para. 148.
[183] Canada's second written submission, para. 231; comments on the European Union's response to Panel question No. 124.
[184] Canada's opening statement at the first meeting of the Panel, para. 60.

sub-groups of like products on such a basis would eliminate the possibility of finding *de facto* discrimination.[185] The main element that needs to be taken into account is whether the EU Seal Regime affects the conditions of competition to the detriment of Canadian seal products.[186]

7.143. Canada maintains that in the case of the IC exception, the conditions that must be satisfied effectively permit all seal products from Greenland to be placed on the market and to circulate freely between European Union member States.[187] At the same time, the conditions exclude the "vast majority" of Canadian seal products from the EU market because the commercial harvest from which the products are derived does not meet the requirements under the IC exception.[188] Canada argues that the "design, structure and expected operation" of the IC exception indicate that the Regime will have a detrimental impact on the competitive opportunities of Canadian seal products as compared to their like counterparts from Greenland.[189] The fact that there is equal treatment granted to Inuit seal products from Canada and Greenland does not change the fact that there is discrimination against nearly all Canadian seal products.[190]

7.144. Similarly, regarding the MRM exception, Canada submits that the Regime effectively allows domestic seal products from Sweden, Finland, and possibly the United Kingdom to be placed on the EU market while excluding virtually all Canadian seal products.[191] Through its requirements, the MRM exception conditions market access on the basis of whether seal products are derived or manufactured from seals culled under specific types of marine management programs. Canada asserts that the requirement to adopt an "ecosystem-based approach" for the management plan will likely operate to exclude Canadian seal products from the market because Canadian hunts are based on the sustainability of seal populations and not the eco-system.[192] Furthermore, the "non-systematic" and "non-profit" requirements will prevent Canadian imports of seal products from being placed on the Community market because the east coast harvest in Canada is conducted based on a "fixed plan or system", on a yearly basis and for the specific purpose of commercial gain.[193] In contrast, according to Canada, "the design, structure, and expected operation of the category indicate that EU seal products are likely to meet those conditions".[194]

7.3.2.2.1.2 European Union

7.145. The European Union does not consider that conforming and non-conforming seal products should be compared for the purpose of assessing whether the EU Seal Regime has a detrimental impact on Canadian imports. For the European Union, conforming and non-conforming seal products are in "different situations". Therefore, the two groups of products cannot be compared to establish whether the measure has detrimentally affected the conditions of competition of Canadian seal products.[195] According to the European Union, the analysis must be undertaken within each category of the group of like products, namely by comparing conforming to conforming

[185] Canada's second written submission, para. 233.
[186] Canada's opening statement at the first meeting of the Panel, para. 60; second written submission, para. 237.
[187] Canada's first written submission, para. 407. Canada notes that Greenland is a self-regulating part of the Kingdom of Denmark. As such, Greenland is not part of the European Union but rather a country or territory associated with the European Union in accordance with the provisions of Part Four of the Treaty on the Functioning of the European Union, Article 355 of the Treaty on the Functioning of the European Union, and Protocol No. 34 on Special Arrangements for Denmark (Greenland). As regards the status of Greenland in the WTO, Canada notes that Greenland was notified in 1951 by Denmark as a territory to which the GATT 1947 applied. Denmark makes WTO notifications and statements on behalf of Greenland and has stated that it represents Greenland (which is not part of the European Union) in the WTO. (Canada's first written submission, paras. 124-125; Norway's first written submission, paras. 71-72).
(See, for instance, The Territorial Application of the General Agreement: A Provisional List of Territories to Which the Agreement Is Applied, (Exhibit NOR-20) and *Preparations for the 1999 Ministerial Conference*, Communication from Denmark, WT/GC/W/384 (8 November 1999)).
[188] Canada's first written submission, para. 323.
[189] Canada's first written submission, para. 324; opening statement at the first meeting of the Panel, para. 66.
[190] Canada's opening statement at the first meeting of the Panel, para. 61; response to Panel question No. 23, paras. 120-121.
[191] Canada's first written submission, para. 341.
[192] Canada's first written submission, para. 344.
[193] Canada's first written submission, para. 339.
[194] Canada's first written submission, para. 337; opening statement at the first meeting of the Panel, para. 65.
[195] European Union's first written submission, paras. 295 and 325.

and non-conforming to non-conforming seal products. Under the EU Seal Regime, products of all origin falling within the same category are treated equally in terms of their access to, or prohibition to access the EU market.[196]

7.146. For the European Union, the fact that most of Canada's seal products cannot be placed on its market, while most of the like domestic or other foreign products can be placed on the EU market, is insufficient to establish the existence of a detrimental impact on Canadian seal products.[197] When the treatment granted to the group of Canadian imports of seal products as a whole is compared to the treatment granted to the entire group of like products from domestic/other origin, there is no alteration of the aggregate competitive opportunities of Canadian seal products as compared to seal products of domestic or other origin.[198]

7.147. With regard to the IC exception in particular, the European Union argues that non-Inuit seal products from Canada and Inuit seal products from Greenland are in "different situations" because the two types of hunts differ in respect of their purpose (subsistence on the one hand, profit on the other hand), their intensity, and the moral perception of the EU public.[199] The European Union further argues that Canadian Inuit seal products are treated in the same manner under the EU Seal Regime as Greenlandic Inuit seal products.[200] The fact that the portion of Greenlandic seal products falling under the IC exception is greater than the portion of Canadian seal products qualifying under the same exception does not make the EU Seal Regime discriminatory *per se*.[201] Moreover, Canada's allegation that the IC exception benefits Greenlandic seal products is unfounded, as not all seal products originating in Greenland will automatically be covered under the IC exception.[202]

7.148. Regarding the MRM exception, the European Union argues that seal products derived from MRM hunts and seal products derived from the Canadian commercial hunts cannot be compared for the purpose of determining whether Canadian imports have been treated less favourably.[203] According to the European Union, the two groups of products essentially differ in terms of their scale and their commercial or non-commercial motivations.[204] The European Union asserts that Canada could, in principle, carry out MRM hunts and place the by-products of such hunts on the EU market.[205] However, the European Union notes that Canada has not requested to be included in the list of recognized bodies authorized to issue attesting documents for placing on the market under the MRM exception.[206]

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[196] European Union's first written submission, para. 324; second written submission, paras. 205 and 552.

[197] European Union's opening statement at the second meeting of the Panel, para. 55.

[198] European Union's first written submission, paras. 293 and 324; second written submission, para. 204; response to Panel question No. 124. The European Union notes that it does not produce any non-conforming seal products. However, the European Union asserts that the fact that there are no domestic like products falling within the category of non-conforming seal products is not an obstacle to making a "category-to-category" comparison of the treatment granted by the EU Seal Regime, i.e. examining the potential treatment that those domestic like products would receive under the EU Seal Regime.

[199] European Union's first written submission, paras. 295-300.

[200] European Union's first written submission, para. 294.

The European Union recalls that 5 per cent of Canadian seal products could potentially fall under the IC exception (a fact that is not denied by Canada) and that Norway could also qualify under the IC exception. However, neither Canada nor Norway has submitted any request to the European Commission to be included in the list of recognized bodies authorised to issue the necessary attesting documents for their products to be placed on the European Union market. (European Union's first written submission, paras. 551 and 562).

[201] European Union's first written submission, paras. 289 and 561.

[202] European Union's first written submission, para. 295 citing COWI 2010 Report, (Exhibit JE-21), Annex 5, p. 17.

[203] European Union's first written submission, para. 323.

[204] European Union's first written submission, paras. 325-329.

[205] European Union's second written submission, paras. 247 and 250.

[206] European Union's first written submission, footnote 446; response to Panel question No. 123, paras. 91-92; second written submission, para. 250 (citing Canada's Marine Mammal Regulations, (Exhibit CDA-21), Article 26.1). The European Union notes that according to Canada's own regulations, licences (which are mandatory for hunting seals) may be granted for commercial use, for personal use, and for "nuisance seal" hunts. Seal products derived from such nuisance seal hunts would in principle qualify under the MRM exception.

7.3.2.2.2 Analysis by the Panel

7.149. Before we engage in our analysis of whether the EU Seal Regime causes a detrimental impact on competitive opportunities for the group of Canadian imported products *vis-à-vis* the group of domestic and/or other imported products, we must first determine the groups of products to be compared.[207]

7.150. The "universe" of products covered in this dispute, as agreed by the parties, is reflected in Table 1 below.

Table 1: Group of like seal products

Distinction	Domestic Seal Products	Norwegian Seal Products	Canadian Seal Products	Other Foreign Seal Products	
				Greenland	Other
Non-conforming	A	B	C	D	E
Conforming (IC and MRM hunts)	F	G	H	I	J

7.151. We recall that while the parties agree in principle that all seal products are like, they disagree on the groups of like products to compare for the purpose of determining whether the EU Seal Regime is consistent with Article 2.1 of the TBT Agreement.

7.152. Canada is of the view that the entire group of imported seal products (including conforming and non-conforming products) should be compared to the entire group of domestic and/or Greenlandic seal products. The European Union considers that the treatment granted under the EU Seal Regime to conforming and non-conforming seal products cannot be compared because these products are in "different situations".

7.153. We note that the question of the groups of products to be compared was also addressed in *US – Clove Cigarettes*. In analysing Indonesia's claim under Article 2.1 of the TBT Agreement, the Appellate Body compared clove cigarettes (the imported product subject to the ban) and menthol cigarettes (the domestic product exempted from the ban). The fact that certain non-clove cigarettes from Indonesia were exempted from the ban was not considered relevant to Indonesia's claim that the competitive opportunities for its clove cigarettes, comprising the "vast majority" of Indonesia's exports to the United States, were being negatively affected *vis-à-vis* menthol cigarettes from the United States, comprising the "vast majority" of like domestic cigarettes in the United States.[208]

7.154. Thus, contrary to the European Union's position, the Appellate Body's approach suggests that the group of imported products should be compared with the group of domestic or other origin products. Thus, for the purpose of considering Canada's claim under Article 2.1 and with reference to Table 1 above, Canada's seal products (cells C+H), the vast majority of which are non-conforming products, are to be compared to domestic seal products (cells A+F) and to Greenlandic seal products (cells D+I) respectively. That is so even if a small percentage of seal products from Canada may still be eligible to qualify for placement on the EU market under one of the exceptions.

7.155. With this in mind, we turn to the question of whether the EU Seal Regime causes a detrimental impact on competitive opportunities for the group of Canadian imported products *vis-à-vis* the group of other imported or domestic like seal products.

7.156. The Appellate Body confirmed that this question requires consideration of the totality of the facts and circumstances before the panel, and an assessment of the implications for competitive conditions discernible from the *design, structure, and expected operation* of the

[207] See Appellate Body Report, *US – Clove Cigarettes*, paras. 190 and 192.
[208] Appellate Body Report, *US – Clove Cigarettes*, paras. 197-200.

measure. Furthermore, the examination of the measure's impact on the market need not be based on the *actual effects* of the contested measure in the market place.[209]

7.157. For the purpose of our analysis, we must therefore assess the "design, structure, and expected operation" of the EU Seal Regime, as well as any other relevant features of the market, which may include the particular characteristics of the industry at issue, the relative market shares in a given industry, consumer preferences, as well as historical trade patterns.[210]

7.158. We recall that under the EU Seal Regime, only seal products that meet the requirements under the IC or MRM exceptions may be placed on the EU market. The prohibition against placing on the market applies to all seal products other than those that satisfy the IC and MRM requirements.

7.159. Considered in light of the specific requirements of the IC and MRM categories, the majority of seals hunted in Canada would not qualify under the exceptions. Canada argues that the prohibition under the EU Seal Regime was specifically targeted at the Canadian non-conforming seal hunt, from which some 95 per cent of all Canadian seal products derive.[211] The evidence referenced by Canada suggests that the EU legislation on seals was in fact primarily aimed at excluding seal products resulting from the non-conforming seal hunt in Canada.[212] This is not disputed by the European Union.

7.160. We note that Canada relies on a study conducted at the request of the European Commission in 2010 by COWI, a Danish Consulting Group (COWI 2010 Report), which concludes that only a minority of Canadian seal products are expected to qualify under the IC exception.[213] In contrast, the Report finds that the Greenlandic hunt is likely to meet the IC requirements.[214]

7.161. Relevant data before us also demonstrate that most if not all of Greenlandic seal products are expected to conform to the requirements under the IC exception, as compared to roughly 5% in Canada, where only a small portion of the overall seal harvest is hunted by Inuit communities.[215] Therefore, the share of the total production that would *not* be eligible to be placed

[209] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 215.

[210] Appellate Body Report, *US – COOL*, para. 269 (footnotes omitted) (referring to Appellate Body Report, *Canada – Autos*, paras. 81 and 85-86; Appellate Body Report, *US – Clove Cigarettes*, para. 206; Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 130; Appellate Body Report, *US – Tuna II (Mexico)*, paras. 233-234; Panel Report, *Mexico – Taxes on Soft Drinks*, para. 8.119; and Appellate Body Report, *Korea - Various Measures on Beef*, para. 145).

[211] Canada notes that "[r]oughly 95 per cent of Canada's seal harvest in the last five years that has been placed into commerce has come from the east coast commercial hunt." Canada explains that this figure is derived from the average proportion of Canada's total seal harvest attributable to the commercial harvest in the years 2006-2011. (See Canada's first written submission, para. 286 and footnote 391).

[212] See, e.g. European Parliament Debates – Item A6-0118/2009 (4 May 2009), (European Parliament Debates) (Exhibit JE-12). See also Parliament Declaration, (Exhibit JE-19), point A (reference by the European Parliament to the hunting of harp seal pups in the "North West Atlantic").

[213] The COWI 2010 Report stresses that:

Inuit products make up only a very small share of Canadian seal trade, and the amount of products currently ending on the EU market is negligible. Whether products from the commercial hunt now directed to the EU will be replaced by Inuit products depend on a number of factors, but several stakeholders have already indicated that it will not be possible in any case – nor desirable as far as the Inuit communities are concerned – to increase significantly the scale of the Inuit hunt. (COWI 2010 Report, (Exhibit JE-21), pp. 64-65; see also European Union's first written submission, para. 292).

[214] Canada's first written submission, para. 277; opening statement at the first meeting of the Panel, para. 66 (citing COWI 2010 Report, p. 30). The COWI Report indicates that in Greenland about 90% of the total population is Inuit; there is a long tradition of seal hunting which has been part of the cultural heritage of the communities; and seals are not hunted for the sole purpose of placing products on the market, but are consumed and used in the local community and contribute to the local economy. We note that these facts are also corroborated by the report of the Greenlandic Government on the management and utilization of seals in Greenland. (Government of Greenland: Ministry of Fisheries, Hunting & Agriculture, *Management and Utilization of Seals in Greenland* (April 2012), (Exhibit JE-26), pp. 15-16).

[215] See Canada's first written submission, para. 286 and footnote 391; Norway's first written submission, para. 391 and Table 1 on "Indigenous Communities Requirements" compiling relevant data from COWI 2010 Report; 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), (Nunavut Report (2012)), (Exhibit JE-30); Management and Utilization of Seals in Greenland, (Exhibit JE-26); Icelandic Marine Research Institute, *Summary of State of Marine Stocks in Icelandic Waters 2011/2012; Prospects for the Quota Year 2012/2013* (2012) (Exhibit NOR-21); Joint Norwegian/Russian Fisheries Commission, *Report of the Working*

on the market under the IC exception is relatively high (i.e. some 95%) for Canada, whereas most if not all of Greenland's seal products are eligible.[216]

7.162. The European Union asserts that seal products from Canada could be eligible for placement on the market under the IC exception, although no entity in Canada has yet made any request to be added to the list of recognized bodies.[217] The European Union further contends that it has engaged in "multiple efforts" to assist the Inuit in Canada to benefit from the IC exception.[218] Canada does not deny the fact that some of its Inuit seal products could in principle qualify under the IC exception. Canada argues, however, that placing these products directly on the market may be difficult for the Inuit because they have limited access to the distribution networks, processing facilities, and marketing opportunities needed to export their seal products to the European Union.[219]

7.163. However, as observed above, the Appellate Body in *US – Clove Cigarettes* clarified that the fact that a small group of imported products was exempted from the ban in question was not considered relevant when assessing the ban's overall impact on the vast majority of imported products *vis-à-vis* the majority of like domestic products. Likewise, the possibility that some of Canada's Inuit seal products *could* enter the EU market does not change the fact that the vast majority of Canada's seal products are *in fact* excluded from the same market on the basis that they derive from a "non-conforming" seal hunt.

7.164. We note that Greenland's Department of Fisheries, Hunting and Agriculture was recently recognized for the purpose of Article 6 of the Implementing Regulation.[220] As such, Greenland is

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Group on Seals to the 40th Session – Appendix 8, (Exhibit NOR-22); United States Department of Commerce, *Marine Mammals; Subsistence Taking of Northern Fur Seals – Harvest Estimates*, Federal Register, Vol. 77, No. 27 (9 February 2012), (Exhibit NOR-23); and Norwegian Ministry of Fisheries and Coastal Affairs, *Facts about Fisheries and Aquaculture 2010* (Exhibit NOR-63).

[216] COWI observes in its 2010 Report that "[i]t is unlikely that all of the Greenland harvest is eligible under Article 3.1 [of the Basic Regulation]." (See COWI 2010 Report, Annex 5, p. 17). However, COWI does not elaborate on the reasons for its assertion. Given the recent authorization of a Greenlandic entity to act as a recognized body pursuant to Article 6 of the Implementing Regulation, it is possible that all seal products from Greenland will be allowed for placement on the EU market under the IC exception.

[217] Canada's response to Panel question Nos. 84, 85, and 117.

[218] European Union's response to Panel question No. 116. The European Union states that "based on the requirements of the IC exception and based on the best information available, seal products derived from hunts conducted by the Inuit in Canada would qualify under the exception." (See also NunatsiaqOnLine, dated 23 April 2013, "European Commission representative visits Iqaluit on good-will trip, Christian Leffler says commission wants to give effect to Inuit exemption" (Exhibit EU-145)).

[219] For instance, Inuit from Nunavut (Canada) have an annual production of less than 8,000 pelts of ringed seals, which they view as insufficient to generate market interest alone on an international scale. The ringed seal pelt industry in Nunavut benefits from the harp seal industry by "piggybacking" on markets that are created and maintained by the much larger harp seal industry. Any variation in the market demand for harp seal products deriving from Canada's commercial hunts would also be felt by Nunavut's ringed seal industry. Commenting on the European Commission's Proposal, the Nunavut Government noted that "[t]his market reality is one of the major factors contributing to the ineffectiveness of the Inuit exemption to the EU Seal ban". (Nunavut Report (2012), (Exhibit JE-30), p. 9).

Canada notes that it considered options to address the negative impact of the EU Seal Regime on the ability of Canadian Inuit to market their seal products internationally. (Canada's response to Panel question Nos. 116 and 117). The COWI 2010 Report draws the following conclusions on the likely impact of the EU Seal Regime:

> As [the Canadian commercial] hunt is unlikely to fulfil the conditions of [the Basic Regulation], some of the sourcing for blubber may shift towards notably Greenland, which is likely to fall within the conditions under Article 3. This may even result in additional investments in Greenland in collection and/or processing facilities. … It is likely that only Greenland will be able to make the investments needed to make use of the exemptions, as the scale of the Canadian hunt is too small and not as centrally organized as that in Greenland (Canadian Inuit hunt essentially uses the sales and marketing chains of the commercial hunt, implying it would need to invest heavily in separating its Inuit products from the rest). For buyers and producers alike, the investments are not likely to outweigh the benefits due to the limited amount of products concerned. (COWI 2010 Report, pp. 62 and 72)

[220] See European Union's response to Panel question No. 156; Commission decision of 25 April 2013 recognising the Greenland Department of Fisheries, Hunting and Agriculture (APNN), (Exhibit EU-149), p. 3. The European Union confirmed that prior to the Greenlandic entity obtaining recognized body status, the Danish customs authorities had processed imports based on certificates issued by the Greenlandic authorities. The European Union notes that this was based on an interpretation of the Implementing Regulation, whereby

entitled to deliver attesting documents for the placing on the EU market of Greenlandic seal products. In light of this fact, and taking into account the arguments of the parties, we believe that all, or virtually all, seal products from Greenland are eligible to access the EU market under the IC exception, while the majority of like products produced by Canada do not conform to the requirements of the IC exception and thus are ineligible to benefit under the EU Seal Regime.

7.165. With regard to the MRM exception, Canada further argues that the requirements *a priori* exclude virtually all of its seal products. In particular, Canadian seal products would not be eligible under the MRM exception because they derive from seal hunts that take place on a "systematic" and organised basis. Furthermore, sealing is a commercial activity in Canada and therefore the hunt could not qualify under the non-profit requirement. In addition, although the seal hunt in Canada is based on sustainability principles, it does not follow an "ecosystem-based approach" as required under the MRM exception.

7.166. The European Union notes that, currently, seal products from Sweden accompanied by the relevant document in accordance with Article 5(2) of the Implementing Regulation can be placed on the market under the MRM exception.[221]

7.167. The evidence submitted by the complainants suggests that while European Union seal products are likely to benefit from the MRM exception, Canadian seal products are not expected to benefit from the same market access opportunities under the EU Seal Regime.[222] A study conducted by COWI in 2008 (COWI 2008 Report) found that a complete prohibition on the placing on the market of seal skins and products derived therefrom would have only a minor economic impact on EU member States.[223] This finding was based on the assumption that the transit of seal skins and other products would continue to take place under the EU Seal Regime.[224] Conversely, the COWI 2008 Report concludes that the economic impact of the measure would be more significant for non-EU sealing states, such as Canada and Norway[225], based on the importance of the EU market and the fact that the size of the hunt is much larger in these countries.[226]

7.168. We observe that the volume of seal products derived from seal hunts covered or potentially covered by the MRM exception is limited.[227] Currently, only entities from Sweden are certified as recognized bodies entitled to deliver attesting documents for placing seal products on the EU market.[228] In the Panel's view, however, the limited impact of the exception is not relevant to assessing whether the MRM exception negatively affects the competitive opportunities for imported products *vis-à-vis* like domestic products on the EU market. Even if the MRM exception concerns only a small number of seal products, most of the European Union's seal products are potentially eligible for placement on the EU market under this exception, while virtually all Canadian seal products are not. In light of the above, the Panel considers that the requirements under the IC and MRM exceptions were designed, structured, and expected to operate so as to

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the issuance of attesting documents complying with the Implementing Regulation would also be allowed during the application process for recognized body status and not only once the process had been completed. (European Union's response to Panel question No. 161).

[221] European Union's first written submission, para. 519. See also List of recognized bodies in accordance with Article 6 of the Implementing Regulation, (Exhibit EU-77), and Commission decision of 18 December 2012 recognising the Swedish County Administrative Boards, (Exhibit EU-159). The European Union observes that small-scale hunts or hunts for the purpose of managing marine resources also take place in other countries within the European Union, namely in Finland. (European Union's first written submission, para. 320, footnote 429).

[222] Canada's first written submission, paras. 99-102; response to Panel question No. 167, para. 207 (where Canada notes that the products of nuisance seal hunts in Canada "may not be commercialized"); European Union's first written submission, paras. 320, , 519, 521, and footnote 429; COWI 2010 Report, p. 66 and Annex 4.

[223] COWI 2008 Report, p. 117.

[224] COWI 2008 Report, p. 117.

[225] Canada's first written submission, para. 276; COWI 2008 Report, p. 118.

[226] We note that the COWI 2008 study also considers the impact of a total prohibition of trade in seal products, i.e. one that would extend also to the transit of seal products. COWI concludes that the economic impact would be more important for EU member States (in particular Finland and Germany) than a prohibition limited to the placing on the market. (COWI 2008 Report, p. 120).

[227] The European Union asserts that the number of seals covered by the MRM exception in 2011 in Sweden was 86. (European Union's response to Panel question No. 122, para. 77).

[228] The European Union notes that no other entity, in Finland or elsewhere in the European Union, has requested authorization to be a recognized body in accordance with the Implementing Regulation. (European Union's second written submission, para. 236).

exclude seal products deriving from the *majority* of Canadian seal hunts, which are not IC or MRM hunts, from being placed on the EU market. In other words, by virtue of its design, the measure excludes all but a very small percentage of potential products from Canada, while at the same time permitting the majority or all of like products from certain EU members.

7.169. As a final observation, we address the European Union's position that the treatment granted under the EU Seal Regime to conforming and non-conforming seal products cannot be compared, because these products are in "different situations" with regard to the type of hunt from which each category of products are derived. We note that despite its position on this particular point, the European Union considers that conforming and non-conforming seal products are "like". Based on the examination of the "nature and extent of the competitive relationship between the products in the [EU] market", we found that Canada's seal products are "like" seal products of Greenlandic and EU origin.[229] In our view, because the two groups of products were found to be "like", such products can be compared for the purpose of determining the implications of the measure on their competitive relationship on the EU market. We are not persuaded by the European Union's assertion that products found to be "like" may not be compared for the purpose of determining whether one group of products are negatively affected in terms of their competitiveness on the market against another group. In our view, the European Union's argument that conforming and non-conforming seal products are in "different situations" is relevant to the justification of the regulatory distinction under the EU Seal Regime. As such, this argument can be more appropriately assessed in the context of our subsequent analysis of whether any detrimental impact caused by the measure to the imported products reflects discrimination against such products.

7.170. On the basis of our examination of the design, structure, and expected operation of the EU Seal Regime, as well as evidence relating to other relevant features of the market, the Panel finds that the Regime has a detrimental impact on the competitive opportunities of Canadian imported products *vis-à-vis* Greenlandic imported and EU domestic products. Next, we turn to the question of whether such detrimental impact caused by the EU Seal Regime results in according less favourable treatment to the imported seal products in violation of Article 2.1 of the TBT Agreement.

7.3.2.3 Whether the detrimental impact caused by the EU Seal Regime "stems exclusively from legitimate regulatory distinctions"

7.171. We recall the Appellate Body's explanation that the "treatment no less favourable" requirement of Article 2.1 should not be interpreted as prohibiting detrimental impacts on competitive opportunities for imports in cases where such detrimental impact on imports stems exclusively from legitimate regulatory distinctions rather than reflecting discrimination against imported products.[230]

7.172. Regarding how to assess whether a detrimental impact on imports stems exclusively from legitimate regulatory distinctions, the Appellate Body stated:

> [S]ome technical regulations that have a *de facto* detrimental impact on imports may not be inconsistent with Article 2.1 when such impact stems exclusively from a legitimate regulatory distinction. In contrast, where a regulatory distinction is not designed and applied in an even-handed manner — because, for example, it is designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination — that distinction cannot be considered "legitimate", and thus the detrimental impact will reflect discrimination prohibited under Article 2.1. In assessing even-handedness, a panel must "carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue.[231]

[229] See Appellate Body Report, *US – Clove Cigarettes*, para. 191.

[230] See Appellate Body Reports, *US – Clove Cigarettes*, paras. 169, 174, 182, and 194; *US – Tuna II (Mexico)*, para. 215; *US – COOL*, para. 271.

[231] Appellate Body Report, *US – COOL*, para. 271. On this point the Appellate Body was referring in this respect to its earlier report in *US – Clove Cigarettes*, para. 182.

7.173. We recall that we have found that the IC and MRM exceptions cause a detrimental impact on competitive conditions for Canada's seal products imported on the EU market. In light of the Appellate Body's guidance on the obligations under Article 2.1 of the TBT Agreement, we proceed to examine whether the European Union has established that such detrimental impact stems exclusively from legitimate regulatory distinctions.[232] As part of that analysis, we will also evaluate whether the regulatory distinctions are designed and applied in an even-handed manner and thus do not reflect discrimination against Canadian seal products.

7.174. Our examination of this question entails an analysis of two main questions: (a) first, what are the relevant regulatory distinctions under the EU Seal Regime; and (b) second, are such regulatory distinctions "legitimate".[233] We address these questions in turn.

7.3.2.3.1 "Regulatory distinctions" drawn under the EU Seal Regime

7.175. The EU Seal Regime distinguishes between seal products that conform to the IC or the MRM requirements under the exceptions (conforming products)[234], on the one hand, and those that do not conform to these requirements (non-conforming products), on the other hand.[235] Specific requirements for the exceptions are set out in Article 3 of the Basic Regulation and Articles 3 and 5 of the Implementing Regulation; only those products satisfying the IC or MRM requirements under these provisions are allowed on the EU market.[236]

7.176. As indicated in the text of the concerned provisions, and as observed in the section on the definition of a technical regulation[237], the distinction between conforming and non-conforming products is based on specific criteria relating to seal hunts from which seals are derived and used as inputs in the final products. These criteria include the identity of the hunter (Inuit or indigenous); the type of hunt (traditional Inuit hunts[238]); the purpose of the hunt (subsistence or marine resource management); and the way in which the products are marketed (non-systematically and on a non-profit basis). The criteria at issue thus do not contain any requirements concerning specific hunting methods.

7.177. Accordingly, the regulatory distinction drawn by the measure is linked to seal hunts; a particular category of the hunt from which a seal is derived determines whether a certain product containing seal is conforming or non-conforming under the measure. Put simply, products with seal inputs derived from IC or MRM hunts as defined under the measure are allowed, whereas products with seal inputs derived from any other hunts are prohibited. The regulatory distinction that the European Union must justify is therefore that between IC and MRM hunts and hunts that are not IC or MRM hunts.

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[232] See Appellate Body Report, *US – Tuna II (Mexico)*, para. 216. With respect to the allocation of the burden of proof, we note the Appellate Body's statement in *US – Tuna II (Mexico*) that "[a]lthough the burden of proof to show that the US 'dolphin-safe' labelling provisions are inconsistent with Article 2.1 of the TBT Agreement is on Mexico as the complainant, it was for the United States to support its assertion that the US 'dolphin-safe' labelling provisions are 'calibrated' to the risks to dolphins arising from different fishing methods in different areas of the ocean." (Appellate Body Report, *US – Tuna II (Mexico)*, para. 283 (referring to Appellate Body Report, *Japan – Apples*, para. 157)).

[233] See, for example, Appellate Body Report, *US – COOL*, para. 341.

[234] We recall that seal products qualifying under the Travellers exception are also allowed to be imported (as that term is defined in the Regulation) under Article 3(2)(a) of the Basic Regulation. For its claim under Article 2.1 of the TBT Agreement, however, Canada has not taken issue with that particular exception.

[235] The parties do not contest that the distinction drawn by the measure is between non-conforming and conforming seal products. (See Canada's second written submission, para. 245; Norway's second written submission, para. 259; European Union's response to Panel question No. 28. See also Appellate Body Report, *US – Tuna II (Mexico)*, para. 284).

[236] See sections 7.2.1.and 7.2.2 above.

[237] See section 7.3.1 above.

[238] The criteria of the EU Seal Regime pertain to "hunts traditionally conducted by Inuit and other indigenous communities", which, for clarification, does not refer to the *methods* of hunting but rather to the requirement that a community have a tradition of seal hunting "in the geographical region". (See Basic Regulation, Article 3(1); Implementing Regulation, Article 3(a); European Union's response to Panel question No. 30).

7.178. The European Union asserts that this distinction is based on the purpose of the hunt from which seal inputs used in a given product are derived.[239] Products from hunts allegedly conducted for "non-commercial" purposes, namely IC and MRM hunts, are allowed, and products from hunts that are "commercial" in nature are prohibited. The European Union contends that these two types of hunts (non-commercial and commercial) present different moral considerations and different levels of animal welfare risks in seal hunting.[240] Canada disagrees with the European Union, arguing that the distinction drawn by the European Union between "commercial" and "non-commercial" hunts is not legitimate. According to Canada, seal welfare concerns exist equally in all seal hunts, irrespective of the type and purpose of the hunt. Further, the purported distinction between commercial and non-commercial seal hunting is illusory because all seal hunts have commercial dimensions.[241]

7.179. Given the parties' positions, we must determine whether the distinction between IC and MRM hunts, on the one hand, and commercial hunts, on the other hand, is legitimate and does not reflect discrimination against imported seal products derived from non-IC and non-MRM hunts. In this regard, we are mindful that the parties contest whether the purposes of these hunts can be characterized as "non-commercial" and "commercial" as such. For ease of reference in these Reports, and without prejudice to our ultimate view on the question, we will use the term "commercial hunts" for hunts other than IC or MRM hunts. For the so-called "non-commercial hunts" as referenced by the European Union to indicate IC and MRM hunts, we will use the specific terms "IC hunts" and "MRM hunts".

7.180. We will begin our analysis with factual aspects of commercial hunts as it is the main distinction drawn by the measure against both IC and MRM hunts. We will then evaluate the specific distinction between commercial hunts and IC hunts and that between commercial seal hunts and MRM hunts to determine whether the respective distinctions are "legitimate" within the meaning of Article 2.1 of the TBT Agreement.

7.3.2.3.2 Preliminary question on commercial seal hunts

7.181. Throughout the proceedings, the parties debated extensively the characteristics of commercial seal hunts.[242]

7.182. In essence, the European Union asserts that seal hunting is inherently inhumane and raises moral concerns especially when the hunting is conducted for commercial purposes. Further, the profit-oriented nature of the hunt increases the risk that seals may be killed inhumanely. Based on *inter alia* scientific opinions, the European Union takes the position that a humane killing method cannot be applied effectively and consistently in the circumstances of commercial seal hunts, which constitute the majority of seal hunts in Canada and Norway.[243]

7.183. The complainants emphasize the equal presence of a commercial component in all types of seal hunting. On that premise, they assert that the distinction between commercial and other types of hunts has no relevance to animal welfare outcomes in seal hunting. Further, they contest

[239] The European Union explains that the "purpose" of the hunt is not different from the "type" of the hunt in the sense that there are three "types" of hunts in view of their "purpose", namely commercial, IC, and MRM hunts. (European Union's response to Panel question No. 30). We note the confirmation from the European Union that the non-commercial purpose of subsistence to which the IC exception corresponds is tied to the *identity* of the hunter as well. Specifically, the EU Seal Regime distinguishes hunts conducted "for subsistence purposes, where seals are killed primarily in order to contribute to the subsistence of Inuit and other indigenous communities". (European Union's response to Panel question No. 29, para. 100).

[240] European Union's response to Panel question Nos. 122 and 133.

[241] See Canada's response to Panel question No. 28, para. 130 and second written submission, paras. 262-264. Norway takes a similar view as Canada concerning the European Union's position based on the distinction between commercial and non-commercial hunts, particularly the European Union's factual arguments regarding so-called "commercial" hunts. (See complainants' comments on the European Union's response to Panel question No. 133).

[242] As explained in footnote 172, we also address Norway's arguments in this section.

[243] See, e.g. European Union's first written submission, paras. 37 and 122. The European Union submits that the question it is asking is whether its view that a humane killing method cannot be applied effectively and consistently in the circumstances of Canada's and Norway's commercial seal hunts finds adequate support from qualified scientific evidence. (European Union's opening statement at the first substantive meeting of the Panel, para. 11).

whether there are "inherent obstacles" in seal hunts to the application of humane killing methods and monitoring and enforcement of regulations.[244]

7.184. In this section, to make an objective assessment of factual assertions advanced by the parties regarding commercial seal hunts, we examine all factual evidence, including scientific opinions and video recordings, submitted by the parties regarding seal hunting.[245] In our review of

[244] See, e.g. Canada's opening statement at the first substantive meeting of the Panel, paras. 12-34; response to Panel question No. 55, para. 239; second written submission, para. 264; Norway's opening statement at the first substantive meeting of the Panel, paras. 147-202; response to Panel question No. 55, paras. 301-313; second written submission, paras. 217-219.

[245] We note that the parties have made various contentions as to the credibility and weight of certain evidence, particularly with respect to scientific reports and video recordings.

With respect to video evidence, we note that the complainants have cited the EFSA Scientific Opinion in support of their argument that video evidence is of limited value. (See, e.g. Canada's opening statement at the first substantive meeting of the Panel, para. 23; Norway's opening statement at the first substantive meeting of the Panel, para. 169). The cited passage of the EFSA Scientific Opinion, however, refers to "the difficulties in evaluating whether or not a seal has been rendered unconscious by a blow to the head or by a bullet *at a distance or on videotape*". (EFSA Scientific Opinion, p. 54) (emphasis added) We do not read this statement as denying the probative value and reliability of video evidence. Viewed in its context, EFSA's statement, which is applied equally to first-hand observation at a distance, serves to explain divergence in interpretation among different studies. Although this suggests reason for caution in the interpretation of video evidence (as it also does for recorded first-hand observations), we consider that video recordings may be usefully consulted as part of the totality of the evidence. Indeed, the complainants have not argued that video evidence should be disregarded, and we find acknowledgement from both Canada and Norway of the utility of video technology in the monitoring of seal hunts and enforcement of regulations. (See Canada's response to Panel question Nos. 155 (para. 199) and 174 (para. 230); Second Statement by Dr Knudsen, (Exhibit NOR-162), para. 12).

Further, Canada called into question the value of several exhibits relied upon by the European Union. In particular, Canada characterizes Butterworth (2012) as a "re-packaged version of the same data used" in Butterworth (2007) and states that "it is framed as an advocacy document rather than an objective scientific paper". Canada further criticizes Butterworth (2012) for its reliance on "the type of video footage that EFSA dismissed as being unreliable as evidence". (Canada's opening statement at the first substantive meeting of the Panel, para. 23). Canada also states that the authors of Burdon (2001), Butterworth (2007), Richardson (2007), and Butterworth (2012) do not have extensive experience or expertise in seals. Further, Burdon (2001) and Butterworth (2007) were organized and funded by NGOs opposed to the Canadian commercial seal hunt. (Canada's opening statement at the first substantive meeting of the Panel, para. 29). Canada contrasts this with the IVWG Report (2005) (which included veterinarians with specific seal expertise) and Daoust (2012) (veterinary experts with direct observation). (Canada's opening statement at the first substantive meeting of the Panel, paras. 24 and 30. See also Canada's second written submission, para. 21). Finally, Canada objects to Richardson (2007) and Butterworth (2012) for lacking original empirical research and the lack of peer review for Richardson (2007). (Canada's second written submission, paras. 28-29. See also Canada's opening statement at the second substantive meeting of the Panel, paras. 10-17).

In Norway's opening statement at the first substantive meeting of the Panel, it pointed out that Daoust (2002) and Daoust (2012) are the only veterinary studies on the methods employed in seal hunting that are published in peer-reviewed scientific journals, whereas Burdon (2001) and Butterworth (2007) are "unpublished, non-peer reviewed reports, that base all their conclusions on analysis of extracted sequences of video clips and/or examination of abandoned carcasses". (Norway's opening statement at the first substantive meeting of the Panel, para. 169, comments of Dr Knudsen). Norway additionally contends that "all of the studies relied on by the European Union (with the exception of papers by Daoust), lack scientific methodology and are the basis for erroneous conclusions by the European Union." (Norway's second written submission, footnote 393 (referring to Second Statement by Dr Knudsen, (Exhibit NOR-162), paras. 4-32)). Norway specifically asserts that studies relied on by the European Union, i.e. Burdon (2001), Butterworth (2007), and Richardson (2007), "are all unpublished reports or statements, made by individuals or NGOs, that have not been subjected to peer-review". (Second Statement by Dr Knudsen, (Exhibit NOR-162), para. 5). Further, Butterworth (2012) "does not report any new studies or new research results", and refers to other unpublished reports relied on by the European Union (Burdon (2001) and Butterworth (2007)). (Second Statement by Dr Knudsen, (Exhibit NOR-162), para. 6). In Norway's view, scientific articles published in merited scientific journals cannot be compared to unpublished reports that have not been subjected to peer-review, and Norway questions the value of analysis of extracted sequences of video clips and/or post-mortem examinations of carcasses. (Norway's second written submission, footnote 393; Second Statement by Dr Knudsen, (Exhibit NOR-162), paras. 8-32).

The European Union responds that formal peer-review is just one of many ways that a study may be reviewed, and, in particular, refers to Burdon (2001) and Butterworth (2007) as having undergone some form of expert review in subsequent studies (including the EFSA Scientific Opinion and peer-reviewed publications such as Daoust (2002) and Butterworth (2012)). The European Union also draws a comparison between Burdon (2001) and the IVWG Report (2005) as having been designed to produce recommendations to the Canadian government for regulatory review. (European Union's second written submission, paras. 5-13). The European Union defends the relevant expertise of the authors of several reports and other experts relied upon, including: Burdon (2001) (six veterinarians, three with experience in seals and wildlife and another part of

the evidence before us, we have given due consideration to the arguments of the parties regarding the reliability and credibility of various sources. Specifically, in assessing the evidence in its entirety, we have taken into account *inter alia* analytical and empirical rigor; relevant expertise of the authors; and the purpose and/or mandate of the studies, statements, and reports submitted to the Panel. The majority of this evidence concerns hunts conducted in Canada and Norway; relatively little scientific or empirical information is provided regarding the actual animal welfare outcomes in hunting conducted in other sealing countries.[246] We also note that in support of their respective positions, the parties have extensively cited the findings and conclusions of the Scientific Opinion of the European Food Safety Authority (EFSA Scientific Opinion) on the animal welfare aspects of the killing and skinning of seals.[247] The reliability and accuracy of the EFSA Scientific Opinion has not been challenged by any party. Based on the entirety of such evidence, therefore, we will assess the characteristics of seal hunting in general and subsequently the alleged characteristics of commercial seal hunting in particular.

7.3.2.3.2.1 Characteristics of seal hunting in general

7.185. The alleged unique conditions in seal hunting include the physical environment of the hunts, characteristics of seals, and the application of killing methods in seal hunting. We examine these conditions in turn.

Physical environment

7.186. The parties do not dispute that the physical environments in which seals live and are hunted can, in certain respects, be distinguished from those existing in the hunting of other wildlife

IVWG); Richardson (2007) (experts in zoology, marine mammal veterinary science and humane slaughter with experience of direct observation of hunt, post-mortem examinations, and review of video evidence); and Professor Broom as a "world leading authority in the field of animal welfare". (European Union's second written submission, paras. 14-19). The European Union also contends that scientific research is not unreliable merely because it has been commissioned or facilitated by NGOs with a non-commercial interest. In the case of the Canadian commercial seal hunt, observation can practically only occur with the facilitation of the Canadian government or an NGO with government permission. (European Union's second written submission, paras. 20-23). The European Union highlights links of Dr Daoust to the Canadian fur industry, adding that had these links been disclosed to EFSA he would not have been permitted to be a member of the Working Group that prepared its Scientific Opinion. (European Union's second written submission, paras. 24-28). The European Union defends the reliability of video evidence, and, pointing out that Canada claims to use such evidence for its monitoring of the hunt, specifically contends that it is in several ways more accurate than first-hand observation/memory and that it is obtained in a random fashion. (European Union's second written submission, para. 35-53). Lastly, the European Union states of Mr Danielsson, who has provided multiple statements to the Panel as to practices and animal welfare in seal hunts (Exhibits NOR-4, NOR-128, and NOR-163), that he "participated in the hunts as a government employee and cannot be regarded as an independent party", and "the statements consist entirely of bare assertions, unsupported by evidence and have been prepared expressly for the purpose of this dispute under the control of the Norwegian authorities." (European Union's second written submission, para. 56).

[246] See EFSA Scientific Opinion, p. 24: "Seal hunts have occurred in various parts of the world throughout history, and the different stunning and killing methods used have been documented in various ways. Very little robust information is available, however, on the efficacy of each of these methods and their respective advantages and disadvantages in relation to animal welfare."

With respect to Namibia, which is one of the principal sealing countries, the European Union introduced video evidence and commentary on the harvesting of Cape fur seals during the first meeting of the Panel.

[247] EFSA Panel on Animal Health and Welfare, Scientific Opinion on the Animal Welfare aspects of the killing and skinning of seals (2007).

The EFSA Scientific Opinion addresses the biology of various species of seals; different killing and skinning methods and how they should be used in theory; the use of the killing methods in practice; the neurophysiological aspects of the determination of death; and the training and competence of sealers. (EFSA Scientific Opinion, (Exhibit JE-22), p. 12).

In this connection, as part of the stakeholders' consultation of the EFSA process, the Norwegian Scientific Committee for Food Safety ("VKM") provided an opinion on the subject with an *ad hoc* group of national experts to prepare the necessary scientific documents. (VKM Panel on Animal Health and Welfare, *Scientific Opinion on Animal Welfare Aspects of the Killing and Skinning in the Norwegian Seal Hunt* (2007), (VKM Scientific Opinion), (Exhibit JE-31)).

or in the commercial slaughter of farmed animals.[248] The parties' disagreement concerns whether the prevalence of such conditions amount to inherent obstacles to humane killing.[249]

7.187. The Panel notes that various seal species are found throughout the world along the coasts of polar, sub-polar, and temperate regions.[250] The seal hunts to which the specific physical conditions at issue may be ascribed are those occurring within or near Arctic and sub-Arctic regions, particularly in the Arctic and northern Atlantic Oceans as well as the Barents, White, and Greenland Seas.[251] In these regions, seals must be hunted in their marine habitats among varying ice formations, which can create attendant conditions of seal hunting such as variable winds, ocean swells and waves, and low/freezing temperatures.[252] This therefore distinguishes the physical environment of seal hunts from that of terrestrial wildlife hunts[253] or commercial slaughterhouses.[254] Further, we observe that deterioration of ice conditions in sealing regions has been observed in recent years[255] and that the volatility of ice conditions may impact the working environment for sealers.[256]

[248] See European Union's first written submission, paras. 127, 412; response to Panel question No. 105, paras. 28-32; Canada's response to Panel question No. 55, para. 239; Norway's response to Panel question No. 55, paras. 301-313.

[249] See, e.g. Norway's opening statement at the first substantive meeting of the Panel, paras. 177-192 (comments by experts); Canada's opening statement at the first substantive meeting of the Panel, paras. 12-34.

[250] EFSA Scientific Opinion, pp. 13-23 and 87.

We note that Cape fur seals are distributed along the southern and western coasts of Southern Africa. In Namibia, which has a history of harvesting seals dating from the 17th century, Cape fur seals occupy colonies located either on the mainland or on small, rocky islands, and Namibia is the only major sealing nation in the southern hemisphere. Harvesting in Namibia is limited to three mainland colonies, and is conducted on dry land by driving selected seals away from the sea. Namibia has submitted to the Panel information about its legislative framework on seal harvesting, including with respect to animal welfare and sustainable ecosystem management. (See Namibia's third-party submission, pp. 4-14). In addition, Namibia is of the view that the EU Seal Regime is discriminatory and fails to achieve the objective of protecting animal welfare. (Ibid. pp. 14-34).

[251] EFSA Scientific Opinion, pp. 13-23; Canada's Department of Fisheries and Oceans, *Overview of the Atlantic Seals Hunt, 2006-2010*, (DFO Overview of the Atlantic Seals Hunt 2006-2010), (Exhibit EU-40), pp. 6-7; VKM Scientific Opinion, pp. 10-18; Norwegian Ministry of Fisheries and Coastal Affairs, *Geographic Distribution of Seal Hunt* (September 2009), (Exhibit NOR-14). This would therefore exclude practices for harvesting of Cape fur seals in Namibia.

[252] Butterworth (2012), pp. 7-8 and Table 3 (providing data on wind speeds and wave heights on the opening days of the commercial seal hunt from 2007-2011); IVWG Report (2005), p. 5 (recognition of "the specific challenges presented by weather, sea and ice conditions" in seal hunts); EFSA Scientific Opinion Annex A, footnote 1 (explanation of risk characterization parameters that "[g]ood weather refers e.g. to fine and ideal weather and bad weather refers e.g. to poor visibility, heavy swells and gusty winds."); Video presented by the European Union at the first meeting of the Panel, (Exhibit EU-79).

[253] We note that complainants' references to the hunts of wild animals have consisted of reference to *terrestrial* animals.

[254] The EFSA Scientific Opinion notes, for example, that in contrast to "an abattoir where the floor should be stable, even and not slippery, seals are killed on different substrates e.g. on land, in the water, on solid ice, loose pack ice, moving ice floes, in environmental conditions that may rapidly alter the position of both sealer and seal, and in weather conditions that may affect visibility". (EFSA Scientific Opinion, p. 88; see also Ibid. p. 35 ("Seals are wild animals and so it is valid to compare the criteria used and the controls in how we kill other wild animals, as well as how domesticated animals are killed in abattoirs … Care should be taken when comparing the efficacy of these different methods of killing because of the great variation in environmental conditions involved."); VKM Scientific Opinion, p. 38; NOAH Report (2012), p. 19 and Appendix D, p. 4 (statement by Norwegian sealing inspector)).

[255] See DFO Overview of the Atlantic Seals Hunt 2006-2010, (Exhibit EU-40), p. 6 ("Although variable ice conditions have been observed historically, there has been an increased frequency of poor ice cover in recent years."); EFSA Scientific Opinion, p. 25 (commenting that "poor ice conditions" in the southern Gulf of St. Lawrence had resulted in a shift of the Canadian hunt towards the northern Gulf). See also Canada's Department of Fisheries and Oceans, *2011-2015 Integrated Fisheries Management Plan for Atlantic Seals*, (DFO Integrated Seals Management Plan 2011-2015), (Exhibit EU-42), pp. 6 ("Although variable ice conditions have been observed historically, there has been a dramatic decline in harp seal-friendly ice cover in recent years. 2010 saw the lowest ice cover ever observed in the Gulf, and suitable ice occurred much further north than is normal at the Front."), 14, and 16-17; NOAH Report (2012), pp. 21-22, Appendix G, p. 5, and Appendix P, pp. 4-5; Canadian Department of Fisheries and Oceans, *Canadian Commercial Seal Harvest Overview 2011* (October 2012), (DFO Commercial Seal Harvest Overview 2011), (Exhibit JE-27), p. 3.

[256] The European Union argues that two factors affect the working environment for sealers by causing more broken and unstable surfaces: first, seasonal effects of hunting seals a few weeks older than in past hunts; and second, the alleged impacts of climate change. (European Union's first written submission,

7.188. By contrast, certain conditions such as the visibility afforded by the wide open habitat and the manoeuvrability of boats in open ice formations have been suggested to present possible advantages in seal hunting.[257] The evidence taken as a whole, however, indicates that the physical conditions of seal hunting are distinct from those present in the hunting of other wildlife or in the commercial slaughter of farmed animals and pose certain additional challenges in seal hunting. Further, the parties agree that the environmental conditions of the Canadian and Norwegian seal hunts are similar in respect of factors influencing the conduct and humaneness of the hunt.[258]

Characteristics of seals

7.189. The European Union argues that seals have certain unique features enabling them to stay under water for long periods and that, as a result, seals may experience suffering "peculiar to that species".[259]

7.190. The Panel observes that seals have special anatomical and physiological adaptations as compared to other animals, such as the ability to withstand poor levels of oxygenation over extended periods of time.[260] This has been understood by some to create potential for prolonged life and comparatively prolonged suffering, raising concerns as to the application of 'conventional' slaughter processes to seals.[261] As a result of these adaptations seals may continue to prolonged display activity while unconscious and even after death, though this characteristic is not limited to seals and is observed in other animals following acute trauma to the brain.[262] At the same time, it has been pointed out that the adaptations of seals do not have any effect on killing times for tools causing extensive brain damage (even if they may affect post-stunning or post-mortem reactions).[263]

7.191. Although "seals conform to the general mammalian [anatomical] pattern" in terms of their skeleton and internal organs, it has been noted that "compared to terrestrial animals of the same

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para. 125; opening statement at the first meeting of the Panel (comments of Professor Broom)). The complainants acknowledge variability in ice conditions and do not dispute the observed reduction of ice cover in recent years. (Canada's response to Panel question No. 65, paras. 285-288; Norway's response to Panel question No. 65, paras. 356-362).

With respect to the seasonal element, we note that some present day hunts do target older seals (in Canada in Norway, for instance, where it is no longer permitted to hunt whitecoat pups) with the result that the hunt takes place later in the spring when the melting and breaking up of ice floes may be more advanced. (Butterworth (2012), p. 2; Richardson (2007), p. 38). Female harp seals give birth in March, and young harp seals are weaned after approximately 12 days, following which they are typically hunted in the "beater" stage of development (i.e. harp seals approximately 3-4 weeks old) as the main target of the hunt. (See Daoust (2002), pp. 1-2; Daoust (2012), p. 445; EFSA Scientific Opinion, pp. 20, 24; see also Johnston et al., "Variation in sea ice cover on the east coast of Canada from 1969 to 2002: climate variability and implications for harp and hooded seals", *Climate Research,* Vol. 29:209-222 (2005), (Exhibit EU-41) (research paper explaining scientists' observation on variation in sea ice over, its potential impact on certain seal populations, and the possible implications of observed changes in climate)).

[257] Daoust (2002), p. 7; VKM Scientific Opinion, p. 27.

[258] See parties' responses to Panel question No. 72.

[259] European Union's first written submission, para. 407. We note that the complainants have not directly challenged the European Union's assertion that seals' physiological capacities may have implications for the killing process. However, Canada has called into question the evidence relied upon by the European Union as "speculative" and of questionable relevance in the context of killing methods that involve the destruction of the brain. (Canada's second written submission, para. 32 and comments on the European Union's response to Panel question No. 155, para. 127). Norway has also advanced arguments regarding "stun/kill" methods causing destruction of the brain. (See, e.g. Norway's opening statement at the first meeting of the Panel, paras. 157-158 and 164-165).

[260] See e.g. EFSA Scientific Opinion, p. 69 (noting that seals have a "relatively large total oxygen storing capacity"); VKM Scientific Opinion, p. 25 (stating that seals "are endowed with an enhanced tolerance to lack of oxygen (hypoxia)" and "have a large and impressive capacity to stay submerged for extended periods of time"); NAMMCO Report (2009), p. 10 (describing the "diving physiology of seals" based on certain "morphological and physiological adaptations, including the "ability to store substantial amounts of oxygen in a large blood volume" and economize oxygen stores, as well as "enhanced tissue hypoxia tolerance at the cellular level").

[261] Butterworth (2012), pp. 6-7.

[262] See e.g. VKM Scientific Opinion, p. 25; First Statement by Dr Knudsen, (Exhibit NOR-5), para. 41; E. O. Øen, *The Norwegian Sealing and the Concept of 'Humane Hunting'* (2006), (Exhibit NOR-36), p. 5 ("reflex movements can continue for several minutes after the seal is unconscious and brain dead" and "other organs like the seal's heart may be beating for a long time after the seal is dead").

[263] NAMMCO Report (2009), pp. 10-11; VKM Scientific Opinion, p. 25.

size the seal's body is characteristically torpedo-shaped, the limbs are short and there is a lack of external landmarks on its torso".[264] In terms of behaviour, seals may move when or even after they are shot or hit by a hakapik posing a challenge to sealers.[265] However, seals have been regarded by some as relatively docile compared to other hunting targets.[266]

Methods for hunting seals

Humane killing methods in seal hunting

7.192. The parties acknowledge generally accepted principles of humane killing, described by EFSA as "the act of killing an animal that reduces as much as possible unnecessary pain, distress and suffering i.e. that causes no avoidable pain, distress, fear or other suffering".[267] Based on such principles, the parties agree that a three-step killing method is the commonly recognized benchmark for the humane killing of seals.[268] This method consists of (a) effective stunning that results in loss of consciousness; (b) checking to ensure loss of consciousness[269]; and (c) effective bleeding out. These three steps are described below.

7.193. EFSA and other scientific studies explain that the most commonly applied methods of stunning involve targeting the seal's head with either firearm or clubbing instrument to render it irreversibly unconscious.[270] The principal tools used for this purpose are: hand-held striking instruments such as a hakapik (consisting of a wooden handle with a metal ferrule at one end that has a slightly bent spike on one side and a blunt projection on the other)[271] or club[272]; and

[264] VKM Scientific Opinion, p. 23. The VKM Scientific Opinion goes on to conclude that "[t]herefore, unlike most other forms of wildlife hunts, the head (and brain) is the preferred target rather than the thorax as in terrestrial large game."

[265] EFSA Scientific Opinion, p. 41; NOAH Report (2012), pp. 10 and 25 (statements by a Norwegian sealer and a sealing inspector); VKM Scientific Opinion, p. 35.

[266] Daoust (2002), p. 7; First Statement by Mr Danielsson, (Exhibit NOR-4), para. 30. Note that younger seals (predominantly hunted in Norway and Canada) are regarded as more docile, whereas adult seals have been noted to be more responsive to human presence and likely to attempt to escape. (European Union's opening statement at the first meeting of the Panel (statement of Professor Broom)).

[267] EFSA Scientific Opinion, p. 117 (definition of "Humane killing"). See also VKM Scientific Opinion, p. 10; IVWG Report (2005), p. 2; Butterworth (2012), p. 4; E. O. Øen, *The Norwegian Sealing and the Concept of 'Humane Hunting'* (2006), (Exhibit NOR-36), p. 1; American Veterinary Medical Association ("AVMA"), *Guidelines on Euthanasia* (June 2007), (Exhibit NOR-91); AVMA Guidelines for the Euthanasia of Animals: 2013 Edition, (Exhibit NOR-133); Canada's first written submission, para. 91; Norway's first written submission, para. 172; European Union's first written submission, para. 79.

[268] Canada's first written submission, paras. 93-98 (describing its Marine Mammal Regulations as patterned on the three-step method); response to Panel question No. 62 (considering that "the three-step process represents the best available scientific knowledge for best practices to ensure a good animal welfare outcome"); Norway's first written submission, paras. 172-180 (describing what is formally a two-step process of stunning and bleeding, but referring to the first step as an outcome that must be assured before bleeding); response to Panel question No. 62 (describing its second step as "second stunning" with a hakapik spike and explaining the stun/kill concept of its approach); European Union's first written submission, paras. 98-105 (recognizing the three-step method as a "recommended killing method"); response to Panel question No. 63 (explaining that a "genuinely humane method for killing seals [could be] based on the three-step method"). See also DFO Integrated Seals Management Plan 2011-2015, (Exhibit EU-42), p. 7; Statement of Mr Landmark, (Exhibit NOR-8), para. 38.

[269] See footnote 309 below with respect to the practice of "second stunning" used in Norway to ensure irreversible unconsciousness as the second step of the killing process.

[270] See, e.g. EFSA Scientific Opinion, p. 68; VKM Scientific Opinion, p. 28; NAMMCO Report (2009), p. 11; IVWG Report (2005), pp. 7-8; Burdon (2001), p. 4.

[271] We note also the existence in Norway of a modified version of the hakapik called a "slagkrok". This is an iron club with a sharp hooked spike opposite the club. (VKM Scientific Opinion, pp. 7, 33-34). EFSA observed that "slagkroks are now rarely used" and therefore limited reference to the slagkrok "to when its use is different from the hakapik". (EFSA Scientific Opinion, p. 38). Other studies have included reference to the slagkrok in connection with discussion of the hakapik. (See VKM Scientific Opinion, pp. 32-35; NAMMCO Report (2009), p. 17 and Appendix 1, Section 2.2).

[272] Generally speaking, clubs are distinguished from the hakapik by the absence of a spiked metal ferrule at one end. (See EFSA Scientific Opinion, pp. 41-42).

firearms.[273] It may entail multiple shots/blows either to ensure that the seal has been effectively stunned or to cure any previously unsuccessful attempt.[274]

7.194. After stunning, the next step requires checking to ensure that the seal is in fact unconscious and insensible to pain. Two generally recognized methods for checking loss of consciousness are "blinking tests" to check corneal reflex and skull palpation to assess physical brain damage. There are certain challenges associated with this step, such as those posed by the physical conditions of seal hunts and neurophysiological features of seals.[275]

7.195. Bleeding (or exsanguination) is to be performed on an effectively stunned and checked seal so as to terminate blood flow to the brain and ensure death at the time the seal is skinned.[276] In some instances where the seal is killed by the application of stunning, bleeding can be a precautionary step rather than the primary means of killing.[277]

7.196. Furthermore, there is considerable evidence to show that the effectiveness of the method used to kill seals is at least partially dependent on the abilities and competence of sealers. For instance, EFSA explained that for any given killing method "the best practice for that method" would involve a competent person with well-maintained equipment[278] and that differing observations between studies of seal hunts might be accounted for by "individual differences in sealer behaviour and competence".[279]

Application of humane killing methods in seal hunting

7.197. The European Union argues that, although it could be possible in theory to prescribe a humane method for killing seals, in practice the unique conditions in which seal hunting takes place make it impossible to *apply* and enforce any such method in an effective and consistent manner.[280] The complainants submit that the conditions in which seal hunts occur do not create

[273] See EFSA Scientific Opinion, pp. 37-45.

[274] See para. 7.205 below regarding the application of humane killing methods as to the competing views about the humaneness of applying multiple shots/blows for stunning. Although Norway does not require "checking" in the sense of monitoring the animal, its requirement of "second stunning" is intended to serve the similar function of confirming irreversible unconsciousness.

[275] See paras. 7.208-7.210 discussing the application of checking seals and paras. 7.217-7.218 regarding hooking/gaffing conscious seals.

[276] See EFSA Scientific Opinion, p. 49.

[277] See e.g. EFSA Scientific Opinion, p. 94, General Recommendation 2 ("Seals should be killed and skinned in a way that meets the three steps of effective stunning or killing, effective monitoring and effective bleeding out, before being skinned".); Burdon (2001), p. 1; IVWG Report (2005), p. 2; Daoust (2012), p. 446 (illustration: "Poster provided to Canadian sealers illustrating a three-step process for killing young harp seals, with the purpose of inflicting minimal or no pain to the animal".).

Note that some suggest that there may be a fourth step in a humane killing, namely ensuring that unconsciousness persists throughout the bleeding process. (See e.g. Richardson (2007), p. 17 and *amicus curiae* submission by Anima et al., pp. 61-62 (Exhibit EU-81), pp. 12-13). Richardson notes that "[t]he potential for tests of unconsciousness to be inaccurately performed in the context of the seal hunt, paired with the reality that neither test [corneal reflex and cranial palpation] confirms irreversible unconsciousness necessitates a fourth step in humane killing at the commercial seal hunt – re-stunning the seal if needed during exsanguination." Richardson then goes on to add, "[t]here is good reason to believe this four step killing process would not be effectively and consistently carried out in the physical environment in which the Canadian seal hunt takes place." (Richardson (2007), p. 17).

[278] EFSA Scientific Opinion, p. 37.

[279] EFSA Scientific Opinion. p. 54. See also ibid. p. 43 ("Besides the power of the rifle and ammunition used, a rifle is only as effective in its ability to stun/kill an animal as the marksmanship of the hunter and the conditions under which the hunt is conducted").

Indications from both participants in the hunts and veterinary experts recognize the heavy demands and difficult conditions of seal hunts. (See e.g. NOAH Report (2012), p. 12 and Appendix K, pp. 6, 9 (noting indications of sealers' fatigue over the course of a hunt); p. 24 and Appendix P, p. 4 (comment by the Norwegian Fisheries Directorate); IVWG Report (2005), pp. 5, 8-9 (noting of a specific location, the Canadian Front, that "[b]ecause of ice, sea and weather conditions there are greater challenges for hunters to carry out" the recommended killing method)).

[280] European Union's first written submission, para. 373.

inherent obstacles to humane killing and that, in fact, seals are killed humanely in their respective hunts.[281]

7.198. The Panel examines, based on the evidence before it, the parties' arguments concerning the application of generally recognized humane killing methods at each step of the seal killing process.

Stunning (clubbing[282] or shooting)

7.199. The parties contest whether the physical environment and conditions in which seal hunting occurs form an inherent obstacle to accurate and effective stunning.[283]

7.200. The Panel first recalls that the most commonly applied stunning methods in seal hunts involve targeting the seal's head with either firearm or clubbing instrument to render it irreversibly unconscious. The evidence before us shows that physical conditions can affect the choice of instrument as well as the manner in which the stunning takes place.[284] EFSA, for example, notes that more solid ice accumulation can facilitate the application of short-range tools such as hakapiks, whereas more unstable and sparse ice formations will favour the use of stunning from longer ranges with firearms.[285] In light of the observed deterioration of ice conditions in recent hunts, EFSA concludes that the use of rifles is likely to continue to dominate and even to increase if the poor ice conditions persist.[286]

7.201. Against this backdrop, we proceed to examine the degree to which stunning methods in seal hunts can be effectively and consistently applied.

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[281] Canada's opening statement at the first meeting of the Panel, paras. 12-14; Norway's opening statement at the first meeting of the Panel, paras. 140-143.

[282] We note that, unless otherwise indicated, the use of the term "clubbing" in these Reports refers generally to the striking of seals and is not limited to the use of a specific instrument. The general term "clubbing" may be understood as corresponding to EFSA's reference to "physical methods (e.g. hakapik or club)", and therefore is not confined to clubs (as distinguished from hakapiks). (See EFSA Scientific Opinion, p. 68).

[283] European Union's first written submission, paras. 127-138; Norway's opening statement at the first meeting of the Panel, paras. 177-192 (comments by experts); Canada's opening statement at the first meeting of the Panel, paras. 12-34.

[284] In this connection, various exhibits explain the unsuitability of other tools and methods of stunning in light of the physical environment and conditions of seal hunting. (See VKM Scientific Opinion, p. 42 (noting that "neither the use of electricity, gas, nor captive bolts would be practical nor realistic to try in the environmental conditions in which the seal hunting is carried out" and that captive bolt methods" would not function well under arctic conditions" and direct placement against the seal's head may not be practicable for unrestrained seals); EFSA Scientific Opinion, p. 48 (commenting on unsuccessful research using pistols and that "proper maintenance of such weapons under cold and wet conditions on the ice floes would be difficult"; "captive bolts may not be appropriate [because] they may not function properly under harsh weather conditions" and use on "unrestrained animals on the ice would pose additional limitations"; and that poisoning/anaesthetic drugs had not been found to be practical; see also NAMMCO Report (2009), p. 13; E. O. Øen, *The Norwegian Sealing and the Concept of 'Humane Hunting'* (2006), (Exhibit NOR-36), p. 4 ("[p]istols and revolvers would be too inaccurate", "penetrative or non-penetrative captive bolt pistols used in slaughterhouses … would probably be even poorer than pistols", and "[t]he use of shotguns is unthinkable")).

Note, however, that other factors of a given seal hunt may also be relevant to the choice of instrument. (See, e.g. VKM Scientific Opinion, p. 27 (explaining the skull thickness of younger seals making hakapiks appropriate)).

[285] EFSA Scientific Opinion, pp. 25 (depending on ice conditions and the size of ice floes, "hunters either shoot the seal from their boats or go down on the ice and strike the animals with a hakapik") and 27 (regarding the Norwegian hunt "[t]he percentage of young seals which are shot (as opposed to the hakapik being used as the primary killing method) may vary somewhat depending on the time of year and the conditions of the hunt (i.e. stability and thickness of ice)"); Daoust (2012), p. 445 ("[d]epending on ice conditions, these seals are hunted mainly with one of two regulation tools …: the hakapik … in years of good ice, when the sealers can get down on the ice and approach the animals; or a rifle … where ice floes are typically much smaller and more spread out"); Butterworth (2007), p. 8.

[286] EFSA Scientific Opinion, pp. 45 and 89, point 5. See also Daoust (2002), p. 2 ("Ice conditions, which, in recent past, have varied considerably from year to year, also influence the nature of the hunt. Years of poor ice formation, with predominance of small ice floes, have led to a larger proportion of the animals being shot rather than struck with a hakapik."); NAMMCO Report (2009), p. 17 ("The environmental conditions and the nature of the hunt determine to a large extent whether the hakapik is being used as the primary tool or not. For example the use of the hakapik as the primary tool has been reduced due to poor ice conditions and changes in targeted age classes").

7.202. Regarding the effectiveness of firearms for stunning, the main risk is "the targeted animal being hit with insufficient force and/or accuracy to cause instantaneous death or unconsciousness, and possibly escaping wounded".[287] Contributing factors to this risk include firing from excessive distance and unstable platforms (e.g. by the relative motion of the boat and of the ice floe on which the seal is resting). Multiple scientific reports have explicitly correlated the accuracy (and thus effectiveness) of firearms with such environmental factors and the small size of the target (head and upper neck).[288]

7.203. At the same time, there is evidence of means employed to enable effective stunning with firearms and to mitigate the risks of inaccurate shooting. For example, the use of optical sights with magnifying lenses on modern rifles can serve to enhance accuracy at the shooting distances relevant for seal hunting.[289] Additionally, several sources stress the destructive power of various firearms and ammunition used for stunning that can help ensure that struck animals will be rendered unconscious.[290] Finally, there are also suggestions that hunters may exercise their judgment to refrain from attempting to stun seals when poor conditions pose a risk of ineffective stunning.[291]

7.204. With respect to what EFSA terms "physical methods" of stunning, namely by striking with a hakapik or other clubbing instrument, there is also evidence detailing the circumstances in which such methods may result in ineffective stunning. As with firearms, an effective stun will largely depend on the accuracy and force of the blow, which in turn can be affected by the stability of the platform, the balance of the hunter, and the hunter's position relative to a potentially moving

[287] EFSA Scientific Opinion, p. 44.

[288] EFSA Scientific Opinion, pp. 43-44 and 89; VKM Scientific Opinion, p. 32 ("There are disadvantages from the use of firearms in the hunt. The risk for bad shots (i.e. strayshots or hits outside vital areas) is present and increase with longer shooting ranges (>50m) and/or if the boat (platform) is moving heavily or the ice floes are in motion in bad and windy weather conditions. The seal might also suddenly move its head. In such situations, the shot might either miss completely, or wound and injure the animal. Seals shot and wounded might escape before they are re-shot."); Butterworth (2012), p. 5. See also NOAH Report (2012), p. 19 and Appendix D, p. 4 (description by sealing inspector of relevant factors to accurate shooting); Letter from Norwegian Fishing Vessel Owners Association, (Exhibit EU-44) (noting that a sealing vessel will be "in motion due to swell, waves and its own progress").

[289] EFSA Scientific Opinion, p. 44 ("Modern rifles with optical sights, possibly combined with rangefinder are very accurate weapons at shooting distances relevant for seal hunting, and shots fired at the brain will usually be grossly destructive with severe bleeding and tissue damage".); First Statement by Mr Danielsson, (Exhibit NOR-4), para. 29 (stating that shooting ranges are usually from 30-40m, but may be between 10-70m, which can be "effectively very close" with magnification lens); Third Statement by Mr Danielsson, (Exhibit NOR-163), para. 5.

[290] See e.g. VKM Scientific Opinion, pp. 30-31; NAMMCO Report (2009), p. 14; First Statement by Mr Danielsson, (Exhibit NOR-4), paras. 41-46; First Statement by Dr Knudsen, (Exhibit NOR-5), para. 22 (stunning involving "a massive impact to the seal's brain" and in the case of rifles potentially causing "complete destruction of the brain after impact of the high-velocity expanding bullet").

[291] EFSA Scientific Opinion, pp. 40, 45; First Statement by Mr Danielsson, (Exhibit NOR-4), para. 38; Second Statement by Mr Danielsson, (Exhibit NOR-128), paras. 4-5 (recognizing that hunting is an outdoor activity with conditions that "could affect the accuracy of a shot", but that hunters may adjust for this factor) and para. 22 (stating that hunting may not proceed under inclement conditions). But see also NOAH Report (2012), p. 10 (comments of a penalized captain of a vessel describing the difficulty of exercising judgment, stating "[t]here will always be an evaluation from the hunter if he dares to shoot. You seldom get a perfect situation in hunting. In our line of business many wrong decisions are made …").

seal.[292] On the other hand, there are indications of the suitability and effectiveness of the hakapik on younger seals due to their relatively weaker skulls and lesser reaction to human intrusion.[293]

7.205. We note that the parties have made specific arguments as to the practice of inflicting multiple blows and/or firing multiple shots on a targeted seal during the stunning process.[294] On this matter, we do not consider that the infliction of multiple blows or repeated shots is *per se* unacceptable in terms of animal welfare, given that this practice may be precautionary and not necessarily a consequence of ineffective stunning.[295] As a remedial action for an ineffective first stunning attempt, multiple blows or shots could be consistent with humane killing principles to the degree they were performed accurately and rapidly. At the same time, we observe that attempts at re-stunning (particularly with firearms) may pose the same challenges to accurate and effective stunning as in the original instance, but with the possibility of additional obstacles from the motions of a struck seal and the difficulty of determining whether re-application of stunning is required.[296]

7.206. The European Union has described the difficulties of effective stunning as part of the inherent obstacles to humane killing in seal hunts. Although the complainants also accept the possibility of ineffective stunning in seal hunts, they dispute the prevalence of its occurrence and implications for the general characterization of the humaneness of methods applied in seal hunts.[297] In this regard, EFSA observes that there is a generally a limited amount of data available on animal welfare in seal hunts, including with respect to effective stunning[298], and that existing data may give rise to conflicting conclusions, "i.e. uncertainty is high in data interpretation".[299]

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[292] EFSA Scientific Opinion, pp. 39 (noting possibility that the "first blow from the hakapik may not stun the animal immediately if it does not hit the calvarium but hits, for example, the jaw or snout or other part of the body"), 40 ("The hunter has to be close to a seal, and if it moves its head or moves away, the accuracy of the strike may be compromised. … The hunter should withhold striking a blow if it is unlikely to be of sufficient force or accuracy e.g. if he is off-balance or if the animal is in a position to escape into the water."), 41 (notes as disadvantage of clubbing that "the accuracy of blows is compromised by the fact that the targets are nearly always in motion"), 70 ("The angle of striking the skull of a seal with a rounded club or hakapik may influence the impact energy delivered to skull, the direction of travel for the spike of the hakapik and, as a consequence, the efficacy of the strike".), and 88, point 4 ("The accuracy of the strike may be compromised if the seal moves its head, or moves away and this depends very much on the behaviour of the seal species, the skill of the hunter and the environmental conditions in which the hunt takes place".); NAMMCO Report (2009), p. 17 ("When using the blunt projection of the hakapik the hunter's relative position to the animal is less important than a stable platform"); Butterworth (2007), p. 41.

[293] EFSA Scientific Opinion, p. 39; VKM Scientific Opinion, p. 45. See also Norway's opening statement at the first meeting of the Panel, paras. 163-170 (comments of Dr Knudsen regarding the effectiveness of the hakapik when properly used and consistency with AVMA guidelines); Daoust (2012) (regarding use of hakapiks on seals at the 'beater' stage of development).

[294] See European Union's first written submission, paras. 114 and 172; Canada's second written submission, paras. 49, 60-61; Norway's opening statement at the first meeting of the Panel, para. 167. There is some conflicting evidence as to the animal welfare implications of such practice, as some experts have considered the practice unacceptable (See e.g. Burdon (2001), pp. 1 and 13; Richardson (2007), p. 13; Butterworth (2012), p. 6) whereas other have highlighted its effect of ensuring effective stunning (See e.g. EFSA Scientific Opinion, p. 38; IVWG Report (2005), p. 8). Various sources point to the option of firing follow-up shots in the case of any doubt that a seal has been effectively stunned with the first shot. (See e.g. Daoust (2002), p. 6; First Statement by Mr Danielsson, (Exhibit NOR-4), para. 29).

[295] See EFSA Scientific Opinion, p. 38 (explaining that observations of sealers striking seals multiple times can be pursuant to regulatory standards or "in order to for the sealer to ensure that the animal is indeed stunned or killed, not necessarily because the extra blows are needed").

[296] In the case of follow-up shots with a rifle, even assuming that the seal's state of consciousness was clearly ascertained, "the erratic movements of the wounded animal, coupled with the bobbing movements of the vessel, would not guarantee the success of the 2nd shot." (Daoust (2002), p. 6; see also paras. 7.208-7.210 regarding the difficulties of checking consciousness).

[297] See Canada's and Norway's responses to Panel question No. 69 (both referring to the EFSA finding that no killing method will work at all time and under all circumstances).

[298] See, e.g. EFSA Scientific Opinion, pp. 12 and 76.

[299] EFSA Scientific Opinion, p. 91.

The data and findings of various scientific reports submitted to the Panel draw upon eyewitness accounts and inspections; review of video of the Canadian hunt in different locations and years; and post-mortem skull and carcass examinations. (See EFSA Scientific Opinion, pp. 53-61; NOAH Report (2012), pp. 12, 18-19, and 25-27 (comments of Norwegian sealing inspectors and sealers); Butterworth (2007), pp. 3, 36, and 41; Butterworth (2012), pp. 2-3; VKM Scientific Opinion, p. 32; Transcript of statements to the radio station CBH-FM (28 December 2008), (Exhibit EU-105), pp. 10-11 (comments of Canadian sealer)). This evidence is predominantly taken from the Canadian commercial seal hunt, and certain limitations have been noted in the availability of data on the Norwegian hunt. (See Norway's response to Panel question Nos. 56 (para. 322)

Having due regard for these limitations, our review of available evidence confirms that inaccurate and ineffective stunning by both hakapik and firearms does occur and that seal hunting poses inevitable risks that some seals will not be instantly and effectively stunned.[300]

7.207. There is some evidence in the form of data samples and sealing inspector observations that indicate potentially high rates of accurate stunning.[301] Though this may serve as empirical

("Statistics on the incidence of poor animal welfare outcomes have not historically been maintained for the Norwegian seal hunt.") and 61 (para. 345) (regarding independent observers). See also EFSA Scientific Opinion, pp. 28, 66; VKM Scientific Opinion, p. 3 ("scientific, peer-reviewed studies and scientific data on the actual performance of the Norwegian hunt are very limited")).

[300] We note that the parties have devoted considerable argument to the comparability of stunning in seal hunts and commercial abattoirs. At the same time, all parties have recognized that there are significant differences in the physical environments of the two settings. (See e.g. Canada's response to Panel question No. 56; second written submission, footnote 66; Norway's response to Panel question No. 56; second written submission, paras. 290-294). Also, as we have noted above, stunning tools commonly employed in slaughterhouses (such as captive bolts) have been generally deemed unsuitable for use in seal hunts on account of basic environmental factors and the challenge of hunting unrestrained wild animals approached from a distance in their marine habitat. In our view, these basic differences limit the value and relevance of a comparison to the stunning in commercial slaughterhouses when determining the risks of inhumane stunning and killing in seal hunts in particular. (See e.g. VKM Scientific Opinion, p. 39; NAMMCO Report (2009), p. 16). For similar reasons, we find comparisons to terrestrial wildlife hunts to be of limited value in the determination of such risks based on *inter alia* differences in the hunting tools, areas targeted on the animal, and physical settings of the hunts. (See EFSA Scientific Opinion, p. 36; VKM Scientific Opinion, pp. 36-38; E. O. Øen, *The Norwegian Sealing and the Concept of 'Humane Hunting'* (2006), (Exhibit NOR-36), p. 2; NAMMCO Report (2009), p. 15).

In any event, the evidence before does not clearly establish that effective stun rates in the seal hunt are comparable to those in a commercial abattoir, as argued by the complainants. EFSA has estimated that the rate of mis-stunning in an abattoir is 4 to 6.6% for captive bolt shooting, and notes of a field study of cattle stunning with captive bolt that "[a]ll catle where the first shot missed were immediately restunned". (EFSA Scientific Opinion, p. 36; see also Daoust (2012), p. 453 (comparing findings on the Canadian seal hunt to hunts of deer, waterfowl, and noting that "the success rate (ie no return to sensibility) for stunning cattle in the best slaughter plants under the best conditions averages 97-98%", though pointing out lower rates in other samples); Tables summarising the evidence available on the rates of mis-tuns and delays in commercial sealing and in slaughterhouses, (Exhibit EU-128)). Canada has compared its struck and lost rate of 5% to the figures given by EFSA, but we note that this comparison does not account for welfare outcomes of inhumanely stunned seals that were ultimately recovered rather than lost. (See Canada's response to Panel question No. 56, para. 252). It is also difficult to draw any conclusion with respect to the Norwegian hunt due to the lack of representative data on stunning rates. Further, it is unclear that the animal welfare consequences of mis-stunning in a slaughterhouse are the same as those in a seal hunt. For example, the circumstances and challenges of *re-stunnin*g in a commercial abattoir are distinguishable from those in a seal hunt based on *inter alia* the proximity to and restraint of the animal, though this may present distinct challenges for re-stunning in a slaughterhouse that are not present in a seal hunt. (See e.g. NAMMCO Report (2009), p. 15; EFSA Scientific Opinion related to welfare aspects of the main systems of stunning and killing the main commercial species of animals*,* EFSA Journal (2004), (Exhibit CDA-47)).

In this connection, we note the complainants' arguments that seal hunts do not pose the pre-killing stress experienced in commercial slaughters. While it is true that seals are not kept in captivity, there is some evidence indicating that seals can experience distress before stunning. Behavioural change during pain and fear in seals (including escape attempts, vocalisations, freezing, rearing up in a defensive posture, opening the mouth, and violent body movements) have been clearly observed in seals immediately prior to being clubbed, though they were generally noted to be relatively short-term events. (See Butterworth (2007), p. 38 and Video footage cited in Butterworth (2012), (Exhibit EU-38), "Fear and Distress"). Ultimately, however, we do not consider the pre-killing condition of the seal to be relevant to the question of humane *killing* and the related risks to seals of poor animal welfare in seal hunts.

[301] For instance, Daoust (2012), a 2012 study of the Canadian hunt, compiled results from four sealing seasons in the Canadian Front and Gulf. The most empirically robust of the data from this study are taken from the 2009 hunt at the Canadian Front east of Newfoundland and Labrador, from which observations were made from a sealing vessel of the complete killing process for 280 seals (only two of which were killed with a hakapik) with the collection of detailed information on several parameters associated with the process. Of particular note, the study records the original site of injury for 245 seals, of which 218 seals (89%) were struck in the head, 25 seals (10.2%) in the neck, and two seals (0.8%) in the "cranial thoracic region". Fourteen (5%) out of the 278 seals that were shot were considered to have had a poor animal welfare outcome as they were not killed immediately with the first shot and were not shot again before being retrieved. This study also recorded the skull damage to over 200 seals stunned by hakapik in the 2005 hunt in the Gulf of St. Lawrence (the majority of which received multiple blows), revealing a completely crushed skulled in all but 12 seals that had varying severity of fractures. (Daoust (2012), p. 449-450). In addition, records maintained by an inspector of the Norwegian hunt show very low struck and lost rates for 5,647 seals hunted in two years, suggesting some degree of accuracy and effectiveness in the use of the rifle. (Second Statement by Mr Danielsson, (Exhibit NOR-128), Annex; see also VKM Scientific Opinion, pp. 29-30; E. O. Øen, *The Norwegian Sealing and*

confirmation that humane stunning can be carried out in some instances, it does not contradict the existence of risks of ineffective stunning and thus poor animal welfare.[302] It is also not clear that the studies claimed to reflect high levels of animal welfare can be conclusively generalized, as they may lack "adequate sampling that is representative of the entire hunt with respect to sample size and sampling design".[303] However, even if such data could be extrapolated to the entire hunt, a poor welfare rate of 5% (as found in the most robust data sample of Daoust (2012) with the greatest continuity of evidence) would still reflect a risk of inhumane killing in seal hunts that, depending on the scale of the hunt, could represent the suffering of a large number of seals. Furthermore, there are studies showing potentially less accurate and effective applications of stunning methods[304], and accounts given by seal hunt participants likewise demonstrate a certain level of risk and inaccuracy in stunning.[305]

Checking

7.208. There is disagreement among experts about the most appropriate method for checking seals to ensure irreversible loss of consciousness. The two principal methods are a corneal reflex "blink test"[306] and palpation of the seal's skull.[307] While the loss of a blink reflex can indicate loss of consciousness, there have been concerns about its reliability and the difficulty of interpreting seals' reflexes. Skull palpation directly examines the physical damage to the seal's skull and brain,

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the Concept of 'Humane Hunting' (2006), (Exhibit NOR-36) (Norwegian study carried out on 349 weaned harp seal pups shot with rifles showing 418 fired shots of which 384 struck seals, with extra shots fired at seals shot outside the neck and head area; 343 (98.3%) of the seals were considered to have been rendered instantly unconscious or dead, while two of the 338 seals hit in the head and four of the other 11 seals were judged to be alive)).

[302] As stated in Daoust (2012) of the hakapik and rifle, and affirmed by its empirical findings above, "neither tool offers a complete guarantee of instant death". (Daoust (2012), p. 453).

[303] EFSA Scientific Opinion, p. 51. See also Canada's response to Panel question No. 172, para. 220; Norway's response to Panel question No. 172, para. 333.

[304] An earlier study by Dr Daoust et al., Daoust (2002), combined first-hand observations in different locations and years of the Canadian hunt along with post-mortem cranial examination of seven killed seals. The recorded observations in the different locations were of a different nature according to the type of examination performed, the number of seals examined, and the instrument used to stun the seal. Thus, from the 1999 hunt at the Canadian Front examining 47 carcasses of shot seals: 35 (75%) were shot in the head; six (13%) were shot in the neck with complete transection; three (6%) were shot in the ventral region of the neck with tissue damage but no bone fracture; the remaining three (6%) were shot in thorax or abdomen, one of which was found alive by itself on an ice floe. In the 1999 hunt in the Gulf, "a minimum of 225 carcasses" were examined and showed only four (1.8%) skulls without multiple calvarial fractures (highlighted by some as evidence of high stunning rates, despite the limitations noted in the EFSA Scientific Opinion, p. 57). For the 2001 hunt at the Canadian Front, a total of 167 seals shot or stuck on the head were observed, recording those brought on board (158) and lost (9), and considering three of seals to be alive after even after they were brought on board. The specific skull damage caused by a hakapik was recorded for 100 seals with the following results: "86 had a completely crushed calvarium with complete destruction of both cerebral hemispheres" and the remaining 14 had partial fractures (e.g. only one side or frontal portion of the calvarium). Other studies involving post-mortem cranial examinations show findings that were interpreted to indicate inaccurate stunning attempts with a hakapik. (See e.g. Burdon (2001) (76 cranial evaluations showing 17% without any apparent skull fractures, leading to the conclusion that it was highly unlikely that the seals would have been unconscious, and 25% with "minimal" or "moderate" fractures) and Butterworth (2007) (17 post-mortem examinations of seals killed in 2007, all of which had been clubbed and one that had also been shot, noting that 47% had been clubbed on the face or neck, and 82% had ocular damage)).

[305] See e.g. Transcript of statements to the radio station CBH-FM (28 December 2008), (Exhibit EU-105), pp. 10-11 (comments of Canadian fisherman and sealer that not "every shot is a clean one, and no matter what, how good the people are at controlling the hunt is, there's going to be some animals that's [sic] going to have to be given the second shot"); NOAH Report (2012), Appendix L, p. 6 ("Shooting whilst moving, in sea swell and/or on moving ice is highly demanding. Different degrees of wounding of animals will therefore arise, but my impression was that the proportion of animals wounded by gunshot lies within the framework of what one would necessarily expect with this kind of hunting.") and Appendix I, p. 4 (instances of wounded but not killed seals due "to a large sea swell, which during parts of the hunt made accurate shooting very difficult").

[306] See EFSA Scientific Opinion, p. 72 (explaining that "absence of a corneal reflex" can be "used as an indicator of brain damage or brain failure"); Burdon (2001), p. 4 (stating that "bilateral loss of corneal reflexes ('blinking eye' reflexes) is generally accepted as the most accurate means of confirming a loss of consciousness").

[307] IVWG Report (2005), p. 7 ("Checking (palpation of the skull) is the process of manually depressing the skull to ensure that the crushing process has been thorough (including both hemispheres of the brain) and has resulted in the desired irreversible loss of consciousness or death.").

but has drawn concern that consciousness (and therefore sensibility to pain) may persist despite severe damage.[308]

7.209. The parties specifically dispute the feasibility of determining the consciousness of seals from a distance when hunted with firearms.[309] There is evidence showing that a *successful* stun can be associated with complete immobility as well as with seizures of varying intensity resulting in a "swimming reflex".[310] Furthermore, there is evidence that an *unsuccessful* stun can be indicated by both continued movement (especially coordinated or "directed" movements) as well as immobility from "fear-induced paralysis".[311] Observations have been made that some potentially distinguishing features between these various states would make checking unconsciousness in seals plausible.[312] Nevertheless, there is a general recognition that the neurophysiological

[308] EFSA Scientific Opinion, pp. 72 (noting the divergence in some studies as to the indicative value of the corneal reflex test for loss of consciousness, and that skull palpation would need to be accompanied by criteria "before any particular degree or extent of damage felt during palpation could be reliably interpreted for field use"), 40, 50-51, and 60; Burdon (2001), p. 4 ("skull palpation is not the most reliable as a means of interpreting death or level of consciousness. The location and severity of crush injuries involving the CNS will affect the possible outcome; it is therefore open to misinterpretation. The bilateral loss of corneal reflexes ('blinking eye' reflexes) is the most accurate means of confirming a loss of consciousness."); Daoust (2002), p. 6 (nothing that "[c]omplete collapse of the calvarium can be verified quickly and reliably by palpation through the skin and blubber" and "[d]isappearance of the corneal reflex implies at least severe depression of brain stem activity"); IVWG Report (2005), p. 16 ("Properly used, the absence of corneal reflex is an accepted method to determine deep unconsciousness. However, the process for checking the corneal reflex is not simple, and can be very difficult to perform by a sealer on the ice. The nature of some head injuries may lead to the eyes being fixed and staring, despite the seal being conscious and perceiving pain."); Richardson (2007), p. 15; Butterworth (2012), p. 6; Daoust (2012), p. 452.

[309] European Union's first written submission, para. 119 and response to Panel question No. 57; Norway's opening statement at the first meeting of the Panel, para. 156; Canada's second written submission para. 50; Parties' responses to Panel question No. 57.

In this connection, the complainants emphasize the possibility of re-shooting of any conscious seal. (See e.g. Canada's second written submission, para. 67; Norway's opening statement at the first meeting of the Panel, para. 156). We simply note that this would require an assessment of the seal's consciousness from a distance on a moving boat followed and an accurate shot of a seal that, if conscious, may be a moving target that is capable of exhibiting directed and/or escape movements.

We also recognize that in Norway, "second stunning" is used in place of checking and serves as a precaution to ensure irreversible unconsciousness. (Norway's response to Panel question No. 62; VKM Scientific Opinion, pp. 27, 34). The parties dispute whether this is a faster and more reliable way of guaranteeing the success of stunning attempts. (See Third Statement by Mr Danielsson, (Exhibit NOR-163), paras. 11-12, 17-18; European Union's first written submission, para. 172). We note that although this may avoid the challenges of applying a blink test or skull palpation, its capacity to ensure irreversible unconsciousness will depend on delivery of an accurate strike of sufficient force and may require some interval of time before performance of the second step at close proximity.

[310] See EFSA Scientific Opinion, p. 71: "When stunned or killed by acute trauma to the brain, harp seals, like other animals, may undergo a period of tonic and clonic seizures. These consist of tonic contraction and lateral movements which can be very strong in some animals, and tended to be accompanied by contralateral movements of the cranial portion of the body."

[311] EFSA Scientific Opinion, p. 71, footnote 15: "A behaviour known as 'fear-induced paralysis' (the equivalent of tonic immobility or freezing behavior shown in poultry and rabbits) and characterized by tonic contraction of the whole body, has been described in a young harp seals and is shown by some animals that feel threatened. Such immobile seals might be interpreted as dead but would still be conscious." (citations omitted) See also C. Lydersen and K.M. Kovacs, "Paralysis as a defence response to threatening stimuli in harp seals (*Phoca groenlandica*)", *Canadian Journal of Zoology*, Vol. 73 (1995), (Exhibit CDA-113), p. 486 (finding that 328 of 382 harp seal pups tested (86%) and 26 of 46 adult seals tested (57%) exhibited the passive defence response of paralysis).

[312] See EFSA Scientific Opinion, p. 71:

> Despite these strong movements the animal moves non-directionally, as opposed to the directional flight response of a threatened animal. These reactions have been described as the 'swimming reflex' and may be … viewed as the movements of a successfully stunned animal … When complete relaxation of the body is seen, it is likely to be associated with complete destruction of the brain and brain stem, and with no breathing. On the other hand if an animal is immobile with some muscle tone (head raised off the ice, flippers load bearing) or it exhibits a state of fear-induced paralysis, and remains immobile, with its head retracted and its front flippers flat against its body, it may still be conscious. (footnote omitted)

See also Norway's opening statement at the first meeting of the Panel, paras. 154-170 (comments of Dr Knudsen); IVWG Report (2005), p. 17; Butterworth (2007), p. 18; Canada's and Norway's responses to Panel question No. 57 (emphasizing the relaxation, contraction, or motion of the seal's head as a factor to distinguish

responses of seals to physical trauma do pose a challenge to the assessment of consciousness, particularly since forms of both movement *and* immobility can be consistent with *either* effective *or* ineffective stunning.[313]

7.210. In the event of a gunshot powerful enough to destroy a seal's head, it would be possible to verify death by visual inspection.[314] However, even following extensive brain damage seals may "on rare occasions display some coordinated activity, if those parts of the brainstem that are responsible for basal control of breathing and/or motor activity remain intact".[315]

Bleeding

7.211. There does not seem to be any dispute that, as an isolated step, bleeding out can be performed effectively in seal hunts. However, the main concerns regarding bleeding out relate to it being performed expeditiously after successful completion of the preceding steps, i.e. on a dead or irreversibly unconscious seal.[316]

Areas of concern in the application of humane killing methods in seal hunting

Delay

7.212. The European Union has argued that when seals are shot from a distance it may take extended periods of time for sealers to manoeuvre their vessels into place to retrieve the animals.[317] The complainants have argued *inter alia* that the issue of delay is often irrelevant as shooting seals serves as a combined "stun/kill" method for a majority of seals such that there is no subsequent suffering.[318]

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successful stunning from the freezing reflex and directed/coordinated movements from unconscious movements such as the swimming reflex).

At the same time, there is evidence that reflex motions may not be easily distinguished from directed movements of the upper-half of the body. For example, Daoust (2012), while defining the swimming reflex as "lateral motions … of the caudal portion of the body", goes on to note that "[c]lose observation of post mortem reflex movements … showed that they were frequent and could also involve front flippers." (Daoust (2012), p. 452). The same study also recounts the poor animal welfare outcome of seven seals shot on the ice "[m]ost of [which] did not move at first, having presumably been stunned by the shot. By the time they showed some evidence of consciousness, mainly through head movements, the vessel was already too close to the ice floe, thus preventing the hunter from taking another shot for safety reasons." (Daoust (2012), p. 450; see also NOAH Report (2012), p. 4 and Annex R, p. 3 (of 250-300 seals hooked aboard the vessel, "[t]wo animals showed signs of life after being taken on board with an extended fishhook. It was not obvious that these animals were conscious prior to their being hooked. This shows that it is difficult to assess whether an animal is dead from the deck of the ship.")).

[313] EFSA Scientific Opinion, p. 71 ("These 'swimming' reflex movements can last for a considerable period of time and such seals have been verified as dead by veterinarians. Nevertheless, there is a concern, in the absence of other indicators such as skull palpation, that some seals showing a swimming reflex may not be unconscious … Some of these conscious responses may resemble swimming reflexes, and it is not always be [*sic*] easy to distinguish between conscious and unconscious reactions from a distance, and particularly, when it is not possible to examine the animal clinically … There is a potential paradox between a successful stun being evidenced by seizures and also by relaxation."); Burdon (2001), pp. 1, 4; Daoust (2002), pp. 2, 6 ("The frequent occurrence of strong swimming actions in seals killed by trauma complicates the determination of their death from a distance" and "the pattern of this reflex activity can be erratic and does not necessarily decrease gradually in intensity from the time of death"; further, "[c]omplete immobility immediately following a blow to the head should actually alert the sealer to the possibility that the animal is still conscious"); IVWG Report (2005), p. 16; Daoust (2012), pp. 449, 452.

The physiological features of seals discussed in paras. 7.189-7.191 have been cited in explaining the prolonged reflex reactions of seals (including muscle contraction and cardiac activity). (See NAMMCO Report (2009), pp. 10-11; Daoust (2002), p. 6).

[314] See VKM Scientific Opinion, p. 30.

[315] NAMMCO Report (2009), p. 11 (further that a "brainless (i.e. decapitated and consequently pain free) animal might actually continue to display breathing activity for several minutes").

[316] European Union's first written submission, paras. 120-121; EFSA Scientific Opinion, p. 49; IVWG Report (2005), pp. 9-10; Butterworth (2007), p. 5; Daoust (2012), p. 449 and Table 2.

[317] See European Union's first written submission, paras. 139-144.

[318] Norway's second written submission, para. 289; Canada's second written submission paras. 38 and 51. The complainants further contend that the proximity required for use of a hakapik means there will not be a delay if this instrument is used. (Norway's opening statement, paras. 154-170 (comments by Dr Knudsen); Canada's second written submission para. 44 (although Canada also acknowledges delay is

7.213. Several sources emphasize that for the three-step method to be an effective and humane way of killing seals, each step must be completed and pursued in immediate (or at least rapid) succession for any given seal.[319] We note that there is some divergence as to what degree of delay between steps can still be consistent with humane killing.[320] While not being in a position to decide based on the evidence presented to us a discrete minimum lapse of time between completion of the steps of the three-step method for a kill to be regarded as humane, we observe that delay between steps in the killing method can lead to prolonged suffering in seals and enhance the magnitude of poor welfare outcomes.[321]

7.214. Regarding actual delays in the killing process in seal hunts, evidence indicates that delays between steps in the killing process are an occurrence in seal hunts and that such delays can be attributable to pervasive characteristics of the hunts, including the physical conditions and the instruments used.[322] Evidence specifically confirms that the likelihood of delay is greater when a firearm is the stunning instrument used because of the distance between the sealer and the seal.[323]

"endemic to all wild animal hunts" and that "generally accepted animal welfare standards recognize the legitimacy of a time lag"); see also Canada's and Norway's responses to Panel question No. 60).

However, given the trend of firearms being the predominant stunning instrument and the attendant risks of inaccurate shooting, we consider that the risks of delay persist for any seal that is not rendered unconscious by an effective "stun/kill" application.

[319] See, e.g. Burdon (2001), p. 1 ("We recommend that a process of rapid stunning (resulting in a rapid loss of consciousness), followed immediately by a bilateral corneal reflex check to assess loss of consciousness, followed immediately by bleeding out to ensure death occurs, are followed in order to reduce these levels of suffering."); Richardson (2007), p. 52; Butterworth (2012), p. 4; Norway's Fisheries Directorate, Proposal to amend the rules on seal hunting (2010), (Exhibit EU-45), pp. 3-4.

[320] For example, EFSA recommends that "[t]he time between shooting and monitoring of the state of the shot animal should be short" and that "[s]eals should be bled-out as soon as possible and, preferably immediately, after they have been successfully stunned and checked to ensure that they are irreversibly unconscious or dead". (EFSA Scientific Opinion, pp. 89-90; see also IVWG Report (2005), p. 2 ("The three steps in the humane killing process -- stunning, checking that the skull is crushed (to ensure irreversible loss of consciousness or death), and bleeding -- should be carried out in sequence as rapidly as possible".); Daoust (2002), p. 6 ("No interval between an animal being shot and losing consciousness will ever be acceptable to some people.")).

We note that some reports, including EFSA, have provided recommendations and conclusions within a limited mandate to provide an opinion on the *minimization* of pain and suffering in seal hunts, taking account of practical limitations, which may affect the allowance for delay. (See EFSA Scientific Opinion, p. 49 ("Considering the safety issues associated with the difficult working conditions often encountered during certain seal hunts (e. g. the small size of some of the ice floes on which seals may be stunned), and that animals may be shot from a distance, a regulation requiring the animal to be bled immediately after stunning may not always be practicable, depending on the hunt.")).

[321] See EFSA Scientific Opinion, pp. 75-82. We note that EFSA's risk assessment to identify hazards to seal welfare relied upon "a qualitative evaluation of the nature of the adverse effect associated with the hazard in terms of intensity and *duration*." Ibid. p. 75 (emphasis added) Consequently, the duration of an adverse effect was one of the key determinants (along with intensity and probability) of EFSA's evaluation of the risks to animal welfare in seal hunting.

[322] There are certain empirical measurements of delays in seal hunts. Daoust (2002) examined IFAW video recordings of six seals and found that "the average interval between the seal being shot and being struck with a hakapik or, in one instance, being shot and hooked (in order to be brought on deck) and then bled and skinned without being struck, was 45.2 s (range 12-111 s)." (Daoust (2002), p. 4). Daoust (2012) measured the interval between steps one and two for 254 seals with a mean duration of 63.5 seconds. This increased to 91.95 seconds for seals shot in water (20 seals) and to 76.5 seconds for seals retrieved with a gaff (90 seals). (Daoust (2012), Table 2).

[323] See e.g. Daoust (2012), p. 447; NAMMCO Report (2009), pp. 18, 21, Appendix N, pp. 6-7, and Appendix G, p. 5; EFSA Scientific Opinion, p. 44 (of the use of a rifle, the "distance between hunter and seal implies a necessary delay in verifying the results of the shot" absent clear demonstration that the seal is only wounded); IVWG Report (2005), p. 9 ("The Group understands that at the Front, where seals are shot at distances of approximately 40-50 meters, there is often a delay in sealers being able to check for effective stunning."). There are also indications that the time required to reach a seal and complete the stun with a hakapik could be reduced by shooting again from the vessel (re-stunning). However, as we have found above, this again poses the risks of inaccurate shooting combined with the difficulties of assessing a seal's condition from a distance as well as the potentially erratic movements of the struck and still conscious seal. (See Daoust (2002), p. 6). The complainants have argued in this regard that what constitutes an "acceptable lapse of time" between steps in the killing process depends on the killing method used. (See Canada's and Norway's responses to Panel question No. 60).

Struck and lost

7.215. Seals that are wounded and escape beneath the surface of the water are known as "struck and lost". Seals that are struck and lost can die shortly after escaping or survive with injuries that can profoundly affect their continued survival in the wild. There is evidence (including video recordings) showing that instances of "struck and lost" do take place as a part of seal hunting and that shooting seals in open water can contribute to its occurrence.[324] Moreover, as concluded by EFSA, "struck and lost rates will also vary with the skill of the hunter and other variables, such as weather conditions."[325]

7.216. We note that the available information from different sealing countries, while confirming struck and lost seals, suggests that the actual rates may not be the same. The Canadian government currently estimates a 5% struck and lost rate in the commercial seal hunt, which in many years may be tens of thousands of seals.[326] Empirical data from Norway are generally scarce[327], and there are varying indications from sealing inspectors of the extent to which struck and lost is a problem in the Norwegian hunt.[328] In Greenland, authorities have explained that the hunting of harp seals occurs "exclusively" from small boats with rifles and that the "shooting of seals at substantial distances is the cause of most hunting losses".[329] However, because the hunt is conducted year-round, the loss rate varies according to the fat content of seals during different seasons and the salinity of different hunt localities.[330] The government of Greenland has reported results from a questionnaire survey showing that 34 per cent of hunters report struck and lost as an ordinary catch when reporting their annual harvest.[331]

Hooking / gaffing conscious seals

7.217. Physical conditions and concerns for sealers' safety may demand that the seal be hooked onto the boat if it cannot be checked on the ice.[332] This may have potentially severe negative

[324] See EFSA Scientific Opinion, pp. 25, 58, and 89; NOAH Report (2012), p. 27 and Appendix K; IVWG Report (2005), p. 2; Daoust (2012), p. 451; Daoust (2002), p. 4; B. Sjare and G.B. Stenson, "Estimating Struck and Loss Rates for Harp Seals (Pagophilus Groenlandicus) in the Northwest Atlantic", *Marine Mammal Science*, Vol. 18 (2002), (Exhibit CDA-115), pp. 710-720; A Review of Animal Welfare Implications of the Canadian Commercial Seal Hunt, cited footage, (Exhibit EU-38); Video presented by the European Union at the first meeting of the Panel, (Exhibit EU-79).

We note that shooting seals in water is prohibited under Norwegian regulations. (See Norwegian Ministry of Fisheries and Coastal Affairs, Regulation Relating to the Conduct of the Seal Hunt in the West Ice and East Ice, (Exhibit NOR-15), section 6).

[325] EFSA Scientific Opinion, p. 58.

[326] EFSA Scientific Opinion, p. 58; Butterworth (2012), p. 4. In its oral presentation at the first substantive meeting, the European Union noted that more than 136,000 seals would have been "struck and lost" at sea in the past decade alone. In a more isolated example, one study recorded that of 278 seals shot all were retrieved, i.e. none were struck and lost. Although a portion (8.6%) of these seals were shot in the water, the authors of the study record that all seals shot in the water floated and thus were able to be retrieved. (Daoust (2012), p 449).

With respect to Nunavut, "the largest Inuit territory where approximately 50 per cent of all Canadian Inuit live", COWI commented that the figure for seal catch levels "excludes hunting loss", which would require an "adjustment of at least 10%-20%" to ring seal catch figures. (COWI 2010 Report, p. 27, footnote 22).

[327] We note that "[t]here are no official statistics on numbers or percentages of seals struck and lost, either alive or dead during Norwegian hunts". (VKM Scientific Opinion, p. 32).

[328] See, e.g. Second Statement by Mr Danielsson, (Exhibit NOR-128), Annex (records kept by a sealing inspector showing extremely low levels of struck and lost rates for 5,647 seals hunted in two years); NOAH Report (2012), p. 27 and Appendix K, (2009 comments of a sealing inspector):

Of the last 20 animals shot … 9 took wounding shots and were lost – almost a 50% rate of wounding shots over more than 2 hours. Many of these animals were then shot in the sea and 2 took 6 shots to the body on the ice before taking the last 2 shots in the sea … A total of 58 animals took wounding shots and were lost in the sea, and around 10 were "lost" because of breaking ice. Then there were animals that took wounding shots on the ice and took more than 2 non-fatal shots to the body … but there were more than 200 of them.

[329] Management and Utilization of Seals in Greenland, (Exhibit JE-26), p. 19 (Box 4). See also para. 7.268 regarding the Greenlandic use of rifles from boats in "open water hunting" as a hunting method.

[330] Management and Utilization of Seals in Greenland, (Exhibit JE-26), p. 19 (Box 4).

[331] Management and Utilization of Seals in Greenland, (Exhibit JE-26), p. 28. See also COWI 2008 Report, p. 46; EFSA Scientific Opinion, p. 66 (providing the results of a questionnaire survey of seal hunters in Greenland according to which part-time hunters reported a mean struck and lost rate of 26% whereas full-time hunters reported a mean rate of 21%).

[332] See IVWG Report (2005), p. 10 ("Some members of the Working Group feel that bleeding should be a requirement of the Marine Mammal Regulations (2003), making it an offence not to bleed a seal before

impacts on animal welfare if a seal is conscious and sensible to pain during this process. In recognition of this, EFSA has recommended that "[u]nless they are in the water, [seals] should not be moved, i.e. gaffed, hauled or moved from the position they have come to rest, until it has been confirmed that they are dead or irreversibly unconscious, or have been bled-out."[333] Nonetheless, there are many reports and recorded instances of hooking/gaffing of potentially conscious seals in the evidence.[334]

7.218. The parties dispute the extent to which hooking/gaffing of conscious seals presents a problem in terms of animal welfare.[335] The parties agree, however, that in actual hunts seals are recovered onto vessels with the use of hooks and gaffs[336], which is consistent with the possibility of unstable ice conditions (so as to preclude performance of the three steps on ice) and the concomitant increase in the use of firearms. We find compelling evidence to show that the possibility of retrieving seals by hook/gaff is important to the feasibility of commercial seal hunting in Canada[337] and Norway[338]. Furthermore, given the difficulties of assessing the consciousness of

hooking or skinning. Other members of the Group feel that worker safety and the difficulties presented by the natural environment in which the hunt takes place were considerations that could make such a regulation difficult to apply, specifically in relation to hooking a seal."); Exhibits EU-44 and EU-45 (assessments of the Norwegian Fisheries Directorate of the safety of sealers and the difficulty of complying with narrow conditions to allow bleeding to take place on board).

As noted in the context of delay, we observe that some sources that have addressed the issue of hooking and gaffing before checking have given explicit consideration to accommodation of the practical demands of seal hunting. (See IVWG Report (2005), p. 7 ("The Group recognizes that part of contributing to improved animal welfare and reduced suffering is to produce recommendations that are realistic in the context of the hunt, so that sealers will accept and implement them. There needs to be a realistic balance between ideal procedure and methodology, and what is practical and achievable".)).

[333] EFSA Scientific Opinion, p. 90.

[334] See e.g. Daoust (2012), pp. 449-450 (documenting instances of gaffing); Daoust (2002), p. 4; Burdon (2001), Appendices 3-5 (results of review of video footage showing many instances of hooking alive); Butterworth (2012), p. 4; A Review of Animal Welfare Implications of the Canadian Commercial Seal Hunt, cited footage, (Exhibit EU-38); Video presented by the European Union at the first meeting of the Panel, (Exhibit EU-79).

[335] For example, in Norway, gaffing of unchecked seals is permitted by regulation only under specified circumstances that Norway argues serve to obviate welfare concerns, namely with seals that are judged to be dead. (VKM Scientific Opinion, p. 27; First Statement by Mr Danielsson, (Exhibit NOR-4), para. 28; see also footnote 338 below). Norway also contends that the European Union exaggerates the problem of hooking/gaffing conscious seals. (Norway's second written submission, para. 301).

[336] See Canada's and Norway's responses to Panel question No. 153.

[337] See Canada's response to Panel question No. 153, para. 183 ("Not all seals can be bled before being recovered, so a total prohibition on retrieval prior to bleeding is likely not feasible in practice."). See also IVWG Report (2005), p. 10.

[338] Under Norwegian regulations, "[i]t is prohibited to use a hook to lift seals that have not been bled out on board the vessel", however "[seals less than one year old] that have been shot may be lifted on board using a hook if there is no doubt that they are dead and the ice conditions make it unadvisable to walk on the ice". (Norwegian Ministry of Fisheries and Coastal Affairs, Regulation Relating to the Conduct of the Seal Hunt in the West Ice and East Ice, (Exhibit NOR-15), Section 10).

In connection with this rule, we note that the Norwegian Fisheries Directorate issued a proposal to amend the regulations based on "several reported violations" relating to requirements "that the animals must be bled on the ice immediately after they have been shot, and provisions on the use of hooks". Specifically, the Fisheries Directorate identified the practice of hooking seals aboard as occurring due to a regulatory exception for "sporadic hunting" being "redefined in practice" by sealers in addition to "worsening ice conditions". While recognizing that "banning the use of hooks on seal pups could in certain respects make hunting difficult", the Fisheries Directorate proposed revoking the exception for their use. (Norway's Fisheries Directorate, Proposal to amend the rules on seal hunting (2010), (Exhibit EU-45), p. 5; see also Consultation of Norway's Fisheries Directorate on the proposed amendment, (Exhibit EU-44), p. 5 (assuming that, due to poor ice conditions, "the extent of hooking and bloodletting on board the vessel can be expected to increase"); NOAH Report (2012), Appendix Q, pp. 4-5 and Appendix R, p. 3 (inspectors' statements of hooking making the hunt more efficient and uncertainty whether it was being done in accordance with regulations)). The proposal was opposed by the Norwegian Fishermen's Association (which stated that the "changes will substantially reduce the efficiency of seal hunting") and the Fishing Vessel Owners Association (which considered that "[i]ce conditions will usually not permit hunting if hooking is prohibited" and "the proposed tightening of the regulations could affect the economic viability of hunting"). (Consultation of Norway's Fisheries Directorate on the proposed amendment, (Exhibit EU-44)). The Ministry of Fisheries and Coastal Affairs ultimately "concluded that amending the regulation was not required". (See Norway's response to Panel question No. 170, para. 326).

the seal and the challenges of re-stunning by firearm, there is a possibility that some seals will be conscious when hooked or gaffed leading to severe negative consequences for animal welfare.[339]

Monitoring and enforcement of the application of humane killing methods in seal hunting

7.219. Both Canada and Norway have adopted regulations pertaining to the method for killing seals and for monitoring and enforcing such regulations, and provide for certain monitoring resources and activities for the purpose of achieving compliance with seal hunting regulations.[340]

7.220. There is evidence indicating that monitoring and enforcement of humane killing standards in seal hunts can be beneficial from an animal welfare perspective[341] but is challenging due to a variety of factors. In particular, the scale of a seal hunt and the large territory over which it can be dispersed contribute to the difficulties of monitoring and enforcing requirements related to humane killing.[342] We take note of the fact that there may be different situations with respect to monitoring and enforcement in the seal hunts of different countries. For example, the Canadian hunt is carried out by a considerably greater number of vessels operating in different locations, and many of the regulatory resources are either land-based or confined to a limited number of DFO vessels and helicopter(s).[343] The Norwegian hunt is typically conducted with a smaller number of vessels and requires the presence of a government inspector to be on board.[344] By way of comparison, in the

[339] Evidence shows that the practice of hooking unchecked and potentially conscious seals aboard vessels can be a consequence of the cumulative difficulties of stunning, checking, and the distinct environmental factors of seal hunts. See Daoust (2012), p. 453:

Because of the variable ice conditions at the hunt, seals killed with a rifle shot may be in the water or on icefloes too small to allow a sealer to stand on. In such cases, a gaff must be used to retrieve the animal, and this may raise welfare concerns since verification of the animal's death or state of irreversible unconsciousness has not yet been performed with step two of the three-step process and, therefore, conscious or partly conscious animals may be gaffed. Whereas shooting seals in the water can be avoided, it is not always evident to a gunner shooting a seal on the ice from a long distance whether the ice floe on which the seal rests is thick enough to support the weight of a sealer and thus allow him to retrieve the animal manually.

[340] See para. 7.237.below on "organization and control" of commercial hunts for greater detail on the regulations of Canada and Norway.

[341] See EFSA Scientific Opinion, p. 95 ("Independent monitoring of hunts (without commercial/industry and NGO links) to provide certain critical information on seal killing and stunning from a welfare perspective should be instigated."); Daoust (2002), p. 5 (qualifying the recording of a relatively high proportion of completely crushed skulls with the possibility that the presence of an observer "may have incited sealers to hit the seals' skulls more vigorously").

[342] IVWG Report (2005), p. 11 (of competitive factors and the scale of the Canadian commercial hunt "notes that these conditions can make it difficult for DFO to undertake effective monitoring and enforcement") and 12 ("The physical realities of the Canadian harp seal hunt present a significant set of challenges for observation, supervision, monitoring and enforcement" and, with regards to the Canadian Front, which was supposed to account for two-thirds of the hunt, "[b]ecause of its remoteness and difficult environmental conditions, it is generally considered not to be well observed or monitored.").

[343] See Canada's first written submission, paras. 113-114; response to Panel question Nos. 89 and 90.

Canada has clarified that in recent years its monitoring, control, and surveillance resources have included a Canadian Coast Guard ice breaker and two to three Coast Guard helicopters, and various authorities and officers aboard the ice breaker. Land-based fisheries officers are also available for either coastal or aerial patrols and/or accompanying sealing vessels (though the extent and regularity of these monitoring activities has not been made clear). We note that Canada has provided detailed inspection data from the 2011 and 2012 hunts providing observations from these various sources, and has claimed that the data show a rate of "compliance with the three-step method" that exceeds 95 per cent. (DFO, Compliance Statistics for Three-step Method, 2011 and 2012, (Exhibit CDA-96); Canada's second written submission, para. 90; response to Panel question No. 173). We first note, however, that 1,636 and 2,998 seals were observed in 2011 and 2012, respectively, which may only constitute a relatively small portion of seals actually hunted (for example, more than 40,000 harp seals were killed in the 2011 hunt). Even within this sample, although the data record the number of seals monitored "with 3-step process issues", it is not clear what kind of "anomalies indicating a possible lack of compliance" were considered to fall into this category. (See Canada's response to Panel question No. 173, para. 226). Thus, on the basis of what we have been provided, there appear to be limitations on the amount of hunting actually monitored as well as on the interpretive value of "compliance with the [Marine Mammal Regulations'] three-step method" for conclusive assessments of overall animal welfare standards. (See European Union's comments on Canada's response to Panel question No. 173 (highlighting *inter alia* the imbalance between the number of sealers and vessels compared to surveillance resources)).

[344] See Norway's first written submission, paras. 40, 252-257; Norwegian Ministry of Fisheries and Coastal Affairs, Regulation relating to regulatory measures and the right to participate in hunting of seals in the West Ice and East Ice in 2012, (Exhibit NOR-13), Section 10; COWI 2008 Report, p. 67; VKM Scientific

Greenlandic hunt, conducted by a combination of full-time and part-time hunters year-round and in many locations along the Greenlandic coast, there is some provision for monitoring by wildlife officers.[345]

7.221. Nonetheless, we consider there to be difficulties of monitoring and enforcement (as commented upon in the context of each hunt) that exist in seal hunting generally notwithstanding specific differences in the manner of hunting and monitoring. Apart from the scale and large territory of the hunt, additional factors include the constraints of surveillance resources/personnel as well as overall difficulties in sealers' application of regulatory requirements under the actual circumstances of seal hunting.[346]

Overall assessment

7.222. Based on the examination of all available evidence in the record, the Panel finds that the circumstances and conditions of seal hunts present certain specific challenges to the humane killing of seals. Such challenges result in a risk in any given seal hunt that the targeted animals may suffer poor animal welfare outcomes of varying intensity and duration.

Opinion, p. 41. See also European Union's response to Panel question No. 64, para. 205 ("Norway's commercial hunt is a smaller operation and, *a priori*, easier to monitor.").

Although Norway requires the presence of an inspector on board every sealing vessel, EFSA has commented that the number of vessels in Canada would make it "much more difficult to institute a programme in Canada similar to that in Norway". (EFSA Scientific Opinion, p. 74).

[345] See Management and Utilization of Seals in Greenland, (Exhibit JE-26); COWI 2008 Report, pp. 49-52 (noting that wildlife officers are employed by the Fisheries and Licence control, though the dispersed and opportunistic characteristics of the hunt pose a challenge to control); Government of Greenland reply to the Commission of 29 January 2013, (Exhibit EU-154) (providing explanation as to the monitoring of legal requirements regarding seal hunting, particularly the control of hunting licences).

[346] See IVWG Report (2005), pp. 11-12; Richardson (2007), p. 45; DFO Integrated Seals Management Plan 2011-2015, (Exhibit EU-42) (referring to the difficulty of tracking unregistered vessels, "especially in such a widespread activity as the seal harvest"); Consultation of Norway's Fisheries Directorate on the proposed amendment, (Exhibit EU-44), p. 5 ("The Fisheries Directorate would like to point out once again that since the hunting season 2005 infringements have been recorded of the regulations governing the practice of sealing, and that this mainly applies to provisions that were introduced in response to the industry's request for catch-enhancing measures. *Experience suggests, therefore, that all catches are conditional on hunters complying in good faith with the rules that are applicable at any given time, and that the regulations themselves cannot in principle prevent infringements occurring*.") (emphasis added); Norway's Fisheries Directorate, Proposal to amend the rules on seal hunting (2010), (Exhibit EU-45), p. 2 (desire "to propose rules that did not leave much scope for exercising discretion, since this would have placed high demands on both hunters and inspectors and would have had the potential to lead to unfounded disputes").

A report prepared by NOAH (a Norwegian animal rights NGO) compiles interviews with multiple past sealing inspectors describing the challenges of overseeing the seal hunt on account of practical difficulties and potential social pressures. (See NOAH Report (2012), p. 3). For example, a former sealer stated in a 2000 interview that "[i]t is practically impossible for one person to control everything that is going on during the hunt; then you would need one inspector for each sealer! All inspectors I have talked to agree that it is impossible to manage a proper control." A former sealing inspector stated in a 2010 interview that "[o]ne man can of course not see all that is happening. … there is a lot that you do not see. You have one inspector and several hunting teams, often the hunting teams go far away from the vessel on the ice. … The system is no guarantee that regulations are followed." (See also NOAH Report (2012), Appendix A, p. 1; Appendix B, p. 2; Appendix K, pp. 7, 12 (inspectors' accounts of the observational limitations faced by an inspector); pp. 5-6, 11-12 (inspectors' statements of compromised objectivity of inspectors as participants in the hunt and colleagues of hunters, as well as possible unwillingness of sealers to follow inspectors' guidance); Appendix K, p. 9 (sealing inspector account of tension on board over reporting witnessed infractions)). We also note that another Norwegian sealing inspector has opined that "the inspector can effectively monitor the hunt" when hunting takes place from the main boat, and can either join small boats when used or observe them with binoculars from the main boat. This same inspector added that "[i]n order to monitor effectively, it is not necessary to see every kill at close distance. An inspector can have a very good control on what is going on by keeping a more general overview." (Third Statement of Mr Danielsson, (Exhibit NOR-163), paras. 24-27).

With regard to monitoring and enforcement, we also take into consideration references to the challenges of conducting empirical research and the obstacles that seal hunts pose to gathering concrete data. EFSA, for example, points out that "there are logistical difficulties inherent in assessing objectively the processes involved when these hunts are conducted under very different, remote, uncontrolled and unverifiable conditions". (EFSA Scientific Opinion, p. 24; see also Daoust (2012), pp. 447-448 (indications that the opportunistic and sequential observations of researchers could only give detailed information on a portion of the total observed samples, which themselves were of limited size)).

7.223. Specifically, there are characteristics of the physical environment of seal hunting that affect the way seals are stunned and that can impact the degree of effectiveness of stunning attempts. We have also noted that attempts to strike or shoot a targeted seal more than once may not ameliorate the risks of ineffective stunning. Combined with the difficulties of assessing the consciousness of seals, seal hunting can present delays in carrying out the killing process and may pose specific animal welfare problems for seals that are struck and lost as well as for seals that are gaffed and hauled onto a sealing vessel while conscious.

7.224. The challenge of reconciling the requirements of humane killing with the practical risks and difficulties of seal hunting, together with the potentially large territory of the hunt, poses an obstacle to monitoring and enforcement of the application of humane killing methods. Our assessment of the evidence taken together indicates that these risks to seal welfare are present in seal hunts in general.

7.3.2.3.2.2 Characteristics of commercial seal hunting

7.225. The European Union refers to commercial seal hunts as hunts conducted "for commercial purposes, where seals are killed primarily or exclusively in order to make a profit out of the skins, oil and other products from the hunted seals".[347] Apart from the motive to make profits, according to the European Union, this commercial purpose is reflected in other characteristics of the hunt, such as its size (usually large-scale involving tens or hundreds of thousands of seals); intensity (systematic, competitive, and over a short timeframe); and the end-use of the derived products.[348] The European Union argues that these conditions characterizing commercial seal hunts therefore distinguish commercial seal hunts from IC and MRM hunts.[349]

7.226. Canada and Norway do not contest that the majority of seal hunting conducted in Canada and Norway are commercial hunts with the motive to make profits. Canada and Norway contend however that their commercial hunts are strictly regulated, conducted in a humane manner, and sustainable.[350] They further contest that their hunts can be distinguishable from IC and MRM hunts based on the purpose of the hunt as asserted by the European Union: Canada and Norway emphasize the equal presence of a commercial component in all types of seal hunting. We address the parties' arguments on this question in the subsequent section.

Factual aspects of commercial seal hunting

Identity of the hunter

7.227. Most commercial sealers in Canada are fisherman for whom the seal hunt supplements the income from fisheries.[351] There is some conflicting evidence as to the economic significance of sealing to the Canadian coastal communities where the majority of the hunt occurs.[352]

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[347] European Union's response to Panel question No. 29, para. 100.

[348] European Union's response to Panel question Nos. 8, 29, and 30.

[349] European Union's response to Panel question No. 8, para. 19.

[350] See e.g. Canada's first written submission, paras. 85, 91-121; opening statement at the first meeting of the Panel, paras 13-20; Norway's first written submission, paras. 47-55, 231-266.

[351] COWI 2008 Report, p. 24. See also COWI 2008, p. 22, (providing the history of Canadian commercial seal hunting dating back to the 18th century); COWI 2010 Report, Annex 2 (pp. 1-2).

[352] See DFO website, Sealing in Canada – Frequently Asked Questions, (Exhibit JE-28), p. 8 (stating based on estimates from the DFO and province of Newfoundland and Labrador find that "between 5,000 and 6,000 individuals derive some income from sealing", i.e. approximately 1% of the total provincial population and 2% of the labor force, which is "a substantial number of individuals in the context of small rural communities"); DFO Integrated Seals Management Plan 2011-2015, (Exhibit EU-42), pp. 3-4 ("The harvest provides important seasonal income and food to residents of small coastal communities where there have been fishery closures and employment opportunities are limited.") and 13 ("Canada's seal harvest is also an economic mainstay for numerous rural communities in Atlantic Canada, Quebec and the North. It supports many coastal families that can derive as much as 35% of their annual income from this practice."); DFO Empirical Base for Canada's Seal and Seal Products Industry, (Exhibit CDA-17), pp. 4 (noting that the volume and value of landings are not recorded against licence numbers, making it difficult to estimate individual incomes from seals) and 9 ("the seal hunt is an economic mainstay for numerous rural communities in Atlantic Canada, Quebec and the North. Canada's seal hunt supports many coastal families who can derive as much as 35% of their annual income from this practice."); DFO website, Canadian Seal Harvest – Myths and Realities, (Exhibit CDA-38), p. 1.

7.228. The participants in the Norwegian commercial seal hunt mainly come from communities in northern Norway.[353] Norway states that seal hunting contributes to the sustainability of the settlements and workplaces of coastal communities.[354]

Purpose of the hunt

7.229. Commercial gain is recognized as one of the main reasons for which seals are killed.[355] As noted by EFSA, the rationale for a particular hunt can however include one or more purposes. For example, a commercial seal hunt may generate some products that are consumed or used within the sealers' community while products sold commercially provide income for the livelihood of sealers.[356] While noting the possible overlap of purposes, EFSA maintains a distinction between "subsistence hunts" and "commercial hunts", for example when referring to data availability "as the vast majority of available data is from commercial hunts".[357]

7.230. Nevertheless, information before us confirms that a "commercial hunt" has commercial profit (rather than direct use or consumption of seal products) as its sole or primary objective.[358]

Scale of the hunt

7.231. The size of commercial seal hunts appears to be characterized by a large number of seals killed. There is, however, evidence of differences between commercial hunts in the exact amount of seals killed as well as potentially large fluctuations of seals killed over time for a given commercial hunt. For example, the Canadian harp seal hunt over the past decade has harvested a peak of roughly 365,000 seals, which has declined to just over 40,000 seals in 2011. The

See also IFAW, Economics of Canada's Commercial Seal Hunt (2011 update), (Exhibit CDA-5), p. 1 (comparing the "minor economic importance to Newfoundland and Labrador" of commercial sealing as compared to other fisheries).

[353] COWI 2010 Report, p. 31.

[354] Norway's first written submission, paras. 267-268. See also O. Vollan, *The Seal Hunt in the Nordic Countries* (Forlaget Nordvest, 1985), (Exhibit NOR-10), p. 35 (noting that Norwegian vessels began leaving for the Arctic on a regular basis starting in the 19th century and that "sealing became more important to provide income in both the northernmost and the southernmost parts of the country").

[355] For example, EFSA distinguishes this from the other two principal reasons for killing seals, namely "subsistence and cultural purposes" or "because seals are perceived as pests or competitors with humans and their activities … or as threats to other species of concern". (EFSA Scientific Opinion, p. 12; see also para. 7.225 above).

[356] EFSA Scientific Opinion, pp. 12-13. See also Canada's response to Panel question No. 132 (recognizing a "spectrum" between a "pure commercial hunt" and a "pure subsistence harvest", and that certain hunts may fall closer to one end of the spectrum than the other depending on the proportion of seal products sold commercially); Norway's opening statement at the first meeting of the Panel, paras. 92-93 and 103-105; response to Panel Question No. 28, paras. 183-185; second written submission, paras. 217-224; response to Panel question No. 132 (arguing that seal hunting will typically have a range of purposes and that it is not possible to distinguish between "commercial" and "non-commercial" hunts); European Union's comments on Canada's and Norway's responses to Panel question No. 132.

[357] See also COWI 2008 Report, pp. 22-24 and 61 (distinguishing a "commercial hunt" in both Canada and Norway).

[358] We note that there are multiple exhibits, including government documents from sealing countries, which recognize commercial sealing as a distinct activity, notwithstanding the contribution of sealing to the income and livelihood of those engaged in the seal hunt. (See DFO Integrated Seals Management Plan 2011-2015, (Exhibit EU-42) (generally referring to the "commercial" harvesting of seals as distinct from personal use and aboriginal subsistence hunting) and pp. 21-23 (explaining allocation and sharing arrangements of TAC quotas with a specific "commercial allocation" and quota allocations "set aside for special projects outside the developed commercial structure", as well as distinct rules in Canada applied to hunts by aboriginal peoples); DFO Empirical Base for Canada's Seal and Seal Products Industry, (Exhibit CDA-17), pp. 1 ("Seals are hunted commercially on the Atlantic coast of Canada, and a subsistence hunt is carried out by Aboriginal peoples in the Canadian Arctic.") and 3 ("Although [the subsistence hunt] is not a commercial hunt, cash is generated from the sale of sealskins in order to help finance the hunt, which has become more and more expensive due to higher capital and operating costs, as well as the need to travel greater distances to hunt."); DFO Overview of the Atlantic Seals Hunt 2006-2010, (Exhibit EU-40), pp. 7 and 17-20.

See also COWI 2008, pp. 22 (identifying one of the "main types" of seal hunting in Canada as being "organised commercial seal hunting" and identifying its focus as "the commercial large scale hunt"), 61 (distinguishing the "Norwegian commercial seal hunt" from the coastal hunt that is "much smaller than the commercial hunt" and a separate hunt "carried out by a limited number of hunters" in Spitsbergen and Jan Mayen), and 64 ("According to Norwegian law, the hunt is considered commercial if it contributes to the [income] of the hunter, separately or combined with other incomes.").

Norwegian hunt involved between 15,000 and 20,000 seals prior to the adoption of the EU Seal Regime, but has since fluctuated between approximately 1,000 and 10,000 seals harvested.[359]

7.232. Canada has been reported to annually issue around 15,000 seal hunting licenses, though a significantly smaller portion may actually be used.[360] In previous years, between 1,500 and 2,200 boats participated in the hunt annually[361], although this number has been reduced more recently.[362]

7.233. In Norway, the commercial seal hunt is typically carried out by a relatively small number of larger vessels (approximately 60 meters long).[363] In recent years, usually two to four ships have participated in the annual hunt in the West Ice, each with a crew of 13 to 15 people.[364]

Seal hunting period

7.234. Under Canadian regulations, the season for the commercial hunt of harp and hooded seals in the Front is generally from November 15 to May 15. The specific timing of the hunt can depend on the movement and condition of ice floes, and the majority of the hunt occurs between late-March to mid-May[365] beginning around the third week of March in the southern Gulf of St.Lawrence and around the second week of April in the Front.[366]

7.235. The Norwegian commercial seal hunt is divided between the "East Ice" and "West Ice" hunts with seasons from April 10 to June 30 and March 23 to May 15 respectively.[367] Further, the period of the hunt is determined on the basis of breeding and moulting times of harp seals so as to ensure compliance with the ban on hunting un-weaned pups.[368]

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[359] See Table 3.

[360] EFSA Scientific Opinion, p. 25; COWI 2008 Report, p. 24 (stating that only between 5,000 and 6,000 licences are actually used); DFO Overview of the Atlantic Seals Hunt 2006-2010, (Exhibit EU-40), Section 3.2 ("In 2005 the number of participants (active licence holders) was 7,000, representing 50% of the commercial sealing licences issued."); DFO Commercial Seal Harvest Overview 2011, (Exhibit JE-27), p. 2 ("Approximately 225 active professional seal licence holders participated in the Atlantic Canada Seal harvest in 2011" and 117 participated in 2010); DFO website, Sealing in Canada – Frequently Asked Questions, (Exhibit JE-28), p. 6 (stating that in 2011 there were approximately 14,000 commercial licences issued to sealers in 2011, but only an estimated 5,000 to 7,000 of those were active); DFO Integrated Seals Management Plan 2011-2015, (Exhibit EU-42), p. 14 (stating that there are approximately 6,400 active commercial licences in Atlantic Canada and "In 2010, approximately 390 people participated in the Atlantic Canada Seal harvest. This number is down significantly from 2009 which reported 1,755 active participants.").

[361] EFSA Scientific Opinion, p. 25; DFO Overview of the Atlantic Seals Hunt 2006-2010, (Exhibit EU-40), Section 3.2

[362] DFO Integrated Seals Management Plan 2011-2015, (Exhibit EU-42), pp. 13-14 (stating that "the number of active vessels in 2010 dropped to 106, from 540 active vessels the previous year"); DFO Empirical Base for Canada's Seal and Seal Products Industry, (Exhibit CDA-17), p. 2 ("Participation varies from year to year, and depends upon ice conditions, price of pelts, etc.").

[363] EFSA Scientific Opinion, p. 26; COWI 2008 Report, pp. 61-62 (less than ten vessels participating in the commercial hunt over a range of years); Norwegian Ministry of Fisheries and Coastal Affairs, *English Summary of White Paper No. 27 (2003-2004) on Norway's Policy on Marine Mammals*, (Exhibit NOR-9), p. 4.

[364] Norway's first written submission, para. 51.

[365] See EFSA Scientific Opinion, pp. 24-26; COWI 2008 Report, pp. 23-24.

[366] DFO website, Sealing in Canada – Frequently Asked Questions, (Exhibit JE-28), pp. 4-5; DFO Overview of the Atlantic Seals Hunt 2006-2010, (Exhibit EU-40), Section 3.2; DFO Integrated Seals Management Plan 2011-2015, (Exhibit EU-42), p. 23 (also stating that the "peak commercial harvest" in the Gulf is in early April).

Further, there are indications that the majority of Canadian commercial hunt can occur within a narrower timeframe (of even a few days) during the designated hunting period. DFO Integrated Seals Management Plan 2011-2015, (Exhibit EU-42), p. 23; DFO website, Sealing in Canada – Frequently Asked Questions, (Exhibit JE-28), p. 7 (indicating that the first day of the harvest is the most lucrative); DFO Overview of the Atlantic Seals Hunt 2006-2010, (Exhibit EU-40), Section 3.2 and JE-29, p. 23; Canada's first written submission, para. 55 ("In practice, the harvest season is fairly short, lasting only a few weeks in the spring, beginning on March 15 and ending some time in mid-April to mid-May, depending on the ice conditions."); Richardson (2007), p. 43 (that as many as 145,000 seals have been killed in less than two days); Butterworth (2012), p. 1 (that most seals are killed in "just a few days").

[367] VKM Scientific Opinion, p. 9 (referring to the opening and closing dates of the seasons for 2007); EFSA Scientific Opinion, p. 26.

[368] Statement of Mr Landmark, (Exhibit NOR-8), para. 33.

Hunting methods

7.236. According to sealing regulations in each country, the permitted hunting tools include hakapiks in both Canada and Norway (as well as clubs in Canada) of specified dimensions as well as firearms of specified power and ammunition. The use of nets is not allowed in the Canadian and Norwegian commercial seal hunts.[369]

Organization and control of the hunt

7.237. Both Canada and Norway maintain a licensing system for seal hunting that determines conditions of participation in the hunt.[370] In addition, both Canada and Norway establish annual total allowable catch (TAC) quotas, both of which administer these quotas through regional allocations for the various geographic areas of the commercial seal hunt.[371] Finally, there are regulations in Canada and Norway imposing requirements on the manner in which the seal hunt is conducted and dealing with the qualifications and training of sealers.[372]

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[369] See Marine Mammal Regulations, (Exhibit CDA-21) and 2011-2012 Seal License Conditions for Newfoundland and Labrador, (Exhibit EU-39); Norwegian Ministry of Fisheries and Coastal Affairs, Regulation relating to regulatory measures and the right to participate in hunting of seals in the West Ice and East Ice in 2012, (Exhibit NOR-13) and Norwegian Ministry of Fisheries and Coastal Affairs, Regulation Relating to the Conduct of the Seal Hunt in the West Ice and East Ice, (Exhibit NOR-15). See also EFSA Scientific Opinion, p. 26; COWI 2008 Report, pp. 28-29; DFO website, Sealing in Canada – Frequently Asked Questions, (Exhibit JE-28), p. 6. See paras. 7.192-7.196 above regarding seal hunting methods.

[370] See COWI 2008 Report, p. 24; 2011-2012 Seal License Conditions for Newfoundland and Labrador, (Exhibit EU-39); Norwegian Ministry of Fisheries and Coastal Affairs, Regulation relating to regulatory measures and the right to participate in hunting of seals in the West Ice and East Ice in 2012, (Exhibit NOR-13); Norway's first written submission, para. 51; Canada's first written submission, paras. 105-112.

[371] EFSA Scientific Opinion, pp. 25 and 27; COWI 2008 Report, p. 27, 62-63, and 66-67; VKM Scientific Opinion, pp. 14-15; DFO website, Sealing in Canada – Frequently Asked Questions, (Exhibit JE-28), p. 5; DFO Integrated Seals Management Plan 2011-2015, (Exhibit EU-42), pp. 17, 21-26; DFO Empirical Base for Canada's Seal and Seal Products Industry, (Exhibit CDA-17), p. 1; Norwegian Ministry of Fisheries and Coastal Affairs, *English Summary of White Paper No. 27 (2003-2004) on Norway's Policy on Marine Mammals*, (Exhibit NOR-9); Norwegian Ministry of Fisheries and Coastal Affairs, Regulation relating to regulatory measures and the right to participate in hunting of seals in the West Ice and East Ice in 2012, (Exhibit NOR-13); Joint Norwegian/Russian Fisheries Commission, *Report of the Working Group on Seals to the 40th Session – Appendix 8*, (Exhibit NOR-22); Norway's first written submission, para. 52; Statement of Mr Landmark, (Exhibit NOR-8), para. 22.

[372] See Marine Mammal Regulations, (Exhibit CDA-21) and 2011-2012 Seal License Conditions for Newfoundland and Labrador, (Exhibit EU-39); Norwegian Ministry of Fisheries and Coastal Affairs, Regulation relating to regulatory measures and the right to participate in hunting of seals in the West Ice and East Ice in 2012, (Exhibit NOR-13) and Norwegian Ministry of Fisheries and Coastal Affairs, Regulation Relating to the Conduct of the Seal Hunt in the West Ice and East Ice, (Exhibit NOR-15).

The parties have provided a great deal of information and arguments pertaining to the regulations of the Canadian and Norwegian hunt, including the development of the current regulatory schemes. While the relevant issue before us is not the adequacy of the complainants' sealing regulations, we have considered this evidence to the extent it provides insight into the conduct of seal hunts, especially regarding the challenges of applying humane killing methods and the risks of poor animal welfare. (See Norway's opening statement at the first meeting of the Panel, para. 143 ("the issue is not whether Norway's sealing regulation or practices achieve an appropriate level of protection. The issue is whether it is *possible* for the EU, as part of an alternative measure, to legislate market access requirements that would ensure humane killing of seals."); Canada's second written submission, paras. 55-69 (defending various aspects of its sealing regulatory framework, such as that steps be carried out "as soon as possible" when rifles are used and that checking occur "immediately" after use of a hakapik or club).

Canada explains that the most recent amendments to its Marine Mammal Regulations came into force on 12 February 2009, reflecting in particular the recommendations of the IVWG Report (2005). These amendments consisted of: the prohibition of the use of the hakapik or club as the primary killing instrument for any seal over one year of age; licence conditions in certain regions imposing "a daily harvest limit based on the size of the vessel with the objective of slowing the pace of the harvest"; and, for 2014, mandatory training in the three-step process for all commercial sealers, which is presently mandatory for all personal use sealers. (See Canada's response to Panel question No. 54 and first written submission, paras. 91-98). Regarding the training of sealers, for many years the basic qualification for becoming a professional sealer in Canada was to serve two years as an apprentice to an existing licensed sealer. More recently a training program was developed through the cooperation of several agencies covering aspects of the Marine Mammal Regulations, approved weapons, and the three-step process, which, although currently voluntary, will be mandatory as of 2014. (Canada's response to Panel question No. 59 and first written submission, paras. 105-112).

7.238. The Canadian commercial seal hunt is carried out by small vessels (less than 35') and "longliners" (35'-65'), and larger vessels may only participate as collector vessels. Smaller vessels may have a crew of 2-5 sealers and generally land daily to offload their catches, while longliner vessels carry larger crews and tend to stay out for a few days at a time.[373]

7.239. The Norwegian commercial seal hunt is carried out by registered ocean-going vessels found suitable and equipped for seal hunting.[374] The particular manner in which the Norwegian commercial seal hunt is conducted requires the use of large vessels that can operate with equipment and provisions for several weeks at a time.[375]

Use of products derived from the hunt

7.240. Evidence shows that commercial hunts are primarily directed toward the sale of seal products such as skins, blubber or oil, and meat. Historically, seal skins and furs have been the primary commodity sold commercially.[376]

7.241. Seal skins are used to make a wide variety of garments and accessory items, including jackets, hats, boots, slippers, mittens, purses, wallets, and novelty items.[377] Seal oil and blubber is refined and processed to make Omega-3 products, the commercial trade of which has been noted to have surpassed seal skin products in recent years.[378] The international trade in seal meat is a relatively smaller part of the commercial sale of seal products.[379]

Norway has described the regulatory history of instituting the three-step method; requirements regarding qualifications and training of those participating in the hunt; rules regarding the first stunning weapon; strengthened rules on the three-step process, for example through assignment of one person per marksman to second and third steps; a prohibition against shooting seals if the conditions are such that they cannot be struck with a hakapik or slagkrok afterwards and be bled out on the ice; and a penal provision. (Norway's response to Panel question No. 54 and first written submission, paras. 231-257; EFSA Scientific Opinion, pp. 27-28). As to training, all participants in Norway, including inspectors, must attend courses held by the Directorate of Fisheries. Hunters must pass a test on the use of a hakapik and marksmen must pass a government approved shooting proficiency test prior to every seal hunting season. (Norway's response to Panel question No. 59 and first written submission, paras. 248-251).

The European Union has taken issue with the Canadian amendments as being inadequate in several respects from the perspective of animal welfare, and cites the most recent amendments of Norway's sealing regulations in 2003 as "a major step backwards in terms of animal welfare", namely the exception allowing seals to be hooked on board before the final two steps are carried out. (European Union's second written submission, paras. 75-85 and first written submission, paras. 112-121, 171-175).

[373] DFO Integrated Seals Management Plan 2011-2015, (Exhibit EU-42), pp. 3-4; DFO Overview of the Atlantic Seals Hunt 2006-2010, (Exhibit EU-40), Section 2. See also DFO Empirical Base for Canada's Seal and Seal Products Industry, (Exhibit CDA-17), p. 5.

[374] See EFSA Scientific Opinion, p. 27; Norwegian Ministry of Fisheries and Coastal Affairs, Regulation relating to regulatory measures and the right to participate in hunting of seals in the West Ice and East Ice in 2012, (Exhibit NOR-13), section 3; Statement by Mr Landmark, (Exhibit NOR-8), para. 29; Norway's first written submission, para. 51.

[375] See Norwegian Ministry of Fisheries and Coastal Affairs, *English Summary of White Paper No. 27 (2003-2004) on Norway's Policy on Marine Mammals* (19 March 2004), (Exhibit NOR-9), p. 8.

[376] See Canada's first written submission, paras. 61-70; Norway's first written submission, paras. 85-102.

[377] See, e.g. DFO website, Sealing in Canada – Frequently Asked Questions, (Exhibit JE-28), p. 8; DFO Empirical Base for Canada's Seal and Seal Products Industry, (Exhibit CDA-17), pp. 8-9. The European Union has characterized products derived from commercial hunts (such as clothing and accessories) as "inessential" items. (See, e.g. European Union's first written submission, para. 39).

[378] See Canada's first written submission, paras. 79-80; DFO Commercial Seal Harvest Overview 2011, (Exhibit JE-27), table 12.

[379] Canada's first written submission, paras. 61-70; Norway's first written submission, paras. 86-102; COWI 2010 Report, pp. 37-38; DFO Commercial Seal Harvest Overview 2011, (Exhibit JE-27) (providing a recent update and outlook on trade in seal skins, seal oil, and seal meat); DFO website, Sealing in Canada – Frequently Asked Questions, (Exhibit JE-28), p. 8 ("Seal pelts are transformed into a wide range of final products including coats, vests, hats, boots, mittens, trims, seal leather items, and novelty items. Seal oil is used in Omega 3 health products, in paints and for fuel in Northern/Inuit communities. Seal meat is sold in a variety of raw and prepared forms for both human and animal consumption"); DFO Integrated Seals Management Plan 2011-2015, (Exhibit EU-42), p. 13 ("Traditionally, seals have been harvested for meat and for pelts, both to use locally and to sell. Pelts have been historically the most commonly-sold commercial product although prices have been highly volatile over the years, resulting in large fluctuations in the economic value of the industry."); DFO Empirical Base for Canada's Seal and Seal Products Industry, (Exhibit CDA-17), pp. 7-8; Government of Newfoundland, *Commercial Utilization*, (Exhibit CDA-23).

7.242. With respect to the commercial purpose of the hunt and its relation to the seals killed, Canada states that the pelts of beaters (a weaned harp seal of 3 weeks to 3 months old that has moulted its white lanugo fur) are of higher quality and have greater value in the marketplace.[380]

Application of humane killing methods in commercial seal hunting

7.243. We recall our conclusion above that seal hunts in general pose various risks to the welfare of seals, including the risks of ineffective stunning, delays in the killing process, struck and lost seals, and the hooking of conscious seals.

7.244. In this section, we have examined evidence of the competitive nature of commercial hunts, including how the competitive pressures in the seal hunt may have changed over time. In particular, the allocation of quotas, in combination with the specific time window for hunts[381], has been noted to place pressures on sealers to the potential detriment of animal welfare.[382] In a similar vein, there is evidence that hunts with commercial profit as their sole or primary objective operate with the incentive to kill more seals in order to maximize profit.[383] By contrast, commercial considerations have also been asserted to promote humane practices in seal hunting on the grounds that sealers may want to kill seals efficiently and thus preserve pelt quality by only targeting the seal's head.[384] As noted, commercial hunts are also conducted in accordance with licensing schemes and sealing regulations which determine *inter alia* who may participate in the hunt and when it occurs.

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[380] Canada's response to Panel question No. 91.

[381] DFO Integrated Seals Management Plan 2011-2015, (Exhibit EU-42), p. 23; DFO website, Sealing in Canada – Frequently Asked Questions, (Exhibit JE-28), p. 7 (indicating that the first day of the harvest is the most lucrative); DFO Overview of the Atlantic Seals Hunt 2006-2010, (Exhibit EU-40), Section 3.2; Richardson (2007), p. 43 (that as many as 145,000 seals have been killed in less than two days and that in 2005, 78 per cent of the harp seals killed in the commercial seal hunt were slaughtered in just six days).

[382] See EFSA Scientific Opinion, pp. 24-27 (describing the compressed sealing season and quota system in both Canada and Norway); DFO Overview of the Atlantic Seals Hunt 2006-2010, (Exhibit EU-40), pp. 17-18 (quota overrun by 10,000 seals in 2005 "largely due to the competitive nature of the hunt", also commenting on "a competitive race for seals in the Gulf of St. Lawrence in 2004 and 2005"); NOAH Report (2012), p. 10 and Appendix H, pp. 11, 15 (identifying certain "negligent infringements" of the regulations on hooking and gaffing seals "committed because hunters were excessively focused on capturing as many animals as possible, which must be considered in the company's interest."). See also NOAH Report (2012), pp. 10-13 and 21-22; Consultation of Norway's Fisheries Directorate on the proposed amendment, (Exhibit EU-44) (describing aspects of tension between commercial interest and animal welfare); Butterworth (2012), p. 8; DFO Integrated Seals Management Plan 2011-2015, (Exhibit EU-42), pp. 17, 22, and 25; IVWG Report (2005), p. 13; Butterworth (2007), pp. 4 and 13.

We note that Canada states that it has taken steps to limit the number of seals that individual vessels can take per day through seal licensing conditions. (Canada's opening statement at the first meeting of the Panel, para. 19). Canada notes, however, that such limits are not imposed in some regions "because the different nature of the hunt [in the Gulf] makes such limits unnecessary". (Canada's second written submission, para. 78). Canada submits that "the implementation of daily limits has slowed down the hunt considerably", and has clarified that limits are not applied elsewhere "because the number of sealing vessels is considerably smaller and thus there is less competition". (Canada's response to Panel question No. 171, para. 217). The European Union responds citing "public data made available to IFAW by DFO" to argue that "quota overruns" have occurred during years of high pelt prices in the region where daily limits are not currently applied by the seal licence conditions. (European Union's comments on Canada's response to Panel question No. 171). Norway has submitted comments denying a "race between sealers" and pointing out that catches have been below quota levels in recent years. (Norway's opening statement at the first meeting of the Panel, para. 188; Third Statement by Mr Danielsson, (Exhibit NOR-163), paras. 6-8).

[383] See Butterworth (2007), pp. 12-13; Richardson (2007), pp. 43-44; Butterworth (2012), p. 8. See also Norway's comments on the European Union's response to Panel question No. 118 (commenting in the context of the Greenlandic hunt that "[p]rofessional seal hunters have an incentive to maximize their income by hunting more seals.")

[384] Canada's second written submission, para. 59; Second Statement by Mr Danielsson, (Exhibit NOR-128), paras. 34-37; EFSA Scientific Opinion, p. 49; DFO Empirical Base for Canada's Seal and Seal Products Industry, (Exhibit CDA-17), pp. 12-13 (outlining Canada's pelt grading and classification system that indicates lower quality grading for pelts with holes). See also Canada's and Norway's responses to Panel question No. 70.

At the same time, it has been suggested that preserving the commercial value of the pelt can provide a disincentive to attempt to re-shoot seals that may still be conscious, thus causing delay in the killing process and prolonging suffering. European Union's opening statement at the first meeting of the Panel; Richardson (2007), p. 39.

7.245. Based on the evidence presented before us, therefore, we find that to the extent that commercial motives lead to killing a greater number of seals in hunts conducted within a limited period of time, this may additionally contribute to subjecting seals to the animal welfare risks identified above with respect to seal hunts in general.

7.3.2.3.3 Whether the distinction between commercial hunts and IC hunts is legitimate

7.3.2.3.3.1 Main arguments of the parties

Complainant (Canada)[385]

7.246. Canada argues that the detrimental impact of the EU Seal Regime on Canadian seal products through the IC exception is not related exclusively to a "legitimate regulatory distinction".[386] To determine whether the detrimental effect on Canadian imports stems from a legitimate regulatory distinction, Canada suggests that the Panel take into account the following factors: first, whether the regulatory distinction at issue is necessary in order to achieve the objectives of the measure; second, whether there is a rational connection between the regulatory distinction and the objectives of the measure in that if there is no rational connection, then the distinction is arbitrary and therefore not legitimate; and, third, whether the evidence shows that the distinction is intended to discriminate against imports as this would undermine the "legitimacy" of the regulatory distinction.[387]

7.247. Canada argues that the regulatory distinction between seal products derived from Inuit hunts and those derived from non-Inuit hunts in no way contributes to the advancement of the EU Seal Regime's animal welfare objective.[388] The cultural heritage or ethnicity of the hunters is not a legitimate regulatory distinction because it is unrelated to the central objective of the EU Seal Regime of responding to concerns about animal welfare.[389] Canada points out that the European Union is not imposing any animal welfare requirements on Inuit from Greenland, and refers to evidence suggesting that a significant number of seals in Greenland are killed inhumanely, i.e. in a manner likely to lead to avoidable pain or suffering.[390]

7.248. Furthermore, Canada argues that, to the extent that seal products derived from hunts in Canada and in Greenland exhibit the same characteristics, they should be afforded the same treatment from a regulatory standpoint.[391] Canada contends that there are significant similarities between the historical and socio-economic contexts of seal hunting in Canada and Greenland. According to Canada, in both cases, the practice of sealing is deeply rooted in the culture and tradition of the communities where the hunt takes place; the by-products of seal hunts are not only marketed outside of the country or territory but are also consumed and used in the local economy; seal hunting provides much needed employment in areas where there are otherwise not many opportunities for employment; and seal hunting is a vital and essential source of income for the community. Canada posits further that the Greenlandic seal hunt has also a significant commercial aspect and is "very sophisticated, extensive, well-organized, well-marketed, and international in scope".[392] In this respect, Canada argues, the Greenlandic seal hunt is very similar to the Canadian east coast seal harvest.[393]

7.249. For Canada, given these similarities between the hunt in Canada and Greenland, the regulatory distinction under the EU Seal Regime is not even-handed, and therefore not "legitimate".[394] Canada asserts that the regulatory distinction arbitrarily and unjustifiably

[385] As mentioned in footnote 172 above, as relevant and as appropriate, we will refer to Norway's arguments in this section. (See, for example, Norway's second written submission, paras. 256-266).
[386] Canada's first written submission, paras. 335-346.
[387] Canada's first written submission, para. 387
[388] Canada's first written submission, para. 402.
[389] Canada's first written submission, para. 406.
[390] Canada's first written submission, para. 402; response to Panel question No. 8; second written submission, para. 248. Canada refers to the COWI 2008 Report, where it is stated that 16 per cent of seals in Greenland are caught using nets, and that causing death by suffocation as a result of trapping seals under water is considered as "inherently inhumane". (COWI 2008 Report, p. 52).
[391] Canada's first written submission, para. 403.
[392] Canada's first written submission, para. 406.
[393] Canada's first written submission, para. 406.
[394] Canada's first written submission, para. 405.

discriminates against the vast majority of Canadian seal products[395] and observes that except for the condition relating to the 'indigenous' status of the hunter, the Canadian seal hunt meets all of the conditions under the IC exception. Canada maintains that the distinction in the IC category is thus fundamentally one between permitted and prohibited seal products based on the "indigenous" status of the harvester.[396]

7.250. Finally, Canada observes that since the adoption of the EU Seal Regime in 2009, Greenland has now surpassed Canada to have the world's largest seal harvest.[397]

Respondent (European Union)

7.251. The European Union submits that the "regulatory distinction" under the EU Seal Regime between IC hunts and commercial hunts is "legitimate" because (a) it is based on a legitimate objective, and (b) it is designed and applied in an even-handed manner.[398]

7.252. The European Union asserts that if the objective of the IC exception is found to be legitimate, then *a fortiori*, the regulatory distinction should also be considered "legitimate".[399] On this basis, the European Union highlights the importance of seal hunting for the subsistence, cultural identity, and social cohesion of Inuit and indigenous communities.[400] Furthermore, the European Union notes that the sale of seal skins, an important by-product of the hunts, serves to cover the hunting expenses incurred by Inuit and indigenous communities.[401]

7.253. Further, the European Union submits that the IC distinction is neither "rationally disconnected" from nor does it "undermine" the objective pursued by the EU Seal Regime.[402] For the European Union, when assessing the moral implications of seal hunting it is both legitimate and appropriate to take into account the purpose of each type of hunt. The European Union contends that traditional hunts conducted for subsistence purposes do not raise the same moral concerns as commercial hunts conducted solely for the purpose of obtaining products, such as fur, to be used in manufacturing inessential goods.

7.254. The European Union argues that, in light of the "unique" situation in which Inuit and indigenous communities find themselves, it would have been "morally wrong" for the EU legislator to prohibit the placing on the market of seal products resulting from the hunts traditionally conducted by those communities.[403] In essence, for the European Union, seal hunts conducted for the subsistence of Inuit and indigenous communities benefit from an "inherent legitimacy" that "overrides the general concerns over the killing methods for purely commercial motives".[404] The European Union stresses that its regulatory approach on seal products, in particular regarding the IC exception, is in line with a consistent body of international law echoing the legitimacy of protecting the interests of Inuit and indigenous communities, and that the European Union is bound by these international legal instruments.[405]

7.255. According to the European Union, the IC exception is designed and applied in an even-handed manner[406]; it is "calibrated" and does not go beyond what it is necessary to achieve its purpose.[407] Moreover, the European Union maintains that the IC exception is not discriminatory

[395] Canada's first written submission, para. 405.
[396] Canada's first written submission, para. 405; second written submission, para. 247.
[397] Canada's first written submission, para. 406.
[398] European Union's first written submission, para. 259; second written submission, paras. 219-234.
[399] European Union's first written submission, para. 261; second written submission, paras. 220-227.
[400] European Union's first written submission, paras. 263-266.
[401] European Union's first written submission, para. 266.
[402] European Union's opening statement at the first substantive meeting of the Panel, paras. 12-17.
[403] European Union's first written submission, para. 268.
[404] European Union's first written submission, para. 268; second written submission, para. 221.
[405] European Union's first written submission, paras. 270-272; second written submission, paras. 223-224 and footnote 245 (citing UN Department of Economic and Social Affairs, "State of the World's Indigenous People", ST/ESA/328 (2009), p. 10, available at http://www.un.org/esa/socdev/unpfii/documents/SOWIP_web.pdf)).
[406] European Union's first written submission, para. 301; second written submission, paras. 228-233.
[407] European Union's second written submission (citing Appellate Body Report, *US – Tuna II (Mexico)*, para. 297).

because it is equally available with regard to all hunts conducted by indigenous communities, including the Canadian Inuit.[408]

7.3.2.3.3.2 Analysis by the Panel

7.256. In this section, we address the question of whether the distinction drawn by the EU Seal Regime between commercial hunts and IC hunts, and consequently between products derived from each category of hunts, is legitimate within the meaning of Article 2.1 of the TBT Agreement.[409]

7.257. We recall the Appellate Body's explanation that the "legitimacy" of the regulatory distinctions drawn by a measure must be analysed in light of the objective of the measure and based on *inter alia* the particular circumstances of the dispute, including the measure's design, architecture, structure, operation, and application of the measure.[410] The Appellate Body further explained that where a regulatory distinction is not designed and applied in an even-handed manner — because, for example, it is designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination — that distinction cannot be considered "legitimate".[411]

7.258. Given the close relationship between the TBT Agreement and the GATT 1994[412], including the similarities in their texts[413], we find it useful, in examining the measure's consistency with the TBT Agreement, to recall the Appellate Body's guidance in previous disputes concerning the obligations under the chapeau of Article XX of the GATT 1994. According to the Appellate Body, analysing whether discrimination is "arbitrary or unjustifiable" under the chapeau would entail an analysis that relates primarily to the "cause" or the "rationale" of the discrimination "put forward [by a regulating Member] to explain its existence".[414]

7.259. The guidance provided by the Appellate Body regarding an analysis of the requirements under Article 2.1 of the TBT Agreement and the chapeau of Article XX of the GATT 1994 therefore suggests that the legitimacy of the regulatory distinction between commercial hunts and IC hunts should be determined by examining the following questions: first, is the distinction rationally connected to the objective of the EU Seal Regime; second, if not, is there any cause or rationale that can justify the distinction (i.e. "explain the existence of the distinction") despite the absence of the connection to the objective of the Regime[415], taking into account the particular

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[408] See, e.g. European Union's second written submission, para. 207.

[409] See paras. 7.130-7.131 above.

[410] Appellate Body Report, *US – COOL*, para. 271 (referring to Appellate Body Report, *US – Clove Cigarettes*, para. 182).

[411] Appellate Body Report, *US – COOL*, para. 271 (referring to Appellate Body Report, *US – Clove Cigarettes*, para. 182).

[412] See Appellate Body Report, *US – Clove Cigarettes*, paras. 91-101. The Appellate Body observed that "the two agreements [the TBT Agreement and the GATT 1994] overlap in scope and have similar objectives."

[413] The chapeau of Article XX of the GATT 1994 provides:

> 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 … (emphasis added)

The fifth recital of the preamble of the TBT Agreement provides:

> *Recognizing* that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they 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, and are otherwise in accordance with the provisions of this Agreement. (emphasis added)

[414] Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 225-226 (citing Appellate Body Reports, *US – Gasoline*, pp. 25-26 and 28-29; *US – Shrimp*, paras. 166 and 172; *US – Shrimp* (*Article 21.5 – Malaysia*), paras. 144 and 147).

The Appellate Body in *Brazil – Retreaded Tyres* observed that the Appellate Body's analysis of the measures under the chapeau of Article XX of the GATT 1994 in previous disputes focused on whether discrimination that might result from the application of those measures had a legitimate cause or rationale in the light of the objectives listed in the paragraphs of Article XX of the GATT 1994.

[415] See Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 226-234.

The Appellate Body stated, "we have difficulty understanding how discrimination might be viewed as complying with the chapeau of Article XX when the alleged rationale for discriminating *does not relate to the pursuit of* or *would go against the objective* that was provisionally found to justify a measure under a paragraph of Article XX." (emphasis added)

circumstances of the current dispute; and, third, is the distinction concerned, as reflected in the measure, "designed or applied in a manner that constitutes arbitrary or unjustifiable discrimination" such that it lacks "even-handedness".[416]

7.260. We examine these questions in turn.

Whether the IC distinction is connected to the objective of the EU Seal Regime

Characteristics of IC hunts

Identity of the hunter

7.261. The EU Seal Regime defines "Inuit" as "indigenous members of the Inuit homeland, namely those arctic and subarctic areas where, presently or traditionally, Inuit have aboriginal rights and interests, recognised by Inuit as being members of their people and includes Inupiat, Yupik (Alaska), Inuit, Inuvialuit (Canada), Kalaallit (Greenland[417]) and Yupik (Russia)"[418]; and "other indigenous communities" as "communities in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions".[419]

7.262. The complainants do not contest the definition of "Inuit" or "other indigenous communities" as stipulated in the EU Seal Regime.

Purpose of the hunt

7.263. Seal hunting by Inuit or other indigenous communities appears to largely serve two purposes: first, for their own use and consumption as part of their culture and tradition[420]; and

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In our view, the Appellate Body's reasoning in *US – Clove Cigarettes* also supports our approach here. In that dispute, regarding the legitimacy of the regulatory distinction drawn by the measure in question (i.e. distinction between clove and menthol cigarettes), the Appellate Body examined the following questions: first, whether the distinction was connected to the objective of the measure that justified the prohibition of clove cigarettes; and, second; in the negative, whether the United States provided any reasons independent of the objective of the measure that could justify the distinction ("the reasons presented by the United States for the exemption of menthol cigarettes from the ban"). (Appellate Body Report, *US – Clove Cigarettes*, para. 225).

[416] See Appellate Body Report, *US – COOL*, para. 340.

In this connection, we take note of Canada's point that the conditions for the IC and MRM exceptions are not the distinctions that must be assessed under the legitimate regulatory distinction test but can be evidence indicating whether the distinction between conforming and non-conforming products is administered in an even-handed manner. (Canada's response to Panel question No. 28, paras. 127-129; second written submission, para. 246).

[417] Ninety per cent of the total population (56,600) in Greenland is Inuit. (COWI 2010 Report, p. 28; Management and Utilization of Seals in Greenland, (Exhibit JE-26), p. 11).

[418] Basic Regulation, Article 2(4).

[419] Implementing Regulation, Article 2(1).

According to the COWI 2010 Report, Inuit or indigenous communities with a tradition of seal hunting that are likely to meet the definitions of such status under the EU Seal Regime are located in Alaska, Canada, Greenland, Norway, Russia, and Sweden. (COWI 2010 Report, pp. v, 23-33; see also Figure 3-1 in the COWI 2010 Report for an overview of the geographical spread of Inuit and other indigenous communities. Ibid. p. 23).

Further, the COWI 2010 Report explains that a hunter's status as belonging to an Inuit or indigenous community is based on self-determination. (See Annex 3, p. 1 (referring to United Nations Declaration on the Rights of Indigenous Peoples, Resolution of the General Assembly 61/295, September 2007, (UN Declaration), Article 3; ILO Convention 169, Indigenous and Tribal Peoples Convention, 1989, (ILO Convention), Art. 1; and Charter of the Inuit Circumpolar Council (Article 6 of which defines Inuit as "indigenous members of the Inuit homeland recognized by Inuit as being members of their people and shall include the Inupiat, Yupik (Alaska), Inuit, Inuvialuit (Canada), Kalaalit (Greenland) and Yupik (Russia)").

[420] See COWI 2010 Report, pp. 24, 26, 29, and 32. For example, in describing Inuit and indigenous communities in Northern and North-Eastern Canada, the Report notes that "seal meat is a traditional staple component in the Inuit diet and Inuit continue to hunt predominantly ring seals for their meat and skins … Sharing of seal meat fosters relationships throughout the community, while the hunt is a means for learning across generations, not just about the hunt itself, but about the environment in which Inuit live and survive. Clothing made of sealskin is still regularly worn both for practical and cultural reasons. Finally, selling some of

second, albeit to varying degrees depending on the Inuit or indigenous community concerned, for the exchange of by-products of seals such as seal skins either through barter for other goods, or sale on the market to generate income.[421] In some cases, and particularly in the case of Greenland, seal products such as skins obtained from Inuit hunters may also be traded in international markets.[422]

7.264. We address below the parties' specific arguments concerning the purpose of IC hunts in the context of our analysis of the European Union's justification for the distinction between commercial hunts and IC hunts.

Scale of the hunt

7.265. Inuit or members of other indigenous communities hunt seals mostly on an individual basis using small boats or using sledge dogs and catching a few seals at a time.[423]

7.266. Although relatively little information on the number of seals hunted by Inuit or indigenous communities other than Greenland has been submitted to us, available data suggest potentially wide variation in the scale of different Inuit hunts. For example, the annual average catch of harp, ringed, and hooded seals in Greenland is reported to be approximately 164,000 seals.[424] COWI provides various data showing a "harvest of as many as 1,600 animals" by Alaskan Aleuts and indigenous populations and 35,000 (predominantly ring) seals annually hunted in Nunavut in Canada.[425]

Seal hunting period

7.267. In contrast to commercial hunts, which were noted to occur during limited time periods within established seasons, IC hunts are typically conducted throughout the year.[426]

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the sealskin to markets provides additional income for a population group that has an average income far below the Canadian average." With respect to an Inuit community in Alaska (Aleut), it describes that "the current hunt in Alaska by Aleut takes place purely for subsistence, with most products consumed locally, or shipped to Aleut communities outside Alaska. It acts as a supplement to the Aleut diet and is still seen as contributing to social and cultural traditions." (Ibid. pp. 26-27). Concerning Inuit or indigenous communities in Russia, the Report states that "the majority of seals that are hunted by Inuit or indigenous communities are not industrialised, but consist of small-scale hunts serving as input to the daily life of these communities …" (Ibid. p. 32).

See also Management and Utilization of Seals in Greenland, (Exhibit JE-26), p. 11 ("The hunting of seals is a vital component of everyday life and culture in Greenland. It provides a significant amount of nutritious food and income to families living in remote coastal communities."); Nunavut Report (2012), (Exhibit JE-30), pp. 1 and 8.

[421] See Nunavut Report (2012), (Exhibit JE-30), p. 2; Management and Utilization of Seals in Greenland, (Exhibit JE-26), pp. 25-28; COWI 2008 Report, pp. 26 (describing both the sale of seal skins by Inuit hunters in Canada to generate income as well as economic contribution from "production of meat and skins for garments and arts and crafts") and 45 (distinguishing the "formal economy" of Greenlandic sealing that refers to economic transactions and the "informal economy" covering "the use of the catch for own consumption, barter or [unreported] sales").

[422] See Management and Utilization of Seals in Greenland, (Exhibit JE-26), pp. 25-28; Nunavut Report (2012), (Exhibit JE-30), p. 2; COWI 2010 Report, p. 29; COWI 2008 Report, pp. 26 and 45-46.

[423] COWI 2010 Report, p. 27; Management and Utilization of Seals in Greenland, (Exhibit JE-26), p. 11.

[424] See Management and Utilization of Seals in Greenland, (Exhibit JE-26), pp. 1-2 (indicating approximate annual catch levels of 82,000 harp seals; 78,000 ringed seals; and 4,600 hooded seals). Full time hunters constitute almost 7% of the work force (approximately 32,000) in Greenland. In Canada, by comparison, 38,018 harp seals were taken in 2011, and less than 100 hooded seals have been taken in recent years.

The COWI 2010 Report describes seal hunts in Greenland as "large scale" stating that "the nature and scale of the hunt vary considerably across the sealing countries. From large scale commercial hunt in Canada, Greenland, Namibia, Russia to small scale hunting in Sweden and Finland with a few hundred seals killed on an annual basis … All countries with the exception of Greenland have seal management plans in place and/or quotas for a yearly total allowance catch (TAC)." (COWI 2010 Report, pp. iv-v).

[425] COWI 2010 Report, pp. 23 and 27.

[426] See COWI 2010 Report, pp. 27-28; Nunavut Report (2012), (Exhibit JE-30), p. 1; Management and Utilization of Seals in Greenland, (Exhibit JE-26), pp. 18-20.

Hunting methods

7.268. Inuit communities use both traditional methods/tools (e.g. harpoons, kayaks, dog sleds) as well as more modern equipment (e.g. rifles, boats, snowmobiles).[427] Evidence also shows that methods such as "trapping and netting" are used in IC hunts.[428] The COWI 2010 Report explains in this regard that the notion of "hunts traditionally conducted" referred to in Article 3.1 of the Basic Regulation can be defined as "hunts that are part of the cultural tradition of a given community located in a specific geographical area"[429], and does not indicate "hunts conducted traditionally, i.e. in a traditional manner". Based on information concerning Greenland, the use of rifles from boats in "open water hunting" or trapping and netting appear to be the main hunting methods for Greenlandic Inuit.[430]

Organization and control of the hunt

7.269. IC hunts take place mostly on an individual basis and Inuit hunters are not usually subject to monitoring or enforcement of sealing regulations in their hunts.[431]

7.270. However, we observe that Greenland requires a full time hunter to have a licence to qualify for selling the skins to the tannery Great Greenland A/S.[432] According to a document published by the Government of Greenland, a large number of hunters use "the possibility to sell skins to the tannery in total a couple of months a year".[433]

Use of products derived from the hunt

7.271. Inuit and other indigenous communities use all parts of the hunted seals. They consume seal meat as an essential part of their diet and use seal skins and other parts of seals for a variety of purposes as part of their culture and tradition.[434] As noted above, Inuit and other indigenous communities also sell by-products of the hunted seals, mostly seal skins, to markets.[435]

Connection between the IC distinction and the objective of the EU Seal Regime

7.272. Based on our examination of the evidence pertaining to IC hunts described above, we have determined that there are certain characteristics that are unique to IC hunts[436], namely: they are

[427] See Parties' responses to Panel question No. 67.

[428] Netting and underwater trapping as a killing method are intended to "restrain the seal in a submerged position long enough for it to exhaust its oxygen supply and to die from asphyxiation" (EFSA Scientific Opinion, p. 46). Nets are currently employed in Artic regions where seasonal and environmental factors make other hunting methods unviable. Whereas humane killing methods, and the three-step method in particular, are designed to minimize the suffering experienced by the targeted animal, netting has raised severe animal welfare concerns for subjecting seals to prolonged durations and intense magnitudes of suffering. (See EFSA Scientific Opinion, pp. 46-48; NAMMCO Report (2009), p. 11).

[429] Management and Utilization of Seals in Greenland, (Exhibit JE-26), p. 9.

[430] Management and Utilization of Seals in Greenland, (Exhibit JE-26), pp. 18-20; see also Nunavut Report (2012), (Exhibit JE-30), p. 1.

[431] See EFSA Scientific Opinion, p. 13; COWI 2008 Report, pp. 25 and 44.

[432] Management and Utilization of Seals in Greenland, (Exhibit JE-26), p. 21; see also COWI 2008 Report, p. 45.

[433] Management and Utilization of Seals in Greenland, (Exhibit JE-26), p. 21 (stating that selling sealskins is for many hunters a very important secondary income, and approximately 100 hunters make more than EUR 10,000 yearly on sealskins).

[434] COWI 2010 Report, pp. 24, 26; Management and Utilization of Seals in Greenland, (Exhibit JE-26), pp. 2 and 11; Parties' responses to Panel question No. 66. Canada submits that in east coast sealing communities, seal meat is consumed and very popular. Norway submits that meat from seal hunted in Norway (non-Inuit) is sold to restaurants, at local markets, or directly to consumers who come to the ships to buy.

In Greenland, seal meat is also used as food for sledge dogs, which power the sledges from which ice-fishing takes place. (Management and Utilization of Seals in Greenland, (Exhibit JE-26), p. 11).

[435] In Greenland, for instance, ringed seal was the most important species in relation to food supply and income, but the demand from the fur industry made it more attractive to hunt harp seals as Greenlandic hunters in some years offered a slightly better price for sealskins from harp seals compared to those from ringed seals. (Management and Utilization of Seals in Greenland, (Exhibit JE-26), p. 22)

[436] The European Union highlights the uniqueness of IC hunts based on the following elements: (a) identity of the hunter: hunts conducted by Inuit or other indigenous communities characterized by its high dependence on seal hunting and a tradition of seal hunting in the geographical region; (b) end-use of the

conducted by Inuit and indigenous communities with a tradition of seal hunting dating back thousands of years[437]; they are normally carried out on an individual basis using small boats; and they take place throughout the year. In addition, by-products of the hunted seals are usually used and consumed by the community and, depending on the Inuit or indigenous community concerned, also sold on the market to generate income.[438]

7.273. We recall our assessment above that the circumstances and conditions of seal hunts present certain challenges to effecting humane killing of seals and that there is a risk in any given seal hunt that the targeted animals may suffer poor animal welfare outcomes of varying intensity and duration.[439] IC hunts are no different; they are conducted in a similar physical environment often using similar hunting methods as described above. Thus, similar challenges to effecting humane killing of seals exist in IC hunts. Further, evidence shows that hunting methods used by Inuit or indigenous communities such as "trapping and netting" are not consistent with humane killing methods.[440]

7.274. As discussed in detail in section 7.3.3.1 below, the objective of the EU Seal Regime is to address the moral concerns of the EU public with regard to the welfare of seals. Specifically, the EU public moral concerns as described by the European Union are two-fold. They include: (a) the incidence of inhumane killing of seals; and (b) EU citizens' individual and collective participation as consumers in, and their exposure to, the economic activity which sustains the market for seal products derived from inhumane hunts. As part of our analysis in section 7.3.3.1, we also found that the EU public concerns on seal welfare relate to seal hunting in general and are not confined to any particular type of hunts.

7.275. Given that the same animal welfare concerns as those arising from seal hunting in general also exist in IC hunts, and considering the evidence showing the use by Inuit hunters of methods such as "trapping and netting", we find that IC hunts can cause the very pain and suffering for seals that the EU public is concerned about. Accordingly, the IC distinction does not bear a rational relationship to the objective of addressing the moral concerns of the EU public on seal welfare.[441]

7.276. Canada submits that this rational disconnection between, on the one hand, the regulatory distinction between IC hunts and other hunts, and, on the other hand, the objective of protecting the welfare of seals or the public morals to which they relate, indicates that the distinction in question is not justifiable, and hence discriminatory contrary to Article 2.1 of the TBT Agreement.[442] The European Union does not contest that seal products potentially qualifying

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by-products of the hunt: partial or entire use, consumption or processing of the by-products of the hunt within the communities according to their traditions; and (c) subsistence purpose of the hunt: contribution of the hunt to the subsistence of the community. (European Union's Response to Question 66; see also COWI 2010 Report, p. 27 (explaining that the majority of seal products are consumed locally by Canadian Inuit and where only one third of sealskins end up on the market) and pp. 29-30 (explaining local consumption by Inuit in Greenland); Canada's response to Panel question No. 74, para. 320; Norway's response to Panel question No. 41, para. 217 (confirming that half of the skins are traded in and exported from Greenland, while the other half are consumed locally)).

[437] The European Union explains that a "tradition of seal hunting" does not relate to the methods of hunting but rather means that the community in question must have a tradition of seal hunting in the geographical region. (European Union's opening statement at the first substantive meeting of the Panel, para. 14 (also referring to Canada's response to Panel question No. 67, para. 292 ("the hunt itself is traditional and a fundamental element of the Inuit culture and society")).

[438] See para. 7.263.

[439] See paras. 7.222-7.224 above.

[440] Some of the Greenlandic harvesting practices have in fact been recognized as creating poor animal welfare outcomes. (EFSA Scientific Opinion, p. 47). The "trapping and netting" method which is used in Greenland precisely because of the environmental factors that prevail during the winter months (limited sunlight), is "problematic" from an animal welfare perspective. EFSA has concluded that netting of seals is "inhumane". (EFSA Scientific Opinion, p. 89; see also Management and Utilization of Seals in Greenland, (Exhibit JE-26), p. 19). Norway claims that hunts that the European Union labels "non-commercial" pose severe animal welfare problems. (See, e.g. Norway's first written submission, paras. 680-684; response to Panel question No. 73, para. 408).

[441] We note our consideration in section 7.3.3.1 that the aim, purpose, and target of the EU Seal Regime could not be considered as protecting the economic and cultural interests of Inuit or indigenous communities.

[442] Canada's second written submission, para. 251. Canada argues that although the Inuit hunt may not be as widespread, organized, systematic, intensive, or competitive as commercial hunts, the European Union has adduced no evidence to show that the existence of these factors produces a different animal welfare

under the IC exception do not conform to the objective of protecting animal welfare and can in fact compromise it.[443] The European Union explains, however, that the application of certain hunting methods such as "trapping and netting" is indispensable for the subsistence of the Inuit, who otherwise would not be able to hunt during almost half of the year, and this therefore overrides the animal welfare concerns.[444]

7.277. We turn to examine the rationale submitted by the European Union as a justification for the distinction between commercial and IC hunts.

Whether the cause or rationale put forward by the European Union for the distinction between commercial *and* IC hunts *is justifiable*

7.278. We understand the European Union's justification of the distinction between commercial and IC hunts to rest on two premises. First, if the objective of the IC exception is found to be legitimate, then, *a fortiori*, the regulatory distinction should also be considered "legitimate".[445] Second, highlighting the alleged uniqueness of IC hunts, the European Union argues that IC hunts, which are conducted for the "subsistence" of Inuit and indigenous communities, benefit from an "inherent legitimacy" that "overrides the general concerns over the killing methods for purely commercial motives".[446] According to the European Union, therefore, the *purpose* of the hunt distinguishes IC hunts from commercial hunts and justifies any risk of suffering inflicted upon seals as a result of the hunts conducted by those communities.[447] The European Union explains further that, because the subsistence of the Inuit and other indigenous communities and the preservation of their cultural identity provide benefits to humans, from a moral point of view, this outweighs the risk of suffering inflicted upon seals as a result of the hunts conducted by those communities.

7.279. First, we are not persuaded by the European Union's premise that a distinction in treatment is justified on the basis of the legitimacy of the objective of the distinction itself, in this case the IC exception. We do not read the Appellate Body guidance on Article 2.1 to support this interpretation. Under Article 2.1 of the TBT Agreement, the inquiry, according to the Appellate Body, is whether the detrimental impact caused by a measure stems from a legitimate regulatory distinction drawn in the measure. If it does, then the detrimental impact is justified and will not offend the non-discrimination obligation under Article 2.1. The analysis of determining the legitimacy of a regulatory distinction is not, as the European Union suggests, simply whether there is a legitimate objective, for example, within the meaning of Article 2.2. In our view, the existence of a legitimate objective will not automatically imbue the discrimination under Article 2.1 with legitimacy; were that to be the case, one would simply need to assess whether the detrimental impact stems from a "legitimate" objective. Even if the objective of the IC exception were separately examined and found to be a "legitimate" policy objective within the meaning of Article 2.2, that alone would not necessarily lead to establishing the legitimacy of drawing the *distinction* – as opposed to the legitimacy of a certain policy objective *per se* – between

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outcome. (Canada's second written submission, para. 249 (referring to European Union's response to Panel question No. 8, para. 20)).

See also Norway's first written submission, paras. 698-703. According to Norway, the same animal welfare conditions prevail in all countries where seals are hunted because all seals are equally vulnerable to hunting that does not respect animal welfare. Norway also makes reference to the EFSA Scientific Opinion, which states that traditional or "subsistence" hunts have "few, if any, regulations and are poorly monitored". Norway infers from this conclusion that "some traditional methods used in 'subsistence' hunts may be detrimental to animal welfare". (See Norway's first written submission, para. 680 and footnote 980 (citing EFSA Scientific Opinion, p.13)).

[443] European Union's response to Panel question No. 10, para. 44.

[444] European Union's response to Panel question No. 8, paras. 22-23; second written submission, para. 232 (citing Management and Utilization of Seals in Greenland, (Exhibit JE-26), p. 19 ("[F]rom October to the end of March, netting is the prevailing method since it is impossible to use any other technique during the dark winter months")).

[445] European Union's first written submission, para. 261; second written submission, paras. 220-227.

In using the term "legitimate"" in this context, the European Union did not clarify whether the objective of the IC exception is "legitimate" within the meaning of Article 2.2 of the TBT Agreement. Further, the European Union took the position in the context of Article 2.2 that the protection of the interests of Inuit or indigenous communities is *not* an independent objective of the EU Seal Regime as a whole. (See, below section 7.3.3.1).

[446] European Union's first written submission, para. 268; second written submission, para. 221.

[447] European Union's second written submission, paras. 230, 232. See also European Union's response to Panel question No. 10.

commercial and IC hunts through the IC exception within the meaning of Article 2.1. The objective of the IC exception is an element that may be examined as part of the "cause" or "rationale" put forward by the European Union to seek to justify the IC distinction. But it is not determinative of the issue of the legitimacy of the regulatory distinction.

7.280. Next, based on the alleged uniqueness of IC hunts, in particular the "subsistence" purpose of IC hunts, the European Union argues that IC hunts are justifiably distinguishable from commercial hunts conducted primarily or exclusively for commercial purposes.[448] According to the European Union, the regulatory distinction made by the EU Seal Regime between conforming and non-conforming seal products is primarily based on the "purpose" of the hunt from which a given product was derived; the term "purpose" is used to refer to the principal aim of the hunt in question, i.e. the primary reason why the seal in question is killed. The purpose of the hunt is also reflected in other characteristics of the hunt, such as its size, intensity or end-use of the products, which together constitute a "type".[449]

7.281. Canada does not contest the unique characteristics of IC hunts. In fact, Canada acknowledges that, regardless of hunting methods, the Inuit hunt itself is traditional and a fundamental element of Inuit culture and society.[450] For example, Canada states that the purpose of the Canadian Inuit hunt today is not materially different from the hunt 1,000 years ago, although the emergence of a monetized society and new technologies has caused the Canadian Inuit to commercialize some output to generate income.[451] Canada however disagrees with the European Union on whether the purpose of IC hunts ("subsistence" purpose) and the purpose of commercial hunts ("primarily or exclusively commercial reasons") can strictly be distinguishable as asserted by the European Union. Canada argues that the "subsistence" purpose of IC hunts can equally be used to describe the Canadian east coast seal hunt (commercial hunts).[452]

7.282. To assess the issue of whether the alleged difference in the purpose of the hunt constitutes a justifiable rationale or cause for the distinction in question, despite its disconnection from the objective of the measure, we must examine two questions: first, whether, and, if so, how, the purpose of IC hunts differs from the purpose of commercial hunts; and, second, whether any distinction found in the *purpose* of the hunt justifies the distinction drawn under the measure between commercial and IC hunts.

Whether the purpose of IC hunts differs from the purpose of commercial hunts

7.283. The term "subsistence"[453] is not defined in the EU Seal Regime. A dictionary definition of the term provides *inter alia* the following: "the action or condition of subsisting or of supporting life, the provision of food etc", "means of supporting life; livelihood", "a bare or minimal level of existence; an income providing this", or "food supply, provisions".[454] Dictionary definitions thus

[448] European Union's response to Panel question No. 30; see also footnote 60 (referring to debates within European Parliament in submitting amendments to the Commission Proposal. See Report on the Proposal for a Regulation of the European Parliament and of the Council concerning Trade in Seals Products (5 March 2009), (Parliament Report), (Exhibit JE-4), p. 64).

For the term "commercial" in this context, the European Union explains that it means the following: "seals are killed with a view to making profit out of the sale on commercial markets of products such as skins or oil". Further, according to the European Union, commercial seal hunts are "organised hunting, on a wide scale with reference to the hunting area and/or the number of animals killed, by people paid to do this in order to supply seal product processing enterprises on a regular and continuous basis for commercial purposes".

[449] European Union's response to Panel question No. 29.

[450] Canada's response to Panel question No. 67.

[451] Canada's response to Panel question No. 67.

[452] Canada's comments on the European Union's response to Panel question No. 121. Canada submits that seal hunting has a long tradition in the Atlantic region, dating back to the 15th century, and plays a role in the social and economic well-being of these communities.

[453] According to the preamble of the Basic Regulation, seal products deriving from hunts traditionally conducted by Inuit communities and which contribute to their subsistence should not be covered by the prohibitions provided for by this Regulation. COWI explains that this recital indicates that the intention of the regulation is to protect the given communities by avoiding negative impacts on the community, hence taking a broad interpretation of the term subsistence. (COWI 2010 Report, p. 9).

See also Basic Regulation, Article 3.1(c).

[454] *Shorter Oxford English Dictionary*, 6th edn, A Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 3087. ("7. The action or condition of subsisting or of supporting life, the provision of food etc. … 8. (A)

suggest that subsistence is closely linked to the notion of providing food or income to support life or livelihood.[455]

7.284. We observe that EFSA also correlates the subsistence purpose of the hunt to the *identity* of the hunter: "the term 'subsistence hunt' is often used to describe a hunt where the seal is killed by an aboriginal for personal consumption".[456] Indeed, the European Union acknowledges that the distinction for hunts conducted for "subsistence purposes" relates specifically to hunts "where seals are killed primarily in order to contribute to the subsistence *of Inuit and other indigenous communities*".[457]

7.285. Information submitted to the Panel confirms that certain Inuit or indigenous communities also sell by-products, mostly seal skins, of their hunts on the market. The extent of such commercial transactions seems to vary, however, depending on the particular Inuit or indigenous community concerned (e.g. bartering with other goods, placing meat or skins on the local market, or selling skins for international markets).[458] For example, based on the information in the COWI 2010 Report, the current hunt in Alaska by Aleut takes place purely for subsistence, with most products consumed locally, or shipped to Aleut communities outside Alaska. The same is true for Inuit in Russia; "the majority of seals that are hunted by Inuit or indigenous communities are not industrialised, but consist of small-scale hunts serving as input to the daily life of these communities …".[459] As regards Canadian Inuit, most of the seal products are consumed locally by Canadian Inuit themselves and only one third of sealskins end up on the market.[460] In Greenland, where 90 per cent of the population are Inuit, half of the skins are consumed locally, and the other half are traded in and exported from Greenland.[461]

7.286. The European Union agrees that qualifying IC hunts may "have a commercial dimension".[462] According to the European Union, if this were not the case, the IC exception would have served no purpose under the EU Seal Regime. The European Union explains that part of the cultural heritage of seal hunting involves bartering the outputs for necessary goods. It also maintains that, now that bartering is rarely practised, that cultural heritage is continued through placing the products on the market and then using the proceeds to buy necessary goods and finance the cost of conducting seal hunting.

7.287. To us, the commercial aspect of IC hunts resembles the purpose of commercial hunts, which is to earn income (and make profits) by selling by-products of the hunted seals. Further, in our view, this commercial aspect of IC hunts is related more to their need to adjust to modern society rather than to continuing their cultural heritage of bartering. The European Union has not explained their position that the commercial aspect of IC hunts is merely a modern version of bartering.

7.288. Nevertheless, based on the definition of the term "subsistence" as well as the evidence concerning Inuit and indigenous communities with a tradition of seal hunting, we consider that the subsistence purpose of IC hunts encompasses not only direct use and consumption of by-products of the hunted seals as part of their culture and tradition, but also a commercial component, to the extent that Inuit or indigenous communities also exchange some by-products of the hunted seals

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means of supporting life; (a) livelihood. Now *spec.*, a bare or minimal level of existence; an income providing this. B Food supply, provisions.").

[455] We also note that "subsistence" can be defined as "using wildlife locally for food, clothing, and shelter, and for making tools, rather than putting wildlife products into trade." (Andrew Linzey , Public Morality and the Canadian Hunt (2005), (Exhibit EU-35), p. 35 (referencing *inter alia* D. Lavigne, V. Scheffer, and S. Kellert, "The evolution of North American attitudes toward marine mammals"' in J.R. Twiss Jr. and R. R. Reeves (eds), *Conservation and Management of Marine Mammals* (Washington and London: Smithsonian Institution Press, 1999), p. 37).

[456] EFSA Scientific Opinion, p. 13.

[457] European Union's response to Panel question No. 29, para. 100. (emphasis added)

[458] COWI 2010 Report, pp. 27, 29-30; Canada's response to Panel question No.74, para. 320; Norway's response to Panel question No. 41, para. 217.

[459] COWI 2010 Report, p. 32.

[460] Evidence indicates that "less than 2% of aboriginal people in Canada are involved in commercial trapping of animals for fur." (Andrew Linzey , Public Morality and the Canadian Hunt (2005), (Exhibit EU-35), p.13)

[461] See Management and Utilization of Seals in Greenland, (Exhibit JE-26), pp. 11 and 25.

[462] European Union's response to Panel question No. 32, para. 112; closing statement at the second substantive meeting of the Panel, p. 4.

for economic gain. As observed by EFSA, a particular hunt may have one or several purposes.[463] Unlike commercial hunts, however, most Inuit and indigenous communities do not appear to hunt seals for the sole or primary purpose of selling them on the market. Rather, seal hunting is a manifestation of a way of living for Inuit and indigenous communities and is an activity that defines them as Inuit.[464] The commercial aspect of IC hunts is thus not the same in its extent as that associated with commercial hunts.

7.289. In conclusion, while IC hunts may also have a commercial aspect, we are persuaded that the subsistence aspect of IC hunts, combined with the identity of the hunter as Inuit, has significance for their culture and tradition as well as for their livelihood.[465] To that extent, the primary purpose of IC hunts is distinguishable from that of commercial hunts.[466]

Whether the difference in purpose between commercial and IC hunts justifies the distinction drawn under the measure between these two hunts

7.290. Having determined that there is no rational connection between the objective of the EU Seal Regime as a whole and the distinction between commercial and IC hunts, in essence because the IC hunts pose at least the same risks to the animal welfare of seals as the commercial hunts, we then examined whether the distinction could nevertheless be justified. The first element of this analysis involved a consideration of whether the primary purpose of the IC hunts could be distinguished from the primary purpose of the commercial hunts. In this we determined that the purpose of the two hunts were distinguishable. The second element of the examination involves an analysis of whether this difference in purpose justifies the IC distinction.

7.291. In this regard, we recall the Appellate Body's statement that:

> the task of interpreting [the chapeau of Article XX of the GATT 1994] is essentially the "delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the right of other Members under varying substantive provisions … of the GATT 1994. … *This line of equilibrium is not fixed and unchanging and moves "as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ*."[467] (emphasis added)

7.292. The European Union points out that the protection of the economic and social interests of Inuit or indigenous communities is recognized at the international level as illustrated, for example, in the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration)[468] and in

[463] EFSA Scientific Opinion, pp. 12-13.

[464] See European Union's responses to Panel questions Nos. 8, para. 20; and 30, para. 103.

[465] See for instance paragraph 7.272 above.

[466] European Union's second written submission, para. 231 (referring to Canada's response to Panel question No. 67, para. 292).

[467] Appellate Body Report, *US – Shrimp*, para. 159. See also Appellate Body Report, *Brazil – Retreaded Tyres*, para. 224.

See also the Appellate Body's approach in *US – Clove Cigarettes* as noted above in footnote 415.

[468] The UN Declaration is a Resolution of the UN General Assembly (General Assembly Resolution A/RES/61/295 of 13 September 2007) affirming indigenous peoples' right to self-determination (Articles 3 and 4) and "to maintain and strengthen their distinct political, legal, economic, social and cultural institutions" (Article 5). States are called on to "provide effective mechanisms for prevention of, and redress for … [a]ny action which has the aim or effect of dispossessing them of their … resources" (Article 8(2)(b)).

In this vein, further recognition of various social and economic interests, including the preservation of cultural heritage and control over resources, is reiterated throughout the UN Declaration. See e.g. Article 20(1) ("Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities".); Article 26(2) ("Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired".); Article 29(1) ("Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources".); Article 32 ("Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources".)

the ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention).[469]

7.293. Further, the recognition of the interests of Inuit or indigenous communities is also reflected in the legislative history of the EU Seal Regime as well as in Canadian sealing regulations. The legislative history of the EU Seal Regime and other measures with respect to seal hunting show that the interests of the Inuit have consistently been addressed and/or taken into account in the form of exceptions. For example, the 1983 Directive banning imports of skins of whitecoat pups of harp seals and of pups of hooded seals (blue-backs) was limited to "only apply to products not resulting from traditional hunting by the Inuit people".[470] In addition, the 2006 Declaration of the European Parliament prompting the legislative process of the EU Seal Regime contemplated that the final regulation "should not have an impact on traditional Inuit seal hunting".[471]

7.294. Canada also exempts Inuit from certain provisions of its sealing regulations.[472] Further, Canada acknowledges the conflicting interests at issue between seal welfare and the interests of Inuit and other indigenous communities engaged in seal hunting. For example, Canada notes that "the onus is not on the complainants to offer solutions to enable Greenlandic sealers to improve animal welfare standards without putting at risk the subsistence of the Inuit and the preservation of their cultural identity."[473] We also observe Inuit exceptions in similar measures adopted by other WTO Members on trade in products derived from marine mammals.[474]

7.295. In our view, these sources, taken in their entirety as factual evidence[475], demonstrate the recognized interests of Inuit and indigenous peoples in preserving their traditions and cultures.

[469] The ILO Convention (Convention No. 169 of 27 June 1989) similarly exhorts governments to account for and protect the interests of indigenous peoples through *inter alia* "promoting the full realisation of the social, economic and cultural rights of these peoples with respect to their social and cultural identity" (Article 2(2)(b)). The ILO Convention recognizes that "the integrity of the values, practices and institutions of [indigenous] peoples shall be respected" (Article 5(b)). Most relevantly, the ILO Convention states that the "rights of [indigenous peoples] to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources"(Article 15(1)).

We note that the definition of "other indigenous communities" in the Implementing Regulation mirrors in identical language provisions from the ILO Convention on its scope of application. See Article 1(b) of the ILO Convention and Article 2(1) of the Implementing Regulation.

[470] Council Directive No. 83/129 of 28 March 1983 concerning the importation into Member States of skins of certain seal pups and products derived therefrom, Official Journal of the European Communities, L Series, No. 91 (9 April 1983), p. 30, (Seal Pups Directive), (Exhibit CDA-12), Article 3. We note that, although the Directive was predicated on concerns about the population status of harp and hooded seals, preamble recitals highlighted that "the exploitation of seals … is a natural and legitimate occupation and in certain areas of the world forms an important part of the traditional way of life and economy".

[471] Parliament Declaration, (Exhibit JE-19), para. 2.

[472] Canada argues that the European Union is incorrect when it states that Canada itself exempts the Inuit from the animal welfare requirements provided in Canada's hunting regulations. According to Canada, the coverage of the MMR is determined by a complex set of constitutionally determined parameters in Canada, with some Aboriginal hunters subject to them while others are not. Inuit hunters in Nunavut – where most Inuit seal hunting occurs – are also subject to their own regulatory regime, which is determined by a land claims agreement negotiated between the federal government and the Inuit. It is therefore also not correct to say that Canada "allows" the Inuit to hunt seals by netting them, as this would imply that federal regulations include a permissive provision in this regard.

Based on Canada's explanation on this issue and the European Union's comments on Canada's explanation, the Panel understands that certain Inuit in Canada are subject to parts of the sealing regulations, but not all of the regulations. We observe in this regard the European Union's statement that as the regulations apply only to the designated seal hunting areas in Canada and exclude the areas where Inuit sealers operate, Inuit are exempted from, for example, the "prohibition against the use of nets or other weapons otherwise deemed to be unacceptably cruel". (See Canada's response to Panel question No. 114 (referring to the European Union's response to Panel question No. 8, para. 24) and the European Union's comments on Canada's response to Panel question No. 114).

[473] See Canada's second written submission, para. 251.

[474] See, e.g. United States Marine Mammal Protection Act of 1972, (Exhibit JE-15), section 101(a) (laying down a "moratorium on the taking and importation of marine mammal products") and section 101(b) exempting "the taking of any marine mammal" by Alaskan natives for "subsistence purposes or for making "native articles of handicrafts and clothing"; Ley General de Vida Silvestre (amendment of 26 January 2006), (Exhibit EU-29), Artículo 55bis (prohibiting the importation, exportation and reexportation of any species of "mamífero marino y primate") and Capítulo II "Aprovechameiento para fines de subsistencia".

[475] In taking into account the recognition given by international instruments in the context of the United Nations and the ILO to the interests of Inuit and indigenous communities, the Panel is mindful that these

More specifically, in the case of seal hunts, the evidence before us shows that seal hunting represents a vital element of the tradition, culture, and livelihood of Inuit and indigenous communities.

7.296. Although we agree with Canada that a cause or rationale for a certain distinction may not be justifiable if such cause or rationale is not connected to the main objective of the measure, we are mindful that the justifiability of a specific cause or rationale provided for a given distinction must be examined on a case-by-case basis.[476] In the circumstances of this dispute, the interests to be balanced against the objective of the measure at issue are grounded in the importance, recognized broadly in national and international instruments, of the need to preserve Inuit culture and tradition and to sustain their livelihood, particularly in relation to the significance of seal hunting in Inuit communities.

7.297. Further, the factual circumstances of this dispute can be differentiated from those of a previous dispute where a rationale or cause for a certain exception or regulatory distinction was not found justifiable. In *US – Clove Cigarettes*, the United States explained the distinction at issue (i.e. allowing menthol cigarettes while prohibiting clove cigarettes) was based on the alleged risks (namely health care costs and black market smuggling) arising from withdrawal symptoms that would afflict menthol smokers. The Appellate Body did not find this reason persuasive enough to justify the distinction between prohibited (clove cigarettes) and permitted (menthol cigarettes) products which were found to be "like" and presented the same health risks for smokers. We also note that in *Brazil – Retreaded Tyres*, certain imports of retreaded tyres were excluded from the scope of the ban on the grounds that the MERCOSUR arbitral tribunal made a ruling to that effect (i.e. to respect trade rules under the MERCOSUR). The Appellate Body found the exception arbitrary and unjustifiable due to the lack of any rational connection to the objective of the ban (i.e. environmental purposes), and the rationale for the exception, namely the MERCOSUR ruling was not considered by the Appellate Body sufficient to justify the exception in the face of the rational disconnection to environmental purposes.

7.298. Unlike the situations in *US – Clove Cigarettes* or *Brazil – Retreaded Tyres*, the cause or rationale for the exception granted under the EU Seal Regime to products derived from IC hunts is justifiable despite the rational disconnection to protecting seal welfare[477], because it is founded on the unique interests of Inuit and indigenous communities, which are and have been recognized broadly, as discussed above. Additionally, as noted above, evidence shows that Inuit interests have always been raised as an important consideration when adopting a regulation relating to seal products, including the current measure.[478] Under these circumstances, we are persuaded that the protection of Inuit interests justifies the distinction between commercial and IC hunts. We thus consider that the European Union has explained sufficiently the basis for distinguishing IC hunts from commercial hunts through the IC exception.

7.299. Before turning to our conclusion on the justifiability of the rationale given by the European Union for the distinction between IC and commercial hunts, we recall the European Union's reference to the alleged moral concerns of the EU public concerning the economic and social interests of Inuit and indigenous communities. According to the European Union, the "standard of the EU public's morality" requires examining in each case whether the suffering inflicted upon animals is outweighed by the benefits to humans (such as Inuit and other indigenous communities) or to other animals.[479] Although we found based on available evidence that the EU public had moral concerns on seal welfare in general, we did not consider that the evidence before us supports the European Union's position that the EU public attributes a higher moral value to the protection of Inuit interests as compared to seal welfare.[480]

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instruments are not WTO instruments and they do not set out WTO obligations *per se*. We are considering the content of these instruments as part of the evidence submitted by the European Union to support its position concerning the interests of Inuit and indigenous communities, not as legal obligations of Members.

[476] See para. 7.172 above.

[477] By definition, the term "exception" refers to "a particular case or individual that does not follow some general rule or to which a generalization is not applicable". (*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 885).

[478] In contrast, the exceptions in *Brazil – Retreaded Tyres*, for instance, were introduced during the application of the ban.

[479] European Union's response to Panel question No. 31.

[480] See para. 7.410 and footnote 676.

Nor are we presented with evidence establishing the precise scope of the "basic morality" of EU citizens as claimed by the European Union.[481]

7.300. In conclusion, based on the factors considered above, we are persuaded by the European Union's explanation that the primary purpose of IC hunts, namely to preserve the tradition and culture of Inuit and to sustain their livelihood, is distinguishable from that of commercial hunts, and justifies the IC distinction, which protects IC interests. We do not find, however, in the evidence presented to us that the rationale or the cause of the distinction can be linked to the alleged "standard of the EU public's morality" in general.[482]

7.301. We next proceed to examine whether this distinction between commercial and IC hunts, as reflected in the EU Seal Regime through the IC exception, is designed and applied in an even-handed manner.[483]

Whether the distinction between commercial and IC hunts, as reflected in the IC exception of the EU Seal Regime, is designed and applied in an even-handed manner

7.302. The IC exception is embodied in Article 3(1) of the Basic Regulation. It provides that "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. These conditions shall apply at the time or point of import for imported products".

7.303. To implement this provision, Article 3(1) of the Implementing Regulation sets out that, to fall under the *IC hunts* category, seal products must originate from seal hunts that satisfy the following three conditions:

a. seal hunts conducted by Inuit or other indigenous communities which have a tradition of seal hunting in the community and in the geographical region;

b. seal hunts the products of which are at least partly used, consumed or processed within the communities according to their traditions; and

c. seal hunts which contribute to the subsistence of the community.

7.304. Canada submits that with respect to Greenland in particular and its qualification under the IC exception, Greenland's commercialization of output is considerably more extensive and organized than Inuit elsewhere, with a large-scale commercial enterprise (Great Greenland A/S), significant capital investment, such as processing and manufacturing facilities, and sophisticated distribution channels. Greenland's production volume and value dwarfs the commercialized output

[481] Referring to the panel reports in *US – Gambling* and *China – Audiovisual Products*, the European Union states:

> The European Union considers that, once it is established that the basic standard of conduct which the EU Seal Regime seeks to uphold is part of the European Union's "public morals", it is not necessary to prove that each of the individual outcomes from the application of that rule in specific situations is regarded by the EU public as a separate rule of public morality on its own. Instead, the mere fact that the EU legislator has made a proper application of the basic rule of morality would be sufficient to confer upon each of those outcomes the status of "public morals". (European Union's response to Panel question No. 31)

The guidance provided by previous panels, as referenced by the European Union to support its position in this regard, pertained to the scope of "public morals" with respect to the policy objective pursued by the regulating Member through the *main measure* at issue. Therefore, the context in which such reasoning was developed in the previous disputes is not the same as in the current context where the European Union must justify the existence of the regulatory distinction under the measure through an exception (i.e. IC exception).

[482] See paras. 7.401-7.402.

[483] We recall the Appellate Body's statement in *US – Gasoline*:

> The chapeau by its express terms addresses, not so much the questioned measure or its specific contents as such, but rather *the manner in which that measure is applied* … The provisions of the chapeau cannot logically refer to the same standard(s) by which a violation of a substantive rule has been determined to have occurred. To proceed down that path would be both to empty the chapeau of its contents and to deprive the exceptions in paragraphs (a) to (j) of meaning. (Appellate Body Report, *US – Gasoline*, pp. 22-23)(emphasis added, original footnote omitted)

of Canada's Inuit; whereas commercial sale of sealskins by Nunavut Inuit is clearly a mere adjunct to the more central purpose of the Canadian Inuit hunt, which is subsistence, Greenlandic Inuit are major commercial operators and conduct the largest commercial seal hunt in the world since 2009.[484] In that sense, according to Canada, the hunts occurring in Greenland and in Canada both have strong commercial elements. Therefore, the artificial distinction created by the European Union by virtue of IC hunts has no basis and is simply unjustified.[485]

7.305. At the outset, we observe that Canada does not contest the status of Greenland as Inuit. Rather, Canada's argument is focused on the fact that compared to other Inuit and indigenous communities practising seal hunts, the Greenlandic seal hunts practically have a commercial aspect that closely resembles that of commercial hunts. This, according to Canada, demonstrates the arbitrariness in the design and application of the distinction between commercial and IC hunts as reflected in the IC exception under the measure.

7.306. We observe that since the introduction of the EU Seal Regime in 2010, Greenland has been the only Inuit community that has applied for and obtained the benefits of the IC exception under the measure. Although such fact alone is not sufficient to establish arbitrariness in the design or application of the IC exception, it may be an indication that a certain *inherent* flaw in the design and structure of the IC exception prevents other potentially qualifying Inuit and indigenous communities from benefiting from the exception. Against this background, we examine whether the IC exception is designed or applied such that only Greenland can *de facto* benefit from the exception.

7.307. Based on a variety of considerations, we considered above that the "subsistence" purpose of IC hunts includes the need to preserve the culture and tradition of Inuit and indigenous communities and to sustain their livelihood. We found that this purpose of IC hunts, combined with the identity of the hunter as Inuit, distinguishes IC hunts from that of commercial hunts.

7.308. Based on the text, we consider that the requirements of the IC exception are generally linked to the characteristics of IC hunts as discussed above, particularly in terms of the identity of the hunter with a tradition of seal hunting, the use of by-products from the hunted seals, and the contribution of the hunts to the subsistence of the community. The scope and meaning of the "subsistence" criterion under the requirements, however, is not defined under the measure.[486] Regardless, the parties do not dispute that all of the communities mentioned in the illustrative list of Inuit and indigenous communities under the Basic Regulation, including from Canada's Nunavut and from Greenland, would potentially qualify under the measure.[487]

7.309. Having regard to the actual application of the IC requirements, particularly the commercial aspect of the subsistence criterion, the information before us indicates that, compared to IC hunts in Canada, Alaska, or Russia where most of the hunted seals are used for personal use, over 50 per cent of the hunted seals in Greenland are sold to the tannery of Great Greenland A/S. The tannery, Great Greenland A/S, is owned by the Government of Greenland and is equipped with a modern facility using state of the art technology in the processing of sealskins.[488] In fact, the tannery of Great Greenland A/S is currently claimed to be "one of the world's leading in producing high quality furs and leather from sealskins".[489] Seals in Greenland are hunted by paid, full time seal hunters (2,100 over the last five years) and paid, leisure time hunters (5,500).[490] It is also

[484] Canada's response to Panel question No. 67.

[485] Norway also emphasizes the commercial aspect of Greenland's hunts whereby 53 per cent of seal hunting is described as a "commercial activity". (Norway's comments on the European Union's response to Panel question No. 121).

[486] We note an observation in the COWI 2010 Report that for a hunt to qualify as a hunt for "subsistence" under the Basic Regulation, the following criteria must be met: (a) the hunt is not conducted for the sole purpose of placing on the market (i.e. the motivation behind the hunt is not purely commercial); (b) part of consumption is on the local market (i.e. the seal is not killed in order to export the products for a commercial profit); and (c) contribution to maintaining the community economically or socially. It also states that the hunt must not be organized on a large scale. (COWI 2010 Report, p. 13).

[487] Canada agrees that seal products from Inuit and other indigenous communities located in Canada would qualify to be imported and placed on the market in the European Union based on the IC requirements under the measure. (Canada's response to Panel question No. 116)

[488] Management and Utilization of Seals in Greenland, (Exhibit JE-26), p. 25.

[489] Management and Utilization of Seals in Greenland, (Exhibit JE-26), p. 25. The tannery operates 46 trading stations all over the country, making it possible for hunters in small communities to sell their sealskins.

[490] Management and Utilization of Seals in Greenland, (Exhibit JE-26), p. 21.

noted that since 2009 a hunter requires a licence as a full time hunter in order to qualify for selling the skins to the tannery Great Greenland A/S.

7.310. Based on available data, we further observe that the number of seals caught annually in Greenland has always been over 163,000 for the period of 1993-2009. Half of these skins are normally traded, and it is reported that Greenland has stored around 300,000 sealskins since the introduction of the EU Seal Regime.[491] By contrast, in the case of Nunavut in Canada, "in 2006, over 6,000 sealskins were exported". The volume of seals hunted and traded in Greenland is thus comparable to that of commercial (rather than IC) hunts in Canada[492], and much larger than other Inuit or indigenous communities that may potentially qualify under the IC exception. Although the scale of the hunt *per se* is not a determinative in distinguishing IC hunts from commercial hunts, we recall that the large scale of the hunt was highlighted as one of the factors characterizing commercial hunts.[493]

7.311. We also take insight from the following statement in "Management and Utilization of Seals in Greenland":

> Previously, ringed seal was the most important species in relation to food supply and income, without any doubt. However, the demand from the fur industry has now made it more attractive to hunt harp seals since Greenlandic hunters in some years were offered a slightly better price for sealskins from harp seals compared to sealskins form ringed seals, as prizes [sic] are fixed while the skins are subsidized by the Government of Greenland. The increasing numbers of harp seals have also played an important role in the choice of hunting method.[494]

7.312. The processing of, and trade in, seal products are also integrated among Greenland, Canada, and Norway.[495] For instance, when the supply of sealskins from local hunters were low due to weather conditions, the tannery of Great Greenland A/S found it necessary to import raw sealskins from Canada to make the best possible use of the capacity at the tannery, and thus also be able to continue to offer local Inuit hunters reasonable prices for their sealskins.

7.313. The factors considered above, namely the level of development in the commercial aspect of Greenlandic seal hunts; the volume of sealskins traded in Greenland; and the integrated nature of the seal product industries in Greenland, Canada, and Norway, indicate that the purpose of seal hunts in Greenland has characteristics that are closely related to that of commercial hunts. Although we recognize that about half of the hunted seals are also used for personal purposes in Greenland and form an important part of their culture and tradition as Inuit, the degree of the commercial aspect of their hunts is comparable to that of the commercial hunts. Greenlandic seal hunts are thus the most commercialized among any other Inuit or indigenous communities. The Government of Greenland itself acknowledges that "Greenland is a country of contrasts. We have culture and tradition that go 4000 years back in time. The Greenlandic society is also part of the

[491] See Management and Utilization of Seals in Greenland, (Exhibit JE-26), p. 22, table 2. See also Canada's first written submission, paras. 127-128; opening statement at the first meeting of the Panel, para. 84; response to Panel question No. 41.

We observe that Greenland is cited as one of the "large-scale commercial" sealing countries in certain exhibits. (See, e.g. Parliament Report, (Exhibit JE-4), p. 32).

We also recall the Appellate Body's guidance that the effects of discrimination [regulatory distinction] might be a relevant factor, among others, for determining whether the cause or rationale of the discrimination is acceptable or defensible and, ultimately, whether the discrimination is justifiable; however, it cannot be an exclusive factor. (Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 225-226).

[492] See Table 2 and 3.

[493] The COWI 2010 Report also states that the hunt must not be organized at large scale for a hunt to qualify as an IC hunt under the EU Seal Regime.

[494] Management and Utilization of Seals in Greenland, (Exhibit JE-26), p. 22.

[495] Parties' responses to Panel question No. 152; COWI 2010 Report, pp. 41-46 (illustrative scenarios for trade in seal products).

modern and developing world today".[496] Hunting of seals for Greenland therefore is now a "mixed economy, with subsistence and monetary elements coexisting".[497]

7.314. As noted above, no other Inuit or indigenous communities, potentially eligible for the IC requirements, have applied for the IC exception since the introduction of the EU Seal Regime. For example, with respect to Inuit seal hunts in Canada, Canada explained that due to the reliance of the Canadian Inuit on the marketing channel provided by commercial hunts for the sale of their products, and given the limited volume of products derived from Canadian Inuit hunts, it is not cost effective under the current circumstances to segregate Inuit products from other products. We also observed that seals hunted by Inuit or indigenous communities in Russia or Alaska are almost entirely used for personal use and consumption. Therefore, based on available evidence, among a small number of Inuit and indigenous communities that may potentially satisfy the specific requirements of the IC exception, Inuit in Greenland and Canada are the most likely, if not the only, beneficiaries under the measure. Given the factual circumstances of the Inuit and indigenous communities in Canada as explained above, however, currently, Greenland, with the most commercialized of IC hunts, is in fact the only beneficiary of the IC exception.

7.315. The legislative history of the EU Seal Regime suggests that this is not merely an incidental effect of the application of the measure. We observe that prior to the crafting of the specific requirements of the IC exception in the Implementing Regulation, seal hunts in Greenland were considered to be the only Inuit hunts that could benefit from the IC exception. In fact, the COWI Reports anticipated that no other Inuit and indigenous communities would be able to benefit from the IC exception "as only Greenland will be able to make the investments needed to make use of exemptions" and "the scale of the Canadian hunt is too small and not as centrally organized as that in Greenland".[498] Canada also explains that it is not economically feasible for Canadian Inuit to develop their own processing and distribution chains, given that the Inuit have relied on synergies with southern producers; as those networks may no longer be viable because of the EU Seal Regime, considerable investment would be needed to develop a new processing and distribution centre.[499]

7.316. Moreover, in the actual operation of the IC exception, Danish customs authorities processed imports based on certificates issued by the Greenlandic authorities prior to the Greenlandic entity obtaining recognized body status within the meaning of the Implementing Regulation.[500] The European Union explains that Danish customs authorities proceeded in that manner "based on [their] interpretation of the Implementing Regulation whereby the issuance of attesting documents complying with the Implementing Regulation would also be allowed during the application process for recognized body status and not only once the process has been completed".

7.317. The considerations above, namely the text of the IC exception, its legislative history, and the actual application of the IC exception, cast serious doubt on the even-handedness of the design and application of the IC exception. Specifically, the rationale or cause of the exception (i.e. the distinction between the IC hunts and commercial based on their purpose) was the "subsistence" of Inuit and indigenous communities in terms of their culture and tradition as well as their livelihood. However, under the measure, the IC exception is available *de facto* exclusively to Greenland, where the Inuit hunt bears the greatest similarities to the commercial characteristics of commercial hunts. This suggests in our view that the IC exception was *not* designed or applied in

[496] Management and Utilization of Seals in Greenland, (Exhibit JE-26), pp. 1 (foreword) and 24 ("Hunting of seals continues to be an important part of everyday life and culture in Greenland.").

[497] Management and Utilization of Seals in Greenland, (Exhibit JE-26), pp. 25-26: "Today, hunting seals is not economically viable without a subsidy. However, harvesting provides the basic food supply for most communities."

[498] COWI 2010 Report, p. 84. It further notes that Canadian Inuit hunt essentially uses the sales and marketing chains of the commercial hunt, implying it would need to invest heavily in separating its Inuit product from the rest. (See Parliament Report, (Exhibit JE-4), p. 34). We also find a similar assessment in the COWI 2008 Report, noting that the Canadian Inuit hunt is small and not centrally organized, and the infrastructure for commercial trade is already in place in Greenland. (COWI 2008 Report, p. 26).

[499] Canada's first written submission, paras. 37-48; response to Panel question No. 84. Canada further submits that the Government of Nunavut has indicated that there has been no demand for Canadian Inuit products from European Union buyers since the coming-into-force of the ban. Therefore there has not been much incentive to pursue the marketing of seal products under the IC category.

[500] European Union's response to Panel question No. 161. See also certificates issued by Greenlandic authorities prior to obtaining recognized body status, (Exhibit EU-162).

an even-handed manner so as to make the benefits of the exception available for all potential beneficiaries.

7.318. The European Union argues that any effects derived from the fact that operators in one country (like Canada) choose not apply for the IC exception cannot be attributed to the EU Seal Regime. In our view, this argument fails to take into account that the absence of the even-handedness in the design and application of the distinction between commercial and IC hunts is linked to the fact that the IC exception, as currently designed and applied under the measure, is not equally available to all Inuit or indigenous communities. Only those in Greenland have been able to benefit from it and this, in our view, is directly attributable to the regime itself and not to the actions of the operators in countries like Canada.

7.319. In light of the above, we conclude that although the distinction between commercial and IC hunts based on the purpose of the hunt is justifiable having regard to the explanations given by the European Union concerning the benefits to Inuit or indigenous communities, it is not designed and applied in an even-handed manner. Therefore, we find that the IC exception of the EU Seal Regime is inconsistent with the European Union's obligations under Article 2.1 of the TBT Agreement as the European Union has failed to demonstrate that the detrimental impact caused by the IC exception on Canadian seal products stems exclusively from a legitimate distinction.

7.3.2.3.4 Whether the distinction between commercial hunts and MRM hunts is legitimate

7.3.2.3.4.1 Main arguments by the parties

Complainant (Canada)

7.320. Canada argues that the EU Seal Regime draws an arbitrary distinction between commercial and MRM hunts by imposing conditions that are unrelated to the Regime's underlying policy objectives.[501] For Canada, the commercial purpose of the hunt has no bearing on whether seals are killed humanely.[502] Canada argues that the distinction between commercial and MRM hunts under the EU Seal Regime is "illusory" because MRM hunts are motivated primarily if not exclusively by commercial gain.[503] In particular, Canada notes that the MRM exception only eliminates profit-making at the hunt level while allowing profit-making through the processing, manufacturing and retailing of seal products.[504]

7.321. Canada observes that the EU Seal Regime does not draw any distinction between seal products on the basis of animal welfare criteria.[505] Therefore, seal products placed on the EU market under the MRM exception may still contain seal that suffered pain and distress at the time of killing.[506] For Canada, such a result is counterproductive to achieving the objective of protecting seal welfare.[507] In addition, Canada argues that the seal hunters' inability to sell seal products for profit may encourage hunting methods that run counter to positive animal welfare outcomes.[508]

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[501] Canada's first written submission, para. 393.

[502] Canada's first written submission, para. 391; second written submission, para. 252.

[503] Canada's first written submission, para. 392; response to Panel question No. 28, para. 130; second written submission, paras. 263-264; and opening statement at the second meeting of the Panel, para. 55.

[504] Canada's first written submission, para. 392; response to Panel question No. 28, para. 130; second written submission, paras. 263-264; and opening statement at the second meeting of the Panel, para. 55.

[505] Canada's second written submission, paras. 222 and 265; response to Panel question No. 28. Canada argues that the European Union could contribute to the protection of animal welfare by conditioning market access for seal products on compliance with animal welfare standards. In Canada's view, "[e]vidence of such compliance can be provided by the country from which the seal product originates which thus minimizes concerns that the EU Seal Regime is being applied extra-territorially". (See Canada's response to Panel question No. 135(a)).

[506] Canada's second written submission, paras. 222 and 265.

[507] Canada's second written submission, para. 257.

[508] Canada's second written submission, para. 257. See Canada's opening statement at the second meeting of the Panel, para. 58.

7.322. Moreover, Canada argues that the alleged moral basis for the MRM exception rests on an unfounded and speculative assumption that marine resource management hunters are more likely to meet animal welfare standards if they have a commercial incentive to recover their costs.[509] According to Canada, the European Union has provided no evidence in support of this argument showing: (a) that hunters were complying with animal welfare standards prior to the EU Seal Regime[510]; (b) that eliminating the MRM category would result in more suffering for seals culled in such circumstances[511]; or (c) that seal culls in EU member States are conducted in a manner consistent with the animal welfare standards that the European Union accuses Canada of failing to apply.[512]

7.323. In addition, Canada claims that the MRM exception is not applied even-handedly, and that the conditions under the exception are arbitrary and unjustifiable.[513] In particular, the small-scale, non-systematic and non-profit requirements of the MRM category effectively prevent the placement on the EU market of seal products from countries such as Canada, where seals are also harvested in sustainable numbers in accordance with a marine resource management plan.[514] The conditions under the MRM exception are thus unrelated to the objective of sustainable marine resource management[515], and to the central objective of the EU Seal Regime of addressing concerns relating to seal welfare.[516] The regulatory distinction thus arbitrarily favours marine management programmes involving small populations of seals, such as those of Sweden, Finland and the United Kingdom.[517] Canada claims that the European Union's willingness to accommodate the interests of its member States while "completely ignor[ing]" the interests of other WTO Members is "plainly discriminatory" and "unjustifiable".[518]

Respondent (European Union)

7.324. The European Union explains that the MRM exception was intended to exempt from the ban seal products deriving from small-scale, occasional hunts conducted with the purpose of managing marine resources.[519] According to the European Union, such hunts are conducted in several countries within and outside the European Union territory.[520] The European Union argues that the conditions in which MRM hunts take place are in principle more favourable to the humane killing of seals than the commercial hunt.[521] For instance, the commercial nature of the hunt creates an incentive for hunters to kill as many seals as possible over a short period of time, thereby potentially disregarding the manner in which the seals are killed; this is not the case for MRM hunts which target specifically seals that pose a threat to fish stocks or fishing equipment.[522]

7.325. The European Union recognizes that there is also a commercial dimension present in the MRM hunts.[523] However, the European Union explains that if hunters were not permitted to recoup

[509] Canada's opening statement at the second meeting of the Panel, para. 58.
[510] Canada's opening statement at the second meeting of the Panel, para. 58.
[511] Canada's opening statement at the second meeting of the Panel, para. 58.
[512] Canada's second written submission, para. 265 (referring to COWI 2008 Report, p. p. 38 and 86).
[513] Canada's first written submission, para. 393; second written submission, paras. 219-226.
[514] Canada's comments on the European Union's response to Panel question No. 123, paras. 59 and 61.
[515] Canada's first written submission, paras. 391, 510-523; second written submission, para. 252; and opening statement at the second meeting of the Panel, para. 54.
[516] Canada's first written submission, para. 391; second written submission, paras. 221 and 252.
[517] Canada's first written submission, para. 391; second written submission, para. 256; and opening statement at the second meeting of the Panel, para. 53.
[518] Canada further argues that where a measure is premised on an objection to conduct that takes place outside the territory of the regulating Member, there should be additional efforts to engage in negotiations to regulate the conduct in question. (See Canada's response to Panel question No. 135(a), paras. 118 and 119).
[519] European Union's first written submission, paras. 309-310 (citing the opinion of the European Parliament's Committee on Agriculture and Rural Development in the Parliament Report, (Exhibit JE-4), p. 57 and Comments from EU Member States on Proposal for a Regulation of the European Parliament and of the Council concerning trade in seal products, (Exhibit JE-10), p. 16). The European Union explains that seals considered as pests, also referred to as "nuisance seals", pose a threat to fish stocks and can also damage fishing gear. (See European Union's response to Panel question No. 123(a)).
[520] European Union's first written submission, para. 320. The European Union notes that seal products derived from the hunts of nuisance seals in Canada could, in principle, fall under the MRM exception provided that all the relevant conditions were met. (European Union's second written submission, para. 250).
[521] European Union's response to Panel question No. 8, paras. 19 and 26.
[522] European Union's first written submission, paras. 326, 328, and 333.
[523] The European Union notes in this regard that "[t]he fact that … hunts for managing marine resources have or may have a commercial dimension does not mean that those hunts are comparable to the hunts

their costs by placing on the market seal products derived from MRM hunts, they would be more likely to resort to inappropriate killing methods; such an outcome could compromise the objective of protecting seal welfare.[524] In this regard, the European Union asserts that the MRM exception is rationally connected to the overall objective of the EU Seal Regime.[525] Moreover, in the European Union's view, prohibiting the marketing of products derived from MRM hunts would not contribute to reducing the suffering of seals because these hunts would continue to take place in any event.[526]

7.326. The European Union notes that the MRM exception addresses the longstanding moral concerns of the EU public with regard to the presence on the EU market of seal products by permitting the placing on the market of certain "morally acceptable" seal products in view of the type and purpose of the hunt from which they derive.[527] According to the European Union, although the MRM exception is not subject to compliance with animal welfare requirements, the benefits arising from the placing on the market of products deriving from these hunts, for humans and other animals outweigh the risk of suffering being inflicted upon seals.[528] To the extent that the EU Seal Regime would permit the placing on the market of seal products deriving from seals hunted inhumanely, it would still be in accordance with the EU's standard of morality that the Regime seeks to uphold.[529]

7.327. Finally, the European Union argues that the MRM exception is designed and applied in an even-handed manner.[530] The conditions set out under the MRM exception are essentially aimed at avoiding a potential circumvention of the ban on trade in seal products.[531] Also, the fact that the MRM exception allows profit-making at the downstream level does not show a lack of even-handedness; the exception aims at affecting the conduct of the hunter by eliminating the incentives to kill seals in an inhumane manner. The fact that other manufacturers or processors down the line can make a profit does not affect the hunter's behaviour when hunting seals.[532]

7.3.2.3.4.2 Analysis by the Panel

7.328. We turn to examine whether the distinction drawn by the measure between commercial and MRM hunts, and consequently between products derived from each category of hunt, is legitimate within the meaning of Article 2.1 of the TBT Agreement. As we did in connection with the IC exception, we assess the legitimacy of the regulatory distinction between commercial hunts and MRM hunts by examining the following questions: first, is the distinction rationally connected to the objective of the EU Seal Regime; second, if not, is there any cause or rationale that can justify the distinction (i.e. "explain the existence of the distinction") despite the absence of the rationale connection to the objective of the Regime[533], taking into account the particular

conducted for commercial purposes, where the hunter is paid to kill as many seals as possible in a short period of time and with a view to the further processing and marketing of seal products through commercial channels." (European Union's closing statement at the second meeting of the Panel, p. 4).

[524] The argument made by the European Union is that the possibility for the hunter to recover his costs (without necessarily making a profit) provides a motivation to retrieve the carcass of the seal hunted and thus to avoid "struck and lost" seals. It further provides a motivation for clean headshots rather than just shooting seals without regard to which part of the body is hit, or ensuring that the seal is dead. (European Union's response to Panel question No. 8, para. 27. See also European Union's first written submission, para. 316).

[525] European Union's first written submission, para. 316.

[526] European Union's first written submission, para. 315; response to Panel question No. 8, paras. 27-28.

[527] European Union's first written submission, paras. 308, 317, and 329.

[528] European Union's second written submission, para. 255.

[529] European Union's opening statement at the second meeting of the Panel, para. 59. According to the European Union, the potential suffering of seals is outweighed by the benefits accruing to humans and other animals under the IC and MRM exceptions, respectively. (See the European Union's response to Panel question No. 136 and Canada's comments on the European Union's response to Panel question No. 136).

[530] European Union's second written submission, paras. 257-263.

[531] European Union's second written submission, para. 260.

[532] European Union's first written submission, para. 334; second written submission, para. 261.

[533] See Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 226-234.

The Appellate Body stated that it had "difficulty understanding how discrimination might be viewed as complying with the chapeau of Article XX when the alleged rationale for discriminating *does not relate to the pursuit of* or *would go against the objective* that was provisionally found to justify a measure under a paragraph of Article XX" (emphasis added)

In our view, the Appellate Body's reasoning in *US – Clove Cigarettes* also supports our approach here. In that dispute, regarding the legitimacy of the regulatory distinction drawn by the measure in question (i.e.

circumstances of the current dispute; and, third, is the distinction concerned, as reflected in the measure, "designed or applied in a manner that constitutes arbitrary or unjustifiable discrimination" such that it lacks "even-handedness".[534]

Whether the MRM distinction is rationally connected to the objective of the EU Seal Regime

Characteristics of MRM hunts[535]

Identity of the hunter

7.329. MRM hunts are conducted essentially on a voluntary basis by fishermen whose fish stocks or fishing equipment are endangered by individual seals, or by the seal population in a particular area.[536] To proceed with a marine resource management hunt, a special licence or permission from the local authorities is normally required.[537]

Purpose of the hunt

7.330. The European Union notes that while compliance with a resource management plan is one of the conditions under the MRM exception, the exception is not aimed at promoting a better management of marine resources; the European Union uses other instruments to achieve this purpose.[538] Rather, the MRM exception takes into account that, alongside large-scale hunts carried out mainly for commercial purposes, there are also small-scale hunts conducted on an occasional basis for the purpose of ensuring that individual seals are eliminated for pest control ("nuisance seals"), or that seals are killed because according to scientific studies their population in a particular area poses a threat to fisheries and/or the ecosystem (seal culling).[539]

Scale of the hunt

7.331. All sealing countries with the exception of Greenland conduct their seal hunt on the basis of marine resource management plans based on scientifically established TAC.[540] The complainants claim that their commercial seal hunt is fully consistent with the objective of sustainable marine

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distinction between clove and menthol cigarettes), the Appellate Body examined the following questions: first, whether the distinction was connected to the objective of the measure which justified the prohibition of clove cigarettes; and, second; in the negative, whether the United States provided any reasons independent of the objective of the measure that could justify the distinction ("the reasons presented by the United States for the exemption of menthol cigarettes from the ban") (AB Report, *US – Clove Cigarettes*, para. 225).

[534] See Appellate Body Report, *US – COOL*, para. 340.

[535] This information is drawn mainly from COWI 2008 Report and COWI 2010 Report, which assess the potential impacts of the MRM exception on the different sealing states.

[536] European Union's response to Panel question No. 123, para. 91. The European Union submits, with respect to the seal hunt in Sweden, that "[t]here are only a few hunters able to conduct seal hunt as it is not a very easy hunt and they also must have a permission [to hunt]." For example, in 2007, out of the 50 hunters who reported to have shot one or more seals, 20-30 of these hunters were commercial fishermen whose primary aim was to keep the seal away from their fishing equipment and reduce the damage created by seals to equipment and catch. (European Union's response to Panel question No. 123, paras. 86-87 (referring in part to Sweden's response of 6 October 2001 to the Commission deficiency letter, (Exhibit EU-158))).

[537] European Union's response to Panel question No. 123, para. 86.

[538] European Union's first written submission, para. 41.

[539] European Union's response to Panel question No. 123(a), paras. 91-92. The European Union refers to the definition of "nuisance seals" in Canada's Marine Mammal Regulations, namely "a seal that represents danger to the fishing equipment despite deterrence efforts or, based on a scientific recommendation, to the conservation of fish stocks. (Marine Mammal Regulations, (Exhibit CDA-21), p. 2). According to EFSA, some hunts are conducted "because seals are perceived as pests or competitors with humans or their activities (e.g. direct or indirect impacts on fishing, aquaculture, or as vectors of fish parasites) or as threats to other species of concern (e.g. predation upon endangered species). In cases where individual animals (vs. population cull) are the focus, the animals are often referred to as 'nuisance seals'." EFSA Scientific Opinion, pp. 12-13. In Canada, the licences issued for the hunt of nuisance seals do not allow culling. (Canada's response to Panel question No. 167, para. 208). Data available on the number of licences granted for nuisance seal hunts in Canada and the total catch per region on an annual basis suggest that this type of hunt concerns only a small number of seals. (See National Nuisance Seal Licence Operational Guidelines and Procedures, (Exhibit CDA-143)).

[540] COWI 2010 Report, pp. iv-v.

resource management and takes place within the limits of their respective TAC.[541] One of the main distinguishing factors between MRM hunts and other types of hunts is the size of the hunt.[542] The COWI 2010 Report indicates that small-scale hunts for marine resource management purposes are conducted in Sweden[543], Finland[544], and Scotland.[545] Nuisance seal hunts are also conducted in Canada.[546]

Seal hunting period

7.332. The hunting period varies depending on the range country and the type of seals hunted. For instance, in Sweden and Finland, the Grey and Baltic ringed seals may be hunted with a licence during their respective hunting seasons. The hunting season in Sweden runs from 16 April to 31 December; in Finland, seal hunts of grey seals are carried out from 16 April to 31 December, while ringed seals are hunted from 16 April to 31 December and 1 September to 15 October.[547] In the United Kingdom (Scotland), the season extends from 1 September to 31 December for grey seals and from 1 June to 31 August for harbour seals.[548] There are annual "closed" seasons set for grey and common seals corresponding to the breeding period of both species; outside of the closed seasons, no licence is required to remove seals.[549] In Canada, nuisance seal hunts generally take place during the open season pursuant to the Marine Mammal Regulations[550]; however, licences may also be delivered during the closed season.[551]

Hunting methods

7.333. The hunting methods used for MRM hunts are generally similar to the methods used in commercial hunts. In Sweden, for instance, the seal hunt is conducted only with firearms.[552] In Finland and the United Kingdom (Scotland), the main weapons are firearms[553] but other killing methods may also be used, such as harpoons, clubs, spears, traps, hooks or nets.[554] In Canada and Norway, hakapiks (as well as clubs in Canada) may be used in addition to firearms.[555]

Organization and control of the hunt

7.334. While MRM hunts are not monitored *per se*, most range countries that conduct seal hunts on a small scale exercise control over the hunts through a licensing scheme.[556] For instance, in the

[541] Canada's comments on the European Union's response to Panel question No. 123, para. 50; Norway's first written submission, para. 437; second written submission, para. 81.
[542] See European Union's response to Panel question No. 123(a), para. 80; COWI 2010 Report, Annex 4, p. 5; COWI 2008 Report, pp. 36 and 87.
[543] The number of seals killed in 2010 was approximately 100-115 seals for a total quota of about 200 seals for the year.
[544] COWI reports that the seal hunt in Finland is mainly recreational but that reducing the negative impact of seals on fisheries is also a consideration in the hunt. According to the Finnish Ministry of Agriculture and Forestry, between 800-1000 hunters of grey seals are licensed annually with a corresponding 400-500 grey seals hunted. While ringed seals are also found in the Baltic Sea region of Finland, no licences are issued for their hunt. COWI 2010 Report, pp. 27-28.
[545] The number of seals killed in Scotland annually is estimated at 3,500 seals.
[546] Marine Mammal Regulations, (Exhibit CDA-21), Article 26.
[547] See EFSA Scientific Opinion, p. 32; COWI 2008 Report, pp. 82 and 88.
[548] See EFSA Scientific Opinion, p. 32; COWI 2008 Report, pp. 82 and 88. EFSA reports that the Habitats Directive (Directive 92/43/EEC) protects five seal species regularly occurring within the European Union. EU member States are obliged to designate special areas of conservation and to monitor the conservation status of identified species. The Habitats Directive also lists the prohibited methods and means of capture and killing, and modes of transportation. (EFSA Scientific Opinion, p. 32).
[549] EFSA Scientific Opinion, p. 33.
[550] National Nuisance Seal Licence Operational Guidelines and Procedures, (Exhibit CDA-143).
[551] Canada's response to Panel question No.167 (referring to National Nuisance Seal Licence Operational Guidelines and Procedures, (Exhibit CDA-143)).
[552] EFSA Scientific Opinion, pp. 24 (Table 2), 31 and 33.
[553] EFSA Scientific Opinion, pp. 24 (Table 2), 31 and 33.
[554] EFSA Scientific Opinion, pp. 32.
[555] COWI 2008 Report, p. 28.
[556] This is the case, for instance, in Sweden, Finland, United Kingdom (Scotland), and Canada. For instance, in Sweden and Finland, samples of the seal must be returned by the hunter for analysis. (See COWI 2008 Report, pp. 35-44 and 78-87). In Canada, a licence is required for hunting "nuisance seals". (Marine Mammal Regulations, (Exhibit CDA-21), Article 26.1; see also National Nuisance Seal Licence Operational Guidelines and Procedures, (Exhibit CDA-143)).

case of Sweden, quotas of seals to be felled are decided by the Swedish Environmental Protection Agency and set specifically on an annual basis for each county. There are areas within the counties where no hunting is allowed. To hunt seals in a particular area, the hunters will have to seek permission by applying to the County Administrative Board in the county where they intend to conduct the hunt. Permission will be granted provided the quota level has not been reached. For this purpose, the Swedish Coast Guard keeps a daily record. Hunters must contact the Swedish Coast Guard at the end of each day to report the result of their hunt. The County Administrative Board receives daily reports from the Swedish Coast Guards who, in addition to keeping track of daily catch, also patrol the waters.[557] In Canada, nuisance seal hunts are also subject to strict conditions, including compliance with the animal welfare requirements imposed under the Marine Mammal Regulations.[558]

Use of products derived from the hunt

7.335. Seals killed in the context of MRM hunts are normally used on a private basis or sold in the local community.[559] This is the case, for instance, for products derived from seal hunts in Sweden where the skin and meat are generally used by the hunter himself or sold on the local market.[560] The European Union notes that the by-product of MRM hunts that may end up on commercial markets would be a small amount of fur skin.[561] In Canada, seals harvested under the authority of a Nuisance Seal Licence cannot not be sold, bartered or traded.

Connection between the MRM distinction and the objective of the EU Seal Regime

7.336. Based on the description above, MRM hunts are characterized by the fact that they are conducted occasionally on a small scale, primarily for sustainable marine resource management, particularly for controlling nuisance seals and seal culling.

7.337. The evidence shows that MRM hunts, though much smaller in scale than commercial hunts, also give rise to concerns regarding seal welfare that are present in seal hunting in general.[562] Although there is limited evidence on the animal welfare outcomes of the seal hunt in countries that engage in small-scale hunts, such as Sweden and Finland[563], based on the evidence presented to the Panel, it would seem that seal hunts conducted in EU member States are not subject to onerous animal welfare requirements.

7.338. For instance, according to the COWI 2008 Report, seal hunting regulations in Sweden and Finland do not require hunters to apply the three-step method of humane killing. COWI reports that in Sweden, it is unclear how well monitored the hunt is due to the relative scarcity of inspectors[564]; in the case of Finland, hunters are largely self-regulated, and it is unclear whether there is any independent monitoring of the seal hunt. Therefore, there is no way of ensuring that MRM hunts are conducted in accordance with the objective of addressing the EU public concerns on seal welfare.[565] In this connection, we find it speculative that the possibility for the hunters to recover the costs of the hunt through the placing on the market of seal products under the MRM

[557] European Union's response to Panel question No. 123(a), para. 86 (citing COWI 2008 Report, pp. 81-86 and Sweden's response of 6 October 2001 to the Commission deficiency letter, (Exhibit EU-158)).

[558] Canada's response to Panel question No. 167. See National Nuisance Seal Licence Operational Guidelines and Procedures, (Exhibit CDA-143) (outlining the conditions under which fishing licences are issued pursuant to Canada's Marine Mammal Regulations, (Exhibit CDA-21)).

[559] European Union's first written submission, para. 327 (citing COWI 2010 Report, (Exhibit JE-21), p. 67). See also COWI 2010 Report, p. 35 and Annex 4, pp. 2 and 5; response to Panel question No. 123, para. 87.

[560] The European Union notes that the market price for a seal in Sweden would be in the order of 150 euros. (European Union's response to Panel question No. 123, para. 87).

[561] European Union's response to Panel question No. 123, para. 87.

[562] See for instance Comments from EU Member States on Proposal for a Regulation of the European Parliament and of the Council concerning trade in seal products, (Exhibit JE-10), p. 16; European Commission's Impact Assessment on the ban of products derived from seal species (23 July 2008), (Commission Impact Assessment), (Exhibit JE-16), pp. 69 and 74.

[563] The European Union notes that the regulation of seal hunting, including the animal welfare aspects of the hunt falls in principle within the competence of EU member States.

[564] See COWI 2008 Report, pp. 78-87.

[565] See COWI 2008 Report, pp. 35-44.

exception encourages more responsible behaviour on the part of the hunter with respect to the welfare of seals.

7.339. Finally, we do *not* consider that the limited scope of MRM hunts and the small volume of potential trade concerned by this exception as such are relevant factors in our assessment of whether the distinction in question is rationally connected to the objective of the measure.[566] We find support for this view in the Appellate Body's consideration in *Brazil – Retreaded Tyres*: the fact that only a small amount of products were imported under the MERCOSUR exception did not affect the finding that the exception was rationally disconnected from the objective of the measure at issue.[567]

7.340. For the foregoing reasons, we find that the MRM distinction is not rationally connected to the objective of addressing the EU public moral concerns on seal welfare. According to the European Union, however, the purpose of the hunt, which distinguishes MRM hunts from commercial hunts, combined with its small scale and occasional occurrences, justifies any risk of suffering inflicted upon seals as a result of such hunts. We next examine whether the European Union's explanation justifies the MRM distinction.

Whether the cause or rationale put forward by the European Union for the distinction between* commercial *and* MRM hunts *is justifiable

7.341. In addressing the argument by the European Union, we first examine the purpose of MRM hunts, specifically controlling nuisance seals and seal culling, compared to that of commercial hunts. We then address the question of whether any distinction found between the purpose of the MRM hunts and the purpose of commercial hunts is justified despite the lack of a rational connection to the objective of the EU Seal Regime as a whole.

7.342. We note that the complainants do not challenge the objective of sustainable marine resource management as such.[568] In fact, the complainants contend that their seal hunts are fully consistent with sustainable marine resource management principles and take place within the limits of their respective TAC.[569] Moreover, the European Union has confirmed that the exception is not aimed at promoting a better management of marine resources as it has other instruments it uses for that purpose. The complainants argue however that the distinction between MRM and commercial hunts based on their purpose is illusory because MRM hunts also have a commercial purpose.[570] Canada notes that MRM hunts are motivated primarily if not exclusively by commercial gain, for instance to support a thriving fishery or to prevent the destruction of fishing gear, all of

[566] European Union's second written submission, para. 288; response to Panel question No. 122.

[567] Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 229 and 233.

[568] See Canada's first written submission, para. 465 and Norway's first written submission, paras. 723-724. Sustainable marine resource management seeks to ensure, among others, that the human exploitation of natural resources does not result in the long-term decline of the resources. As submitted by Norway, such principles have been recognized consistently by the international community. (See for instance the definition of the term "sustainable use" contained in Article 2 of the United Nations Convention on Biological Diversity (1992), (Exhibit NOR-66)).

[569] COWI notes that Norway's seal hunt would probably meet the first two requirements of the MRM exception because it is conducted as part of a marine resource management plan that uses scientific population models of marine resources and applies the ecosystem-based approach, and because the hunt does not exceed the TAC established under the management plan. (See COWI 2010 Report, pp. 69-79 and Annex 4, pp. 3-4). Furthermore, Norway argues that the national quotas established for seal hunting are typically identical to those recommended by the International Council for the Exploration of the Seas (ICES), which provides scientific advice on the marine eco-system to all countries bordering the North Atlantic Ocean and the Baltic Sea. (Norway's first written submission, para. 639, second written submission, para. 245). Canada comments that its seal products are unlikely to meet this requirement under the MRM exception as its national management plan is not based on an "ecosystem-based approach". (Canada's first written submission, para. 344 (citing COWI 2010, p. 64 and Annex 4, p. 1)).

[570] Canada's second written submission, paras. 262-263. Norway argues that fishermen derive a net economic benefit in the form of an improved fishing activity. Further, Norway argues that evidence on the legislative history of the measure indicates that the fishermen killing seals for MRM purposes are entitled to earn income compensating for the cost of their time.

which are used in a commercial venture. Canada further argues that the killing of seals during resource management culls is also a means to generate income.[571]

7.343. As mentioned previously, the commercial seal hunt is characterized *inter alia* by the competitive pressure on hunters to kill as many seals as possible in a limited period of time. In the case of MRM hunts, the motivation of the hunter is not primarily linked to the exploitation of seals as a natural resource; rather, it is aimed at mitigating the damage caused by seals and is incidental to the conduct of another fishing activity. To that extent, we agree with the complainants that there is a commercial dimension to seal hunts conducted for the purpose of managing marine resources. The evidence before the Panel further shows that the costs associated with damage caused by seals can be significant in some cases.[572] Therefore, while the hunter cannot place seal products on the EU market for profit under the MRM exception, there is nevertheless an economic incentive for fishermen or seal hunters to conduct an MRM hunt. Further, while the MRM exception aims to eliminate profit at the hunt level, it still allows profit-making at the downstream level.

7.344. While we recognize that MRM hunts take place on an occasional basis, and on a much smaller scale than commercial hunts, and that the primary means to generate income for those conducting MRM hunts is not seal hunting itself, in light of the considerations above, we are not convinced that the purpose of MRM hunts and the purpose of commercial hunts are of a different character or nature. Furthermore, the difference that might be found between the commercial aspects of an MRM and a commercial hunt is, in our view, not sufficient to justify the lack of a rational connection between the distinction in question and the objective of addressing the EU public moral concerns on seal welfare.

7.345. Finally, the European Union argues that the placing on the EU market of seal products derived from MRM hunts conforms with the "EU's standard of morality" because the potential suffering of seals is outweighed by the benefits accruing to other animals. However, as noted above, the evidence adduced by the European Union on the EU public's moral concerns regarding seal welfare does not clearly establish that the concerns of EU citizens vary according to the type of hunt.[573]

7.346. In conclusion, we do not find that the rationale put forward by the European Union based on the purpose of MRM hunts, combined with their small scale and occasional occurrences, justifies the MRM distinction in the absence of a rational connection to the objective of the EU Seal Regime concerning seal welfare.

7.347. Therefore, we conclude that the European Union has failed to establish that a detrimental impact caused by the MRM exception on Canadian seal products *vis-à-vis* the like EU domestic products stems exclusively from a legitimate regulatory distinction. Nevertheless, for completeness, we turn to consider the design and application of the regulatory distinction between MRM and commercial hunts under the EU Seal Regime.

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[571] See Comments from EU Member States on Proposal for a Regulation of the European Parliament and of the Council concerning trade in seal products, (Exhibit JE-10), p. 16 (stating that "[t]he seals are not hunted only as pests but they are used as a natural resource for livelihood and also as a means to generate income.").

[572] See Swedish Management Plan for Grey Seals, (Exhibit CDA-54), pp. 37-39; and Finnish Management Plan for Seals in the Baltic Sea, (Exhibit CDA-51), p. 3. The Finnish Management Plan for Seals in the Baltic Sea, for instance, states that:

> On the basis of data on damage in the period 1997-1999, damage to professional fishing by seals in Finland was estimated to be roughly 1.68 million euros. Since then, the grey seal population has more than doubled. In the period 2000-2001, professional fishermen were compensated for 3.2 million euros for the damage they had sustained, although the claims sent in suggest that the overall damage amounted to 7.47 million euros. (Exhibit CDA-51, p. 40).

[573] In this regard, we agree with Canada's comment that:

> [t]he public opinion polls produced by the European Union … do not specifically gauge whether the subjects of the poll view the nature of seal hunting as a matter of public morality. They also fail to solicit popular views about the acceptability of permitting seal products from … resource management hunts, regardless of whether the seals from which those products were obtained were killed humanely. (Canada's response to Panel question No. 31).

Whether the distinction between commercial and MRM hunts, as reflected in the MRM exception of the EU Seal Regime, is designed and applied in an even-handed manner

7.348. We recall the specific requirements of the MRM exception as set out in Article 5(1) of the Implementing Regulation: (a) seal hunts conducted under a national or regional natural resources management plan which uses scientific population models of marine resources and applies the ecosystem-based approach; (b) seal hunts which do not exceed the total allowable catch quota established in accordance with the plan referred to in point (a); and (c) seal hunt by-products of which are placed on the market in a non-systematic way on a non-profit basis.[574]

7.349. We note that currently only Sweden has entities registered as recognized bodies entitled to deliver attesting documents permitting the placing on the market of seal products under the MRM exception.[575]

7.350. According to Canada, the legislative history of the EU Seal Regime is proof that the MRM exception was designed to "fit the reality" of the seal hunt in EU member States.[576] Canada refers to debates in the Committee on Agriculture and Rural Development of the European Parliament[577], as well as comments by Sweden and Finland on the need to exempt from the ban seal products deriving from small-scale hunts conducted for marine resource management purposes.[578] Canada argues that "the requirements that became the [MRM] category and its purpose as described by the EU in this dispute incorporate the exact elements set out by Sweden, i.e. allowing market access for seal products originating from states with 'small scale' 'statutory controlled hunting' with the 'purpose to reduce damages from fisheries', and which is 'done in accordance with a management plan'."[579]

7.351. In this regard, the Panel notes the conclusions of COWI (2010) that seal products from Sweden, Finland, and possibly the United Kingdom would likely qualify under the MRM exception, while seal products from Canada and Norway would not.[580] In particular, the Report notes that seal hunts in Finland and Sweden do not take place on a "commercial basis" and seal products deriving from these hunts are not placed on the market "in a repetitive way".[581] In addition, most by-products resulting from the hunts are sold "on a private basis" in the local community.[582] Thus, the non-systematic and non-profit requirements of the MRM exception effectively rule out the eligibility of products from any type of sustainable marine management hunt other than the hunting of individual nuisance seals.[583] The conclusions of COWI seem to be corroborated by

[574] See section 7.2.1.

[575] The European Union notes that at the time of the dispute, Finland had not submitted any request to have entities enlisted as recognized bodies under Article 6 of the Implementing Regulation.

[576] Canada's first written submission, para. 341 and Section III. C.3.a; response to Panel question No. 123 (citing Comments from EU Member States on Proposal for a Regulation of the European Parliament and of the Council concerning trade in seal products, (Exhibit JE-10), p. 20 and Parliament Report, (Exhibit JE-4), pp. 70-71 and 73).

[577] Opinion of the European Parliament's Committee on Agriculture and Rural Development in Parliament Report, (Exhibit JE-4), pp. 70-71 and 73.

[578] Comments from EU Member States on Proposal for a Regulation of the European Parliament and of the Council concerning trade in seal products, (Exhibit JE-10), pp. 16 and 19.

[579] Canada's comments on the European Union's response to Panel question No. 123 (citing Comments from EU Member States on Proposal for a Regulation of the European Parliament and of the Council concerning trade in seal products, (Exhibit JE-10), p. 18).

[580] COWI 2010 Report, pp. 67-68. See also European Union's response to Panel question No. 8; Canada's comments on the European Union's response to Panel question No. 123, para. 59. Norway highlights in its submissions the similarities between the Norwegian and Swedish seal hunts. The Norwegian hunt is statutorily controlled, under the direction of a government agency; quotas are set on an annual basis; few hunters take part in the hunt; permission for participation must be obtained; and the Norwegian authorities monitor the seal hunt closely to ensure conformity with sustainable resource management principles. In addition, the Norwegian hunt is better regulated from the perspective of animal welfare. On this basis, Norway concludes that "[t]he main difference between Sweden and Norway's seal hunt is, therefore, the scale of the Norwegian hunt, which as explained above, does not matter from the perspective of sustainable resource management, so long as the hunt is conducted in accordance with an SRM plan and a TAC established under that plan." (Norway's comments on the European Union's response to Panel question No. 123, paras. 116 -117).

[581] COWI 2010 Report, Annex 4, pp. 2-6.

[582] COWI 2010 Report, Annex 4, pp. 2-6.

[583] Canada's comments on the European Union's response to Panel question No. 123.

the legislative history of the EU Seal Regime, which suggests that the MRM exception was designed with the situation of EU member States in mind.[584]

7.352. Therefore, we conclude based on the considerations above that the MRM exception is not designed in an even-handed manner.

7.353. For the above reasons, we find that the MRM exception of the EU Seal Regime is inconsistent with the European Union's obligations under Article 2.1 of the TBT Agreement as the European Union has failed to demonstrate that the detrimental impact caused by the MRM exception under the EU Seal Regime on Canadian imports of seal products stems exclusively from a legitimate regulatory distinction within the meaning of Article 2.1 of the TBT Agreement.

7.3.3 Article 2.2

7.354. Article 2.2 of the TBT Agreement provides:

> Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products.

7.355. Article 2.2 can be parsed into several different elements: "legitimate objective"; "fulfilment"; "not … more trade-restrictive than necessary"; and "taking account of the risks non-fulfilment would create".[585] Based on these elements, the Appellate Body has described how a panel should assess a claim under Article 2.2 as follows:

> [A] panel must assess what a Member seeks to achieve by means of a technical regulation. … Subsequently, the analysis must turn to the question of whether a particular objective is legitimate …
>
> In sum, … an assessment of whether a technical regulation is "more trade-restrictive than necessary" within the meaning of Article 2.2 of the TBT Agreement involves an evaluation of a number of factors. A panel should begin by considering factors that include: (i) the degree of contribution made by the measure to the legitimate objective at issue; (ii) the trade-restrictiveness of the measure; and (iii) the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective(s) pursued by the Member through the measure. In most cases, a comparison of the challenged measure and possible alternative measures should be undertaken … [586]

7.356. The Appellate Body stated that all these factors provide the basis for the determination of what is to be considered "necessary" in the sense of Article 2.2 of the TBT Agreement in a

[584] Comments from EU Member States on Proposal for a Regulation of the European Parliament and of the Council concerning trade in seal products, (Exhibit JE-10), pp. 16-19. For instance, Sweden indicated that its preference would be to introduce an exemption for seal products originating from states with "small scale, statutory controlled hunting with the main purpose to reduce damages from fisheries and which is done in accordance with a management plan". (Ibid. p. 18). Finland noted that about 500 seals were hunted yearly in its territory; seals in Finland are not only hunted as pests but are also used as a natural resource for livelihood and as a source of income. According to Finland, prohibiting the possibility for income at the local level would lead to a waste of resources as the hunting would continue without the possibility to make proper use of the seal. (Ibid. p. 16; see also European Parliament Debates, (Exhibit JE-12), pp. 65 and 72).

[585] Appellate Body Report, *US – Tuna II (Mexico)*, para. 312.

[586] Appellate Body Report, *US – Tuna II (Mexico)*, paras. 314-322. (footnotes omitted) See also Appellate Body Report, *US – COOL*, para. 374.

particular case.[587] With this legal framework in mind, we begin our examination of the complainants' claim under Article 2.2 with an inquiry into the objective of the EU Seal Regime.

7.3.3.1 Identification of the objective(s) pursued through the EU Seal Regime

7.3.3.1.1 Main arguments of the parties

7.3.3.1.1.1 Complainants

7.357. The complainants claim that the EU Seal Regime pursues the following six objectives; (i) the protection of animal welfare, including public concerns regarding animal welfare in respect of seals; (ii) the protection of the economic and social interests of Inuit and other indigenous communities engaged in sealing (the IC interests); (iii) the encouragement of the sustainable management of marine resources (the MRM interests); (iv) the prevention of consumer confusion; (v) allowing EU consumers to choose to purchase seal products for their personal use from outside the European Union (the Travellers interests); and (iv) harmonizing the EU internal market with respect to member States' regulations on seal products.[588]

7.358. Furthermore, both complainants claim that the European Union has failed to show that addressing public moral concerns on seal welfare is the objective of the EU Seal Regime.[589]

7.359. Canada argues that the alleged public moral objective is not supported by the text or the design of the measure.[590] It points out that the EU Seal Regime does not refer to public *moral* concerns and contends that the EU public concerns regarding animal welfare of seals mentioned in recital (5) of the Basic Regulation are not public moral concerns regarding seal welfare because they do not arise from perceptions as to the rightness or wrongness of specific conduct. Canada argues that concerns regarding seal welfare are qualitatively different from moral concerns on seal welfare.[591] Moreover, Canada maintains that, although the treatment of animals may, for some, be a matter of ethics, this does not amount to a shared view that the public's concern about seal welfare stems from an ethical perspective.[592] According to Canada, the variety of reasons why members of society oppose a particular activity cannot form the basis of an established community-wide standard of right and wrong conduct.[593]

7.360. Relying on *US – Gambling*, Canada submits that for a measure to fall within the scope of measures "necessary to protect public morals", it must be designed to protect the public moral in question by having a "sufficient nexus" with the interest (public moral) to be protected.[594] In the case of the EU Seal Regime this nexus or rational connection does not exist. This is because, for Canada, the three categories of conditions in the operative parts of the measure are not rationally connected to either animal welfare or protecting EU citizens from the moral harm that would arise from the presence on the EU market of products derived from seals harvested inhumanely. This is due, according to Canada, to the combination of the absence of requirements relating to animal welfare and the market access granted to seal products derived from seals killed inhumanely as permitted under the three conditions set out in the measure.

7.361. Canada asserts, furthermore, that the idea that the EU Seal Regime addresses public moral concerns rests on a false premise that the commercial seal hunt is inherently inhumane.[595] Any public concerns, whether moral in nature or reflecting some other value, are based on

[587] See Appellate Body Report, *US – Tuna II (Mexico)*, para. 318.
[588] Canada's first written submission, paras. 449-450, 452-452*bis*; second written submission, paras. 268-269; Norway's first written submission, paras. 70-75; second written submission, paras. 167-171.
[589] Canada's second written submission, paras. 137-165; Norway's opening statement at the first meeting of the Panel, paras. 76-99. Certain arguments of Canada on the identification of the measure's objectives are contained in its arguments on Article XX(a) of the GATT 1994. The Panel refers to them in this section to the extent that such arguments are also relevant to Canada's arguments under Article 2.2 of the TBT Agreement.
[590] Canada's response to Panel question No. 31; second written submission, paras. 272-274, 290-295.
[591] Canada's response to Panel question No. 18; second written submission, paras. 13-45, 273.
[592] Canada's second written submission, para. 158.
[593] Canada's second written submission, para. 158.
[594] Canada's second written submission, paras. 290-295 (citing Panel Report, *US – Gambling*, para. 6.455 and Appellate Body Report, *US – Gambling*, para. 292).
[595] Canada's second written submission, para. 159.

misinformation about the seal hunt in Canada; indeed, Canada argues that it has shown that the Canadian seal hunt is not inherently inhumane.[596]

7.362. Canada submits further that the European Union has also failed to establish that there is a single coherent and consistent objective of public morality or even several objectives of public morality that are coherent and consistent.[597] For Canada, accepting an ill-defined public morality objective effectively allows a Member to adjust *ex post facto* the content of the public morality objective to justify any measure.[598]

7.363. Although Norway does not dispute that, as a general principle, seal welfare could be a moral issue[599], it argues that the European Union has shown "neither the *existence* of public morals whose protection is necessary through the various elements of [the] EU Seal Regime nor the *specific normative content* of any public morals that purportedly necessitate protection".[600] The European Union has offered (a) the measure at issue; (b) surveys of the EU public opinion; and (c) scientific evidence[601] as evidence purporting to show the objective of addressing the public moral concerns on seal welfare.[602] However, according to Norway, the evidence does not support the European Union's assertion. Norway maintains, instead, that the legislative history shows that the particular choices made by the EU legislator were motivated by political expediency and not by public morals[603]; and the measure itself lays bare the absence of a standard of right and wrong conduct relating to the killing of seals and the sale in the EU market of products containing seal.[604]

7.364. Norway submits further that the public surveys submitted by the European Union do not support the existence of the "public morals" invoked by the European Union.[605] Instead, the surveys: (a) highlight an extremely low level of knowledge about seal hunting; (b) did not use techniques that would provide information on the moral views of the respondents; and (c) do not even elicit information on the different public morals that the European Union invokes.[606]

7.365. Norway also claims that the scientific evidence invoked by the European Union as "grounds for the public moral concerns"[607], including the evidence that was before the European Union during the legislative process, does not support the existence of the invoked public morals regarding animal welfare.[608] To the contrary, the scientific evidence shows that the hunts the products of which are granted market access under the EU Seal Regime pose the greatest animal welfare problems.[609]

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[596] Canada's opening statement at the first substantive meeting of the Panel, para. 12-35; second written submission, paras. 62-82, 159.

[597] Canada's second written submission, paras. 268-269; 275-289.

[598] Canada's second written submission, para. 275.

[599] See Norway's opening statement at the first substantive meeting of the Panel, para. 87; response to Panel question No. 9, para. 72.

[600] Norway's response to Panel question No. 15, para. 109. (emphasis original) See also Norway's second written submission, paras. 172-208.

[601] Norway's opening statement at the first substantive meeting of the Panel, para. 81.

[602] Norway's second written submission, paras. 184-206.

[603] Norway's first written submission, para. 616; second written submission, para. 204 (referring to European Parliament Debates, (Exhibit JE-12), p. 72; Comments from EU Member States on Proposal for a Regulation of the European Parliament and of the Council concerning trade in seal products, (Exhibit JE-10), pp. 16-18; European Commission Proposal for a Regulation of the European Parliament and of the Council Concerning Trade in Seal Products (23 July 2008), (Commission Proposal), (Exhibit JE-9), Explanatory Memorandum ("Grounds for and objectives of the proposal"), p. 5). See also Norway's first written submission, para. 616.

[604] Norway's opening statement at the first substantive meeting of the Panel, paras. 78-94; response to Panel question Nos. 14, 18, and 52; second written submission, para. 204.

[605] Norway's second written submission, paras. 188-200.

[606] Norway's opening statement at the first substantive meeting of the Panel, paras. 97-98; second written submission, paras. 188-200.

[607] European Union's first written submission, Section 2.4.

[608] Norway's second written submission, paras. 201-203.

[609] See Norway's first written submission, paras. 679-684; opening statement at the first substantive meeting of the Panel, paras. 117-121; response to Panel question No. 14, paras. 101-102; response to Panel question No. 73, paras. 402-410. By contrast, COWI noted that "[s]eal hunting is comprehensively regulated in Norway and [Norway] has the most developed management system [for seal hunting]". (COWI 2008 Report, p. 133. See also Ibid. pp. 63 and 70).

7.366. According to Norway, the European Union attempts to place a moral gloss over the objectives it pursues (which, according to Norway, include animal welfare, indigenous communities, and sustainable resource management). In an attempt to present multifarious and competing objectives as a single, coherent objective, the European Union describes them as traits of an umbrella "public morals" objective.[610] Yet, the European Union has not succeeded in identifying any coherent and consistent standard of right and wrong conduct held within the European Union.[611] Thus, for Norway, in order to find that EU public morals extend to concerns about the welfare of seals, the European Union would have to convince the Panel of the existence and normative content of such public morals.[612]

7.3.3.1.1.2 Respondent

7.367. The European Union submits that the objective of the EU Seal Regime is "to address the moral concerns of the EU public with regard to the welfare of seals".[613] Those concerns arise from the fact that seal products may have been obtained from animals killed in a way that causes them excessive pain, distress, fear, or other forms of suffering. Further, the European Union asserts that "contributing to the welfare of seals by reducing the number of seals killed in an inhumane way" can be regarded as being simultaneously a legitimate objective on its own and one of the instruments to achieve the first, broader and overarching, objective of addressing public moral concerns on seal welfare.[614]

7.368. Further, the European Union contests that it pursues the objectives identified by the complainants. Contrary to the complainants' arguments, the EU Seal Regime does not pursue consumer choice and the prevention of consumer confusion.[615] The European Union asserts that the EU Seal Regime seeks to uphold a rule of public morality, equally applicable with regard to all members of the EU public, irrespective of their personal beliefs. The complainants have thus misunderstood the objective of the Travellers exception, which is not to "promote the personal choice" of the EU consumers, but to avoid inequitable results in the operation of the measure.[616] Further, the IC and MRM exceptions under the measure do not pursue independent objectives from those sought by the general ban; the concerns relating to those exceptions are articulations of the same "standard of morality".[617] The EU Seal Regime allows the placing on the market of seal products under the IC and MRM exceptions because products qualifying for those exceptions do not raise the same moral concerns as products from commercial seal hunts.[618]

7.369. The European Union argues that in assessing the moral implications of seal hunting, therefore, it is essential to take into account, together with the welfare of the seals, the purpose of each type of hunt.[619] Specifically, some hunts are conducted primarily for commercial purposes, such as obtaining skins for manufacturing inessential clothing items.[620] The EU public regards seal products from commercial hunts as morally objectionable and is repelled by their availability in the EU market.[621] In contrast, in the cases of other seal hunts conducted for non-commercial purposes, such as the subsistence of indigenous communities or the sustainable management of

[610] Norway's opening statement at the first substantive meeting of the Panel, paras. 69, 76-99; second written submission, para. 170.
[611] Norway's opening statement at the first substantive meeting of the Panel, paras. 76-99; Norway's response to Panel question Nos. 9, 15, 17, 18, and 48.
[612] Norway's response to Panel question No. 109. Norway specifically contends that the European Union has failed to prove that its "umbrella moral norm" allows commerce in six distinct circumstances irrespective of animal welfare, namely where products are: (i) derived from IC hunts; (ii) derived from MRM hunts; (iii) imported for personal use by travellers; (iv) sold at auction in the European Union for re-export; (v) used in EU manufacturing for export under inward processing rules; or (vi) where they transit the European Union. See Norway's response to Panel question No. 18; second written submission, para. 172 and footnote 232; and opening statement at the second substantive meeting of the Panel, para. 54.
[613] European Union's first written submission, para. 33; response to Panel question No. 10.
[614] European Union's response to Panel question No. 10.
[615] European Union's first written submission, para. 43 (referring to Norway's first written submission, para. 600).
[616] European Union's first written submission, para. 42.
[617] European Union's response to Panel question No. 10; opening statement at the second meeting of the Panel, paras. 43-51.
[618] European Union's first written submission, para. 43.
[619] European Union's first written submission, para. 38.
[620] European Union's first written submission, para. 39.
[621] European Union's first written submission, para. 36.

marine resources, it may be justified, or even required, from a moral point of view to tolerate a higher level of risk to the welfare of seals.[622]

7.370. To demonstrate further the existence of moral concerns on the welfare of seals among the EU public, the European Union points to a number of public opinion surveys. The European Union alleges that these survey results show the public's general feeling against seal hunting, particularly commercial hunting, and support for the ban.[623]

7.371. As for the objective of harmonizing the EU internal market, described by the European Union as the immediate objective of the EU Seal Regime, the European Union asserts that the elements challenged by the complainants are not necessary to achieve that objective but rather seek to address the moral concerns of the EU public with respect to the welfare of seals.[624]

7.3.3.1.2 Analysis by the Panel

7.372. As explained above, to assess a measure's consistency with the obligations under Article 2.2 of the TBT Agreement, the Panel must first identify the objective pursued by a regulating Member through the measure at issue.

7.373. The parties in this dispute disagree on what objectives the European Union aims to fulfil through the EU Seal Regime.

7.374. The European Union claims that the EU Seal Regime pursues two closely related objectives[625]:

- first, addressing the moral concerns of the EU population with regard to the welfare of seals ("addressing the public moral concerns on seal welfare"); and
- second, contributing to the welfare of seals by reducing the number of seals killed in an inhumane way.

7.375. Regarding the first objective, the European Union points to two aspects of the public's moral concerns: first, "the incidence of inhumane killing of seals"; and, second, EU citizens' "individual and collective participation as consumers in, and exposure to, the economic activity which sustains the market for commercially-hunted seal products".[626] Further, according to the European Union, the second objective can also be regarded as one of the instruments to achieve the first, broader and overarching, objective of addressing the public moral concerns on seal welfare.

7.376. The complainants assert that the European Union failed to identify any coherent and consistent standard of right and wrong conduct held within the European Union with respect to seal welfare concerns. Rather, the European Union pursues a multiplicity of objectives through the measure such as protection of seal welfare, including the EU public's concerns on seal welfare; protection of the IC interests; and promotion of marine resource management.

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[622] European Union's first written submission, para. 39.

[623] European Union's first written submission, paras. 190-194 (referring to public opinion surveys of EU member States, (Exhibits EU-48-59). The European Union submits that the EU public moral concerns with regard to the killing of seals are deep and longstanding. Those concerns emerged in the 1950s, became widespread among the public by the 1960s, which in turn led to the introduction of various import restrictions by EU member States during the 1970s and 1980s. The European Union states that this culminated with the adoption of the 1983 Seal Pups Directive banning products made of whitecoat harp and blueback hooded seal pups. (Seal Pups Directive, (Exhibit CDA-12)).

[624] See European Union's response to Panel questions No. 13 and 113, para. 53. The complainants have also addressed the objective of internal market harmonization. (See Canada's response to Panel question No. 13 ("Canada is of the view that the harmonization objective is qualitatively different from the other objectives, and should not be considered for the purposes of Article 2.2 of the TBT Agreement."); Norway's response to Panel question No. 13 ("Norway agrees that that the "harmonization of the EU internal market" is distinct from the policy objectives of the type covered by Article 2.2 of the TBT Agreement, and that the Panel should not consider this as a policy objective within the meaning of that provision.").

[625] European Union's response to Panel question No. 9.

[626] European Union's response to Panel question No. 9.

7.377. We consider that the disagreements between the parties on the objective of the EU Seal Regime come down, in essence, to two issues. First, while not disputing that the EU Seal Regime is aimed at addressing the public concerns on seal welfare, the parties disagree on whether the public concerns at issue are *moral* concerns for the EU public. Second, the parties also contest whether other interests addressed through the exceptions in the measure (i.e. IC, MRM, and Travellers exceptions) constitute objectives of the EU Seal Regime that are separate and independent from the objective of addressing seal welfare concerns.

7.378. In these circumstances, and based on guidance provided by the Appellate Body, we must assess the objectives of the EU Seal Regime on the basis of available evidence such as the texts of statutes, legislative history, and other evidence regarding the structure and operation of the measure at issue.[627] We are also mindful that a panel is *not* bound by the objectives asserted by the regulating Member, and "may also find guidance" in contrary evidence proffered by the complainant in determining the objective pursued by the regulating Member.[628]

7.379. Before moving to examine these aspects, however, we find it useful to recall the meaning and scope of "public morals" as discussed in previous disputes.

7.380. In *US – Gambling*, the panel considered the term "public morals" as used in Article XIV of the GATS, which provides, "… measures: (a) necessary to protect public morals or to maintain public order". The panel observed that the term "public morals" denotes "standards of right and wrong conduct maintained by or on behalf of a community or a nation" and that the content of the concept of public morals "can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values".[629] For this reason, it considered that:

> Members should be given some scope to define and apply for themselves the concepts of "public morals" and "public order" in their respective territories, according to their own systems and scales of values.[630]

7.381. The panel in *China – Audiovisual Products* agreed with the interpretation of the term "public morals" developed by the panel in *US – Gambling* for the purposes of its analysis under Article XX(a) of the GATT 1994.[631] In a similar vein to Article XIV of the GATS, Article XX of the GATT also refers to "measures … (a) necessary to protect public morals". The assessment of the scope of "public morals" in the context of the general exception provisions of the GATT 1994 and the GATS referring to public morals therefore suggests that WTO Members are afforded a certain degree of discretion in defining the scope of "public morals" with respect to various values prevailing in their societies at a given time.

7.382. Although previous interpretations of the notion of "public morals" were developed in the context of examining general exceptions provisions under the GATT 1994 and the GATS, we consider that they are equally applicable in identifying a regulating Member's alleged moral objective in the context of Article 2.2 of the TBT Agreement. We observe in this regard the Appellate Body's statement in *US – Clove Cigarettes* that the second recital in the preamble of the TBT Agreement indicates that "the TBT Agreement expands on pre-existing GATT disciplines and

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[627] Appellate Body Report, *US – Tuna II (Mexico)*, para. 314. See also Appellate Body Reports, *EC – Sardines*, paras. 276-282; *US – COOL*, para. 371; Panel Reports, *US – Tuna II (Mexico)*, para. 7.405 (citing Appellate Body Report, *US – Gambling*, para. 304); and *US – COOL*, para 7.612 (citing an observation by the Appellate Body in *Japan – Alcoholic Beverages* that "Members of the WTO are free to pursue their own domestic goals through internal taxation or regulation so long as they do not do so in a way that violates … any of the other commitments they have made in the WTO Agreement").

[628] Appellate Body Report, *US – Gambling*, para. 304.

[629] Panel Report, *US – Gambling*, paras. 6.465 and 6.461.

[630] Panel Report, *US – Gambling*, para. 6.461. In *US – Gambling*, for example, the panel assessed whether the gambling problem addressed by the measure falls within the scope of the "public morals" within the meaning of Article XIV(a) of the GATS. In doing so, the panel considered *inter alia* other members' trade measures with similar objectives as shown in trade policy review reports and secondary interpretative materials such as decisions by other jurisdictions on similar issue (e.g. the ECJ). Based on such resources, the panel found that gambling is a matter that could fall within the scope of public morals. Panel Report, *US – Gambling*, paras. 6.470-6.474.

[631] Panel Report, *China – Audiovisual Products*, para. 7.759. The public morals at issue in that dispute concerned the protection of the public from potential negative impacts caused by cultural goods (e.g. reading materials and audiovisual products).

emphasizes that the two Agreements should be interpreted in a coherent and consistent manner".[632]

7.383. Accordingly, the question of whether a measure aims to address public morals relating to a particular concern in the society of a regulating Member requires, in our view, an assessment of two issues: first, whether the concern in question indeed exists in that society; and, second, whether such concern falls within the scope of "public morals" as "defined and applied" by a regulating Member "in its territory, according to its own systems and scales of values".

7.384. In the factual circumstances of the present dispute, and bearing in mind the guidance of the Appellate Body referred to above as to how to assess the objective of a measure, we must therefore examine whether the evidence as a whole shows (a) the existence of the EU public's concerns on seal welfare and/or any other concerns or issues that the European Union seeks to address; and, (b) the connection between such concerns, if proven to exist, and the "public morals" (i.e. standards of right or wrong) as defined and applied within the European Union.

7.385. We begin our assessment with the text of the EU Seal Regime.

7.386. At the outset, we note that the EU Seal Regime does not have a specific section setting forth the objective of the EU Seal Regime. The preamble of the Basic Regulation, comprising 21 recitals, describes various concerns and observations on seal hunting and seal products. For example, the preamble refers to *inter alia* the following:

- legislative initiatives calling for a ban on trade in seal products and cruel seal hunting methods (recital 1);
- existing consumer confusion over products derived from seals and other products (recitals 3, 7);
- concerns by the public and governments regarding the pain, distress, fear, and other forms of suffering which the killing and skinning of seals cause to seals (recitals 4, 5, 10, 11);
- several EU member States' adoption or intention to adopt legislation regulating trade in seal products and differences between national provisions governing trade in seal products (recitals 5, 6);
- different trade regulations on seal products within the EU internal market and the need to harmonize such regulations (recitals 6, 7, 8, 10);
- obligation to "pay full regard to" the animal welfare requirements when formulating an EU internal market policy (recital 9);
- public concerns about the possible presence on the market of products obtained from animals killed and skinned in a way that causes pain, distress, fear and other forms of suffering (recitals 5, 10);
- design of the current measure in harmonizing the EU internal market and addressing animal welfare concerns (recitals 10, 12, 13);
- difficulty in consistent verification and control of hunters' compliance with animal welfare requirements in seal hunting (recital 11);
- fundamental economic and social interests of Inuit communities engaged in seal hunting (recital 14); and
- three conditions (IC, MRM, and personal use) according to which the placing and/or import of seal products on the EU market would be allowed (recital 17).

[632] Appellate Body Report, *US – Clove Cigarettes*, para. 91. See also Ibid. paras. 90, 96, and 101.

7.387. Based on our review of the preamble, the Basic Regulation appears to address three main considerations: first, the need to harmonize the regulations on seal products within the EU internal market (recitals 5, 6, 7, 8, 10, 15, 21); second, concerns about seal welfare issues (recitals 1, 4, 5, 10, 11); and, third, the need to preserve the economic and social interests of Inuit communities engaged in seal hunting and to define the conditions for IC, MRM, and Travellers exceptions (recitals 16 and 17).

7.388. The operative part of the Basic Regulation, discussed in section 7.2.1 above, reflects these main considerations by providing for the IC, MRM, and Travellers exceptions and prohibiting seal products derived from any other seal hunts. Specific rules for implementing the exceptions and other obligations under the Basic Regulations are contained in the Implementing Regulation.[633]

7.389. Overall, we can discern from the text of the EU Seal Regime that, in designing the Regime, the European Union sought to address the public concerns on seal welfare. In doing so, the European Union also took into account certain other interests (i.e. IC, MRM, and Travellers interests). Although we have also observed references to the need for harmonizing the EU internal market, we recall the acknowledgment of both the complainants and the respondent that, for the purpose of this dispute, it is not necessary for the Panel to address this particular consideration.[634]

7.390. Next, we proceed to examine the legislative history of the EU Seal Regime to assess whether it sheds further light on the measure's objective.

7.391. The initiative to introduce a measure governing trade in seal products in the European Union originates in the 2006 "Declaration of the European Parliament on banning seal products in the European Union" (Parliament Declaration).[635] In its preamble, the Parliament Declaration references *inter alia* an observation that a certain proportion of seals hunted may have been skinned while still conscious.[636] Although the Parliament Declaration does not explicitly elaborate on the specific reasons for the initiative for a ban on seal products, a list of points contained in the preamble suggest a connection between the Declaration and seal welfare.[637] It also states that "this regulation should not have an impact on traditional Inuit seal hunting"[638]; no reference is made, however, to MRM hunts or Travellers' interests.

7.392. Subsequent to the Parliament Declaration, the Parliamentary Assembly of the Council of Europe made certain observations on seal hunting:

> 5. The Assembly welcomes the Declaration of 26 September 2006 by the European Parliament on banning seal products in the European Union ...
>
> ...
>
> 8. The Assembly is aware that the international controversy surrounding seal hunting is first and foremost a political debate, bringing different and sometimes

[633] We note that while providing practical details necessary for the enforcement of the Basic Regulation, the Implementing Regulation does not in itself assist us in identifying the objective of the measure.

[634] See para. 7.371 above.

[635] Parliament Declaration, (Exhibit JE-19). We note that issues relating to sealing and seal products have been subject to discussions and debates within the European Union preceding the adoption of the EU Seal Regime. For instance, we take note of the adoption in 1983 of a ban on the importation of products derived from certain seal pups. (Seal Pups Directive, (Exhibit CDA-12)). The Council's Parliamentary Assembly also refers to its Recommendation 825 (1978) on the protection of wildlife and on seal hunting. (Council of Europe, Parliamentary Assembly, recommendation 1776 (2006) of 17 November 2006 on seal hunting, (Council of Europe Recommendation), (Exhibit EU-117), para. 1). In addition, the European Union refers to the adoption of several restrictions of seal products by various current EU member States dating back to 1970. (See European Union's first written submission, para. 615 (referring to certificates issued by Greenlandic authorities prior to obtaining recognized body status, (Exhibit EU-162)).

[636] Parliament Declaration, (Exhibit JE-19), point D.

[637] For instance, the reference to the skinning of conscious seals occurs after recitals noting the large number of harp seal pups "slaughtered" in the North West Atlantic (point A) and impacts on seal population from such a large scale of killing (point B). Moreover, the EU Parliament observes that the 1983 Directive banning seal pup products did not extend to products of older seals being targeted by sealers (point E).

[638] Parliament Declaration, (Exhibit JE-19), point H(2).

> conflicting values, objectives and attitudes into play, and that public opinion is particularly sensitive to this matter.
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> 9. The Assembly notes that during the last decade, the cruelty of seal hunting has been documented by videos from several authoritative television channels as well as by the personal observations of many members of national and European parliaments, scientists, celebrities and representatives of non-governmental organizations (NGOs). Such cruelty has generated a public morality debate in Europe ...[639]

7.393. We note in particular that the observations quoted above refer to the existence of *inter alia* concerns on seal welfare and a "public morality debate" regarding seal hunting in Europe.

7.394. In 2008, the European Commission submitted a proposal for a regulation concerning trade in seal products (Commission Proposal).[640] This proposal refers to the public concerns about "the animal welfare aspects of the killing and skinning of seals and about trade occurring in products possibly derived from seals that have been killed and skinned with avoidable pain, distress and other forms of suffering …".[641] The Impact Assessment accompanying the Commission Proposal[642] also describes the main overarching objectives of the initiative as "[p]rotect seals from acts that cause them avoidable pain, distress, fear and other forms of suffering during the killing and skinning process", and to "[a]ddress the concerns of the general public with regard to the killing and skinning of seals".[643] Thus, these documents, which inform us of the legislative process leading to the adoption of the current measure, make explicit references to the public concerns on seal welfare.

7.395. Further, we observe that the Commission Proposal describes public concerns as relating to "ethical" considerations. For example, the following expressions are used in the Proposal: "out of ethical reasons"; "citizens' deep indignation and repulsion regarding the trade in seal products in such conditions"; "the public's growing awareness and sensitivity to ethical considerations in how seal products are obtained".[644] More particularly, the Commission's 2008 proposal states:

> For several years, many members of the public have been concerned about the animal welfare aspects of the killing and skinning of seals and about trade occurring in products possibly derived from seals that have been killed and skinned with avoidable pain, distress and other forms of suffering, which seals, as sentient mammals, are capable of experiencing. Those concerns have therefore been expressed by members of the public *out of ethical reasons*. The Commission received during the last years a massive number of letters and petitions on the issue expressing citizens' deep indignation and repulsion regarding the trade in seal products in such conditions.[645]

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[639] Council of Europe Recommendation, (Exhibit EU-117).

[640] Commission Proposal, (Exhibit JE-9). The Commission Proposal was presented to the European Parliament and Council in 2008 following the Commission's undertaking to assess the animal welfare aspects of seal hunting and provide possible legislative proposals in response to the Parliament Declaration. (See Commission Impact Assessment, (Exhibit JE-16), p. 8).

[641] Commission Proposal, (Exhibit JE-9), pp. 2-3 ("grounds for and objectives of the proposal"). See also Ibid. p. 8 (stating that the Proposal "focuses on animal welfare considerations while [other existing Community legislation] addresses conservations issues") and p. 11 (referring to "the animal welfare concerns expressed by the public" in respect of suitable measures to address the issue).

Norway also acknowledges based on its own assessment of the Commission Proposal and Commission Impact Assessment that "protecting animal welfare and addressing public concerns relating to animal welfare" are described as "overarching objectives". (Norway's first written submission, paras. 612-617 (referring to Commission Impact Assessment, (Exhibit JE-16), p. 7). It nevertheless also points to the protection of IC interests as well as internal market harmonization as the objectives emerging from the European Commission documents.

[642] Commission Impact Assessment, (Exhibit JE-16). The Impact Assessment provides a more detailed description of the assessment process, including the subjects reviewed and legislative options canvassed by the EU Commission in the preparation of its Proposal.

[643] Commission Impact Assessment, (Exhibit JE-16), p. 23. The document also establishes the specific objectives based on the main overarching objectives, namely (i) to "[e]nsure consistency and legal clarity in terms of the requirements for placing seal products on the EU market" and (ii) to "[p]romote and reward good sealing practices".

[644] Commission Proposal, Explanatory memorandum, (Exhibit JE-9), pp. 2-3.

[645] Commission Proposal, Explanatory memorandum, (Exhibit JE-9), p. 2.

...

> The Treaty establishing the European Community does not provide for a specific legal basis allowing the Community to legislate *in the field of ethics as such*. However, where the Treaty empowers the Community to legislate in certain areas and that the specific conditions of those legal bases are met, the mere circumstance that the Community legislature relies on *ethical considerations* does not prevent it from adopting legislative measures.[646] (emphasis added)

7.396. In our view, therefore, the references above to "ethical considerations" in the Commission Proposal, combined with the reference to a "public morality debate" in the Council of Europe Recommendation, provide evidence that the public concerns about seal welfare constitute a moral issue for EU citizens.[647]

7.397. The evidence also includes documents demonstrating various EU member States' views on the Commission Proposal as well as the measure in its current form.[648] Based on our examination of these documents, we observe that certain EU member States expressed doubts as to various features of the proposed measure and that the "difficulties of balancing different views"[649] had to be overcome in the legislative process.[650] However, a majority of comments and statements documented in these exhibits show an overall support for the measure in light of the wishes of EU citizens to ban seal products from the EU market based on their concerns on seal welfare.[651]

7.398. As with the text of the EU Seal Regime, the legislative history of the measure demonstrates the existence of the EU public's concerns about seal welfare. We observe in this

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[646] Commission Proposal, Explanatory memorandum, (Exhibit JE-9), p. 3.

[647] We recall in this regard the view of the panel in *US – Gambling* that public morals can "depend[] on a range of factors, including prevailing social, cultural, *ethical* and religious values". (Panel Report, *US – Gambling*, para. 6.461) (emphasis added)

[648] See, e.g. Comments from EU Member States on Proposal for a Regulation of the European Parliament and of the Council concerning trade in seal products, (Exhibit JE-10); Council of the European Union, Member States' Comments on the Proposal for a Regulation Concerning Trade in Seal Products (20 July 2009), (Exhibit JE-11); and European Parliament Debates, (Exhibit JE-12).

[649] European Parliament Debates, (Exhibit JE-12), p. 64. The Parliamentary debates contain repeated references to the "compromise" reflected in the text of the draft legislative proposal. (See Parliament Report, (Exhibit JE-4)).

[650] See Comments from EU Member States on Proposal for a Regulation of the European Parliament and of the Council concerning trade in seal products, (Exhibit JE-10), p. 16 (view of Finland that certain welfare requirements in the Commission Proposal were "not necessary" for the specific manner of seal hunting in Finland) and p. 18 (preference of Sweden "to introduce a second exemption possibility for seal products originating from states with small scale, statutory controlled hunting with the main purpose to reduce damages from fisheries and which is done in accordance with a management plan"). See also Council of the European Union, Member States' Comments on the Proposal for a Regulation Concerning Trade in Seal Products (20 July 2009), (Exhibit JE-11), p. 1 (opinion of Denmark that "trade in seal products as a whole is a legitimate activity, which should not be unnecessarily hampered and stigmatised").

We also observe certain opposing views during the Parliamentary debates. (See European Parliament Debates, (Exhibit JE-12), p. 64 ("we are solving nothing at all in terms of seal hunting. We are simply relocating the problem ... you are not banning seal hunting. You are potentially relocating the problem to China or to other countries, which will be able to accept these products"); p. 68 ("This proposal destroys people's lives and their communities in remote regions. It destroys business opportunities on both sides of the Atlantic and seriously harms good relations … "; and p. 69 (" … on behalf of Greenland, which is part of the Kingdom of Denmark. There are a few tiny, remote settlements in the far north with a population of just 10-20 people who live from hunting seals. If we take away their livelihood, they will have no chance of economic survival")).

[651] Specifically, the Parliamentary debates indicate that European citizens have consistently expressed concerns on seal welfare and their wish to have seal products banned from the market through numerous letters and e-mails. (See, e.g. European Parliament Debates, (Exhibit JE-12), pp. 61-62 ("we will have respected the wishes of many citizens in many of our countries across the EU who tell us that they do not like what they see of the commercial seal hunt and that they wish to have no association with the trade that results from that hunt. We have respected that wish: we have dealt solely with what we can deal with within the confines of Europe's internal market: the circulation of goods in the market that arise from the commercial hunt … our consumers should be assured that nothing from the commercial hunt will be sold on Europe's market"); pp. 62-63 ("seal hunting and the way it is carried out has resulted in the expression of serious reaction and concern by the public …"); p. 65 ("The public have demonstrated in numerous polls across European countries that they want an end to the trade…"); p. 67 ("We are meeting the wishes of the many citizens who have asked us in countless letters and e-mails to take action in this area"); p. 67 ("many EU citizens do not, and they support a total ban on the import of seal fur skins …")).

regard that the EU public's concerns on seal welfare found in the evidence are related to seal hunting in general, and not to any particular type of hunting.[652] The public survey results submitted by the European Union are also informative, although to a limited extent, in demonstrating the EU public concerns.[653]

7.399. Furthermore, on the basis of a plain reading of the text of the Basic Regulation, and in the light of the evidence mentioned above, we conclude that, in drawing up the measure, the European Union accommodated other interests or considerations, such as the Inuit communities engaged in seal hunting, seals hunted for marine management purposes, and seal products brought into the European Union for personal use. As mentioned above, however, the parties contest whether these interests should be considered as separate objectives of the EU Seal Regime independent from the objective of addressing seal welfare concerns.

7.400. The Appellate Body in *US – Clove Cigarettes* observed that "measures, such as technical regulations, may have more than one objective".[654] Thus, it may not be uncommon for a measure to have "a multiplicity of objectives".[655] Hence there is no reason in principle why the measure at issue could not have several objectives.[656]

7.401. However, based on its text and legislative history as well as its structure and design, we are not convinced that the "aim", "target", or "goal" of the EU Seal Regime was to protect the interests of IC, MRM, and Travellers.[657] Based on the text of the EU Seal Regime, we found that the Regime consists of a ban, albeit formulated in positive terms, and exceptions. Next, the structure and design of the measure – a ban with exceptions – establish that it operates as a prohibition against seal products, unless they meet specific conditions prescribed in the measure. The legislative history described above further shows, in our view, that the principal objective of adopting a regulation on trade in seal products was to address public concerns on seal welfare. Specifically, we noticed references in certain evidence relating to the measure's legislative history

[652] See, for instance, COWI 2008 Report, pp. 124-127. A public consultation conducted regarding their view on regulation of seal hunting, which COWI cautions should be reviewed with the limited representativeness of respondents, shows that "62.1% [of the respondents] state that seals should not be hunted for any reason", whereas "17.6% state that hunting is most acceptable when the hunter belongs to a traditional seal hunting culture/community or depend on seal hunt for his main income."

[653] See Public survey results, (Exhibits EU-48-59). The public survey results submitted by the European Union exhibit the existence of a certain level of public awareness and concern on seal welfare in the European Union and other countries. However, their probative value is limited as the surveys, considered alone, are insufficient to establish the existence of the EU public moral concerns on seal welfare as argued by the European Union.

Notably, some of these surveys were conducted with respect to citizens of countries other than those belonging to the European Union. Therefore, such surveys do not provide sufficient factual guidance in the assessment of public morals in the European Union.

We do note that the European Union has also presented evidence of surveys carried out in various countries which are member States of the European Union. (See Public survey results from Germany, the Netherlands, Portugal, Slovenia, Belgium, France, Austria, Sweden, and the Czech Republic, (Exhibits EU-50-57)). As argued by Canada, however, we observe that the public surveys (with the exception of the survey in Sweden) do not solicit views on whether it is acceptable to exempt seal products obtained from Inuit hunts and resource management-related culls from a prohibition on the sale of seal products. (See Canada's second written submission, para 93. See also Norway's second written submission, paras. 188 and 200). We further note that the survey companies' responses cited by the European Union do not rebut this specific claim put forth by both complainants. (See Exhibit EU-131 A, B, and C; European Union's opening statement at the second meeting of the Panel, para. 51).

[654] Appellate Body Report, *US – Clove Cigarettes*, paras. 113 and 115.

[655] Appellate Body Report, *US – Clove Cigarettes*, paras. 113 and 115.

[656] Colombia has submitted that, although Members may try to address more than one policy concern in a technical regulation, "it seems rather difficult to accept that it would be legitimate to enact a measure with one main objective and then impose exceptions to that measure that … undermine the principal policy objective". (Colombia's third-party submission, paras. 5-7, 32; third-party statement, paras. 6 and 15). Colombia thus maintains that the important legal issue in the alleged breach of provisions of the TBT Agreement is "the relationship that exists between [different policy objectives]" of a technical regulation. (Colombia's third-party submission, para. 23).

[657] The Appellate Body describes the word "objective" as a "thing aimed at or sought; a target, a goal, an aim" (Appellate Body Report, *US – Tuna II (Mexico)*, para. 313, (citing *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 1970)).

that the interests of Inuit and indigenous communities engaged in seal hunting should be protected from possible trade regulations on seal products.[658]

7.402. For us, the interests that were accommodated in the measure through the exceptions must be distinguished from the main objective of the measure as a whole. Further, unlike the issue of seal welfare, we do not find in the evidence submitted that the interests covered by the IC, MRM, and Travellers exceptions are grounded in the concerns of EU citizens. Rather, the evidence suggests that they appear to have been included in the course of the legislative process. For all these reasons, we do not consider that the interests incorporated in the IC, MRM, and Travellers exceptions form independent policy objectives of the EU Seal Regime as a whole.[659]

7.403. In paragraph 7.383 above, we explained that to determine the objective of the EU Seal Regime, we must examine whether the evidence as a whole shows (a) the existence of the EU public's concerns on seal welfare and/or any other concerns or issues that the European Union seeks to address; and, (b) the connection between such concerns, if proven to exist, and the "public morals" (i.e. standards of right or wrong) as defined and applied within the European Union.

7.404. As regards the first question, we have concluded that the text and legislative history of the measure established the existence of the EU public's concerns on seal welfare. We therefore proceed to examine the second question, namely, whether the concerns at issue fall within the scope of "public morals" in the European Union. In this connection, given our determination that IC and MRM interests do not constitute objectives of the EU Seal Regime, we find it unnecessary to determine whether such interests are "articulations of the same standard of morality" governing the public concerns on seal welfare as claimed by the European Union.[660] Thus, our task is confined to assessing whether the public concerns on seal welfare are anchored in the morality of European societies.

7.405. We found that the legislative history of the measure suggests a link between the public concerns on seal welfare and an ethical or moral consideration.[661] With that in mind, we now turn to other evidence before us. The European Union refers to various other sources, which in its view establish that the public concerns on seal welfare are indeed a moral issue within the European Union as a community.[662] Specifically, the European Union refers to the various actions

[658] For example, the 1983 ban on products of certain seal pups refers to "non-traditional hunting" and notes in its preamble that "the exploitation of seals … and in certain areas of the world forms an important part of the traditional way of life and economy; whereas hunting, as traditionally practised by the Inuit people, leaves seal pups unharmed and it is therefore appropriate to see that the interests of the Inuit people are not affected". (Seal Pups Directive, (Exhibit CDA-12)). The legislative history of the EU Seal Regime shows that exceptions for Inuit and indigenous communities from the regulation on seal products, albeit varying in scope, were consistently a consideration. The European Commission's proposed regulation, subsequent comments on the regulation, and the parliament's proposal also indicate references to exempting imports of occasional nature and for personal use. (See Commission Proposal, (Exhibit JE-9), p. 5; Parliament Report, (Exhibit JE-4), p. 10 (Justification for Amendment 8).

An exception for "communities dependent on artisanal fishing and which contribute to their subsistence or to the regulated and controlled management of seal populations with a view to mitigating the damage occasioned to fish stocks" appears for the first time in the Committee on Agriculture and Rural Development's proposed amendments to the Commission's proposed regulation. (Parliament Report, (Exhibit JE-4), p. 66, Amendment 18). We observe that this suggestion was not included in the parliament's proposal.

[659] We note that, in *Brazil – Retreaded Tyres*, while the measure concerned was a prohibition on the importation of retreaded tyres, certain imports were exceptionally allowed (e.g. imports from MERCOSUR partners or subject to domestic court ruling). Such derogations from the general ban in that dispute did not form part of the measure itself; rather they were made effective through the application of the measure. Under the circumstances of that dispute, Brazil identified the protection of environment as the objective of the measure (namely an import ban) under Article XX(b) of the GATT 1994, but never raised, for instance, the reasons behind such derogations as the "policy objective" of the measure *per se*. Moreover, the panel in that dispute addressed the situations involving the derogation from the ban under the chapeau of Article XX of the GATT 1994 (i.e. arbitrary or unjustifiable discrimination among imported products).

[660] The European Union submits that "the rule of morality" invoked by it requires balancing in each case the welfare of the animals concerned and other interests. (European Union's opening statement at the second meeting of the Panel, para. 44; response to Panel question No. 104).

[661] See para. 7.396 above.

[662] The European Union argues that the way in which humans treat animals is a matter of public morals, and humans are not free to treat and use animals as they wish, but ought instead to conform to certain moral standards of right and wrong. (European Union's first written submission, para. 61). The European Union

taken by the European Union as well as EU member States concerning animal protection in general; various pieces of legislation and Conventions on animal welfare within the European Union and in other countries, including Norway and Canada; and various international instruments. We examine these materials in turn.

7.406. "The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (the Treaty of Lisbon)" stipulates that "the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals".[663] The European Union asserts that, consistent with the mandate in the Treaty of Lisbon, the European Union adopted a comprehensive body of legislation on the welfare of farm animals within the framework of its Common Agricultural Policy.[664] Further, the European Union submits that although the protection of the welfare of wild animals and pets falls, in principle, within the scope of the competence of the EU member States, the EU legislators have in certain cases deemed it necessary to take protective action also with regard to such animals, including the measure in question in this dispute.[665] The European Union also points out that EU legislation on animal welfare is based to a large extent on a series of Conventions[666] elaborated since the 1960s at the Council of Europe, which were the first international instruments laying down comprehensive ethical rules for the use of animals.

7.407. The European Union also refers to EU member States' animal protection laws based on public morals considerations, as well as evidence of the moral objectives of measures taken with respect to seal welfare. For example, the European Union highlights laws in Austria (Federal Act which in §1 expressly aims at "the protection of the life and well-being of animals based on man's special responsibility for the animal as a fellow creature") and the United Kingdom (Animal Welfare

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claims that the first law on animal welfare was enacted in 1822 in the United Kingdom. (European Union's first written submission, para. 62 and Peter Sandøe and Stine B. Christiansen, *Ethics of Animal Use* (2008), (Exhibit EU-1); Austria's Federal Act on the Protection of Animals, (Exhibit EU-2); United Kingdom's Animal Welfare Act (2006), (Exhibit EU-3)).

[663] Article 13 of the Treaty on the Functioning of the European Union provides: "In formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage." (European Union's first written submission, para. 63, footnote 28)

The European Union explains that Article 13 of the Treaty on the Functioning of the European Union replaces and reproduces, with some slight changes, the content of the Protocol on Animal Welfare annexed to the Treaty Establishing the European Community by the Treaty of Amsterdam, which entered into force on 1 January 1999.

[664] See the legislative references provided in the Parliament Report, (Exhibit JE-4). For instance, regarding the protection of animals at the time of slaughter and killing, the exhibit references the following EU regulations: Council Directive 93/119/EC of 22 December 1993 on the protection of animals at the time of slaughter or killing; Council Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing; European Convention for the protection of animals for slaughter (Official Journal L 137, 02/06/1988 p. 0027-0038); and 88/306/EEC (Council Decision of 16 May 1988 on the conclusion of the European Convention for the Protection of Animals for Slaughter Official Journal L 137).

The European Union refers in particular to its amended regulation on the protection of animals at the time of killing, which asserts the status of animal welfare as "a Community value" and that "protection of animals at the time of slaughter or killing is a matter of public concern". (See European Union's first written submission, para. 64 (referring to Council Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing, Official Journal of the European Union, L303/1, 18 November 2009, (Exhibit CDA-31))).

[665] Such cases also include the 1983 Seal Pups Directive, (Exhibit CDA-12); Council Regulation (EEC) No 3254/91, of 4 November 1991, prohibiting the use of leghold traps, Official Journal of the European Union, L Series, No. 308 (9 November 1991) (Exhibit EU-5); and Regulation (EC) No 1523/2007 of the European Parliament and the Council, of 11 December 2007, banning the placing on the market and the import to, or export from, the Community of cat and dog fur, and products containing such fur, Official Journal of the European Union, L Series, No. 343 (27 December 2007), (Exhibit EU-6).

[666] European Union's first written submission, para. 66, footnote 36. The Council of Europe has drawn up five conventions for the protection of animals: (a) European Convention for the protection of animals during transport, Paris, 13 December 1968, E.T.S. No 65; (b) European Convention for the protection of animals kept for farming purposes, Strasbourg, 10 March, 1976, E.T.S. No 87; (c) European Convention for the protection of animals for slaughter, Strasbourg, 10 May 1979, E.T.S. No 102; (d) European Convention for the protection of vertebrate animals used for experimental and other scientific purposes, Strasbourg, 18 March, 1986, E.T.S. No 123; and (e) European Convention for the protection of pet animals, Strasbourg, 13 November 1986, E.T.S. No 125. http://conventions.coe.int

Act of 2006 with provisions for the prevention of harm to and promotion of welfare of animals); and, references a moral aspect of the public concerns on seal welfare found in Belgian and Dutch material, such as "au nom de la morale publique"; "outrage"; and "an offense to public order and decency in this country".[667]

7.408. Further, the European Union refers to recommendations of the Office International des Epizooties (OIE) (Guiding Principles for Animal Welfare)[668], certain other WTO Members' measures on seal products based on moral grounds (e.g. Chinese Taipei[669]; Russia[670]; and Switzerland[671]), as well as the "philosophy of animal welfarism" and its connection to "a long-established tradition of moral thought".[672]

7.409. The evidence presented by the European Union, taken as a whole, illustrates in our view "standards of right and wrong conduct maintained by or on behalf of [the European Union]" concerning seal welfare. In reaching this conclusion, we observe that ascertaining the precise content and scope of morality in a given society may not be an easy task.[673] As the panel in *US – Gambling* stated, we are mindful that Members should be given some scope to define and apply for themselves the concepts of "public morals" in their respective territories, according to their own systems and scales of values. Although not all evidence presented to us makes an explicit link between seal or animal welfare and the morals of the EU public, we are nevertheless persuaded that the evidence as a whole sufficiently demonstrates that animal welfare is an issue of ethical or moral nature in the European Union. International doctrines and measures of a similar nature in other WTO Members, while not necessarily relevant to identifying the European Union's chosen objective, illustrate that animal welfare is a matter of ethical responsibility for human beings in general.[674]

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[667] European Union's first written submission, para. 62 (referring to the comments of one of the sponsors of the proposal leading to the Belgian ban on seal products and an explanatory memorandum accompanying the Dutch ban). See Loi relative a l'interdiction de fabriquer et de commercialiser des produits dérivés de phoques, 16 March 2007, (Exhibit EU-110); Chambre des députés de Belgique, minutes of the session of 25 January 2007, (Exhibit EU-111); Bulletin of Acts, Orders and Decrees of the Kingdom of the Netherlands, (Exhibit EU-112).

[668] European Union's first written submission, para. 71; second written submission, para. 152-153; response to Panel question No. 46. One such "guiding principle" cited by the European Union is that "the use of *animals* carries with it an ethical responsibility to ensure the *welfare* of such *animals* to the greatest extent practicable". OIE's Terrestrial Animal Code, Chapter 7.1, (Exhibit EU-116) (emphasis original)

[669] The European Union has submitted the proposal leading to the ban in Chinese Taipei, which states that "the hunting process has proven to be extremely brutal and inhumane" and alludes to the contribution of consumers to the slaughter of "innocent seals" (European Union's second written submission, paras. 161-164 (referring to Chinese Taipei Parliament, YZ-No 1749, Committee proposal of bill No. 13359, (Exhibit EU-126)).

[670] The European Union cites statements of Russian officials reported in the press and Russia's response to the Panel's question that the purpose of its hunting ban is for population concerns "and to protect wild animals and baby animals from hard treatment". (See European Union's second written submission, para. 165 (citing the Russian Federation's third-party response to Panel question No. 16)).

[671] The European Union cites portions of the Swiss legislative proposal characterizing the seal hunt as "extremely cruel". (European Union's second written submission, paras. 169-170).

[672] The European Union refers to the philosophy of "animal welfarism" and its connection to "a long-established tradition of moral thought", which is discussed in an *amicus curiae* submission filed by Howse et al. (European Union's second written submission, para. 140; response to Panel question No. 10).

[673] We take note of the following statements by third parties on this question.

Iceland states that the public morals exception "is bound to be based on more subjective and less tangible arguments", but public morals should not be equated with "broad political and public support for a measure" and that there must be "actual public moral concerns" to justify a trade restriction". (Iceland's third-party submission, paras. 14 and 16-17).

Japan states that "while Members have the right to determine whether a specific objective forms part of 'public morals' on the basis of their own prevailing social, cultural, ethical and religious values, … Members are not free to label any policy objective as forming part of public morality." (Japan's third-party submission, para. 11).

[674] For example, we observe references to a link between animal welfare and ethical considerations in the complainants' government documents relating to seal hunting. (See Norway's Fisheries Directorate, Proposal to amend the rules on seal hunting (2010), (Exhibit EU-45), p. 1 (explaining regulatory initiatives in Norway for "measures that would be compatible with today's animal welfare requirements and ethical standards")).

See also Norway's Ministry of Agriculture and Food, Parliamentary Report No. 12 Regarding animal husbandry and animal welfare, (Exhibit EU-114)). This report was the product of an initiative by the Norwegian Ministry of Agriculture published in 2002 as a white paper and "constitutes a broad review and evaluation of all

7.410. In sum, based on our examination of the text and legislative history of the EU Seal Regime, as well as other evidence pertaining to its design, structure, and operation, we conclude that the objective of the EU Seal Regime is "to address the moral concerns of the EU public with regard to the welfare of seals". Specifically, these concerns have two aspects as claimed by the European Union: (a) "the incidence of inhumane killing of seals"; and, (b) EU citizens' "individual and collective participation as consumers in, and exposure to ('abetting'), the economic activity which sustains the market for" seal products derived from inhumane hunts.[675] Further, in light of the evidence before us, we note that the EU public concerns on seal welfare appear to be related to seal hunts in general, not any particular type of seal hunts.[676] Therefore, the second aspect of the objective of the EU Seal Regime pertains to seal products derived from inhumane hunts rather than "commercially-hunted seal products" as submitted by the European Union.

7.411. In this connection, we note that contributing to the welfare of seals by reducing the number of seals killed in an inhumane way, which the European Union claims can constitute the second objective of the measure, is closely linked to the first aspect of the public moral concerns, namely the moral concerns on "the incidence of inhumane killing of seals". We will therefore consider this as one aspect of the moral concerns in question, rather than as a separate, second objective of the measure.

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animal care in Norway from an *ethical* and animal welfare perspective. It also includes proposals for long-term goals and actions, hereunder an *ethical* platform". (Norway's Ministry of Agriculture and Food, "Norwegian Action Plan on Animal Welfare", (Exhibit EU-115), p. 1 (emphasis added) Notably, the white paper identifies a "widespread moral view in Norway today [that] takes elements from utilitarianism and rights philosophy", and specifically links such moral considerations to the treatment and slaughter of animals. (Norway's Ministry of Agriculture and Food, Parliamentary Report No. 12 Regarding animal husbandry and animal welfare, (Exhibit EU-114), p. 12. See also DFO Integrated Seals Management Plan 2011-2015, (Exhibit EU-42), p. 17 (describing "public attitudes toward the seal hunt" based on the results of a national survey)).

We also take note of the United States' comment that "while the focus must be on the responding Member's system and scale of values, what Members other than the responding Member consider to be public morals can offer confirmation of a panel's determination as to what constitutes a public moral within the system of the responding Member." (United States' third-party submission, para. 4).

[675] For ease of reference, we will use in these Reports the phrase "addressing public moral concerns on seal welfare" as shorthand for the specific objective as identified and described in paras. 7.324-7.325 including the two specific aspects of addressing such public moral concerns.

[676] We observe the European Union's reference to Canada's Royal Commission Report on sealing (Exhibit EU-48) to support its position that some of the opinion polls confirm that "the public do value very differently the various types of seal hunt." (European Union's response to Panel question No. 31). The Report shows that in two of five polls reviewed in the Report, the public showed a greater level of acceptance for killing animals if it is carried out for a person's survival or livelihood than if it is carried out for making a profit. (Report of the Royal Commission on Seals and Sealing (1986), Volume I, Chapter 11, "Public Opinion on Sealing", (Exhibit EU-48), p. 160). The Report, however, points out two uncertainties about this result: first, the question in the polls refers to "animals" and not "seals"; and, second, the term "livelihood" is not clearly defined and would mean something equivalent to subsistence (i.e. food or clothing) for some people and providing a cash income to others. It also mentions the much lower percentage of people willing to accept seal hunting by Inuit and other local communities to provide cash, and particularly to provide cash to enable them to undertake the hunting and fishing essential for their survival, than people willing to accept seal hunting by Inuit and other local communities to personally use the hunted seals. This suggests, according to the Report, that the public has very little understanding of the socio-economic realities by which these communities survive.

We consider that the results of the public opinion polls referenced in Canada's Royal Commission Report have limited probative value because the reliability of the results of these surveys, including the formulation of the questions asked and the target audience, has not been clearly demonstrated to us.

Further, we have taken note of an observation regarding the public perception of seal hunting in the COWI 2008 Report that the survey respondents showed some ambivalence on the issue of concerns over animal welfare versus concerns over the well-being of local communities (58% stating that animal welfare is equally important as well-being of local communities) and that the results of this question in relation to the question on the acceptability of different uses of seal products showed the complexity of the issue. We also note that 62% of the survey respondents in the COWI 2008 Report stated that seals should not be hunted for any reason, whereas 18% stated that hunting is most acceptable when the hunter belongs to a traditional seal hunting culture/community or depends on the seal hunt for his main income. (COWI 2008 Report, p. 126).

Overall, the results shown in two polls referenced in the Royal Commission Report, in our view, are not sufficient to establish a variance in the EU public's concerns on seal welfare depending on the type of hunts.

7.3.3.2 Legitimacy of the identified objective

7.3.3.2.1 Main arguments of the parties

7.412. Canada argues that the European Union's defined objective is *not* legitimate because it is based on an arbitrary and unjustifiable distinction between "commercial" and "non-commercial" hunts. It argues further that the EU Seal Regime, under the IC and the MRM categories, contains trade-restrictive requirements with no rational connection to the objectives of animal welfare and public concerns regarding animal welfare, which in fact undermine those objectives.[677]

7.413. Norway would accept that addressing a public moral relating to seal welfare (without the other peculiar contours of the "umbrella" public moral alleged by the European Union) is "legitimate". Norway argues, however, that a *distinction* based on the alleged "commercial" and "non-commercial" seal hunts is not legitimate. The objective of the IC exception is not legitimate either because it discriminates in favour of particular communities.[678]

7.414. The European Union claims that its stated objective of addressing the EU public moral concerns on seal welfare is legitimate because the public authorities must define and enforce certain moral standards to which humans must conform in treating and using animals.[679]

7.3.3.2.2 Analysis by the Panel

7.415. We now examine the question of whether the identified objective of the EU Seal Regime, i.e. "addressing EU public moral concerns on seal welfare", is legitimate within the meaning of Article 2.2 of the TBT Agreement. This policy objective is not included in the non-exhaustive list of exemplary legitimate objectives in Article 2.2. Therefore, its legitimacy must be assessed based on several reference points.

7.416. The Appellate Body considered that the following would be relevant factors in assessing the legitimacy of a non-listed objective: (a) objectives provided in Article 2.2 of the TBT Agreement; (b) objectives listed in the sixth and seventh recitals of the preamble of the TBT Agreement; and (c) objectives recognized in other provisions of the covered agreements.[680]

7.417. Article 2.2 of the TBT Agreement lays out the following objectives as examples of legitimate objectives: "national security requirements"; "the prevention of deceptive practices"; "protection of human health or safety, animal or plant life or health, or the environment". Further, the fifth and sixth recitals of the preamble recognize the following objectives: "to ensure the quality of its exports"; "for the protection of human, animal or plant life or health, of the environment"; "for the prevention of deceptive practices"; and "for the protection of its essential security interest". "Public morals" as such is thus not included in the lists provided in Article 2.2 and the fifth and sixth recitals of the preamble of the TBT Agreement.

7.418. With respect to policy objectives in other covered agreements, the objective of protecting public morals is recognized in both Article XX of the GATT 1994 and Article XIV of the GATS. The explicit inclusion of "public morals" as one of the general exceptions for a GATT- or GATS-inconsistent measure demonstrates that WTO Members considered this objective to be particularly significant. In light of this, and considered together with the objective of the TBT Agreement to further the objectives of the GATT 1994 as referenced in recital (2) of its preamble, we conclude that "public morals" falls within the scope of "legitimate" objectives under Article 2.2.

7.419. Proceeding on that basis, a subsequent question is whether addressing public moral concerns on a specific type of issue, seal welfare in this dispute, is a legitimate objective under Article 2.2 of the TBT Agreement. As discussed above, the concept of public morals is a relative term which needs to be defined based on the standard of right and wrong in a given society. Given that the European Union has established that the concerns of the EU public on animal welfare involve standards of right and wrong within the European Union as a community, we consider that

[677] Canada's second written submission, paras. 296-303.
[678] Norway's response to Panel question No. 109; opening statement at the first meeting of the Panel, paras. 100-111.
[679] European Union's first written submission, paras. 61 and 354.
[680] Appellate Body Reports, *US – Tuna II (Mexico)*, para. 313; *US – COOL*, para. 370.

addressing the public moral concerns on seal welfare, identified as the objective of the measure at issue, is "legitimate" under Article 2.2 of the TBT Agreement.

7.420. In support of its position that the stated objective is legitimate, the European Union also refers to various measures on animal welfare and seal products adopted by other WTO Members as well as international instruments on animal welfare.[681] We need not determine whether these examples as such exhibit the existence of a global social norm ("a universal value" according to the European Union) on animal welfare in general or seal welfare in particular. Nevertheless, these various actions concerning animal welfare at the international as well as national levels suggest in our view that animal welfare is a globally recognized issue. This further supports our conclusion above that the objective of addressing the public moral concerns on seal welfare falls within the scope of legitimate objectives within the meaning of Article 2.2 of the TBT Agreement.

7.421. Finally, we observe that the complainants do not dispute that "addressing the public moral concerns on seal welfare" *per se* is legitimate within the meaning of Article 2.2 of the TBT Agreement. Both complainants dispute a specific aspect of the EU Seal Regime – a distinction between allegedly "commercial" and "non-commercial" seal hunts – which they claim renders the objective illegitimate. In our view, the complainants' position with respect to this particular distinction is not relevant to addressing the question of whether the identified objective is legitimate within the meaning of Article 2.2 of the TBT Agreement. We discussed the questions raised by the complainants regarding the distinction between "commercial" and "non-commercial" seal hunts in the context of our examination of Canada's claim under Article 2.1 of the TBT Agreement.[682]

7.3.3.3 Whether the EU Seal Regime is more trade restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create

7.422. As noted above, an examination of the obligations under Article 2.2 requires a relational analysis of all of the following elements: (a) trade-restrictiveness of the EU Seal Regime; (b) degree of the measure's contribution to the identified objective; and (c) availability of alternative measures. We have identified the objective of the EU Seal Regime as addressing EU public moral concerns on seal welfare. In this section, we examine, based on the elements highlighted above, whether the EU Seal Regime is more trade restrictive than necessary to fulfil the identified objective, taking account of the risks non-fulfilment would create.

7.3.3.3.1 Whether the EU Seal Regime is trade restrictive

7.3.3.3.1.1 Main arguments of the parties

7.423. The complainants submit that the EU Seal Regime is trade restrictive because it imposes limiting conditions or restrictions on imports into the European Union and placing on the EU market of seal products.[683] If a given seal product does not satisfy the cumulative conditions of one of the sets of requirements, the seal product is prohibited on the EU market. The EU Seal Regime is therefore, by nature, trade restrictive because it lays down regulatory conditions limiting the importation and sale of seal products. Further, in practice, the mere expectation of the adoption of the EU Seal Regime hampered trade.[684]

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[681] European Union's first written submission, paras. 67-76.

[682] See section 7.3.2.3 above.

[683] Canada's first written submission, paras. 472-476; Norway's first written submission, paras. 662-672.

[684] Norway's first written submission, paras. 673-674 (referring to a COWI briefing note of 2009):

> At the same time [as the financial crisis,] the current legislation has been in the pipeline and has created uncertainty about the EU market. Hence, trade numbers are down substantially since 2007 and so is the market price of raw skin (less than half) … Some European markets [for seal oil], Sweden, Denmark, Finland and Germany were emerging but halted in recent years due to the Regulation. (COWI, Traceability systems for trade in seal products – Briefing note for workshop participants, 20 October 2009, pp. 16 and 19 in COWI 2010 Report, Annex 5)

Norway also refers to another COWI warning (before the Commission tabled its original proposal) that "[s]ince seal hunting mostly takes place outside the Community territory, any restrictions to market access in the Community will have trade impacts". (COWI 2008 Report, p. 102.)

7.424. The European Union does not dispute that the EU Seal Regime restricts trade to the extent that it imposes a prohibition on the placing on the EU market of all seal products. The ban aspect of the measure aims at being very trade-restrictive, consistently with the high level of fulfilment sought by the EU Seal Regime of its policy objective.[685] The European Union contends however that unlike the ban, the three exceptions to that prohibition are *not* trade-restrictive.[686] To the contrary, they allow trade which would otherwise be prohibited by the ban.

7.3.3.3.1.2 Analysis by the Panel

7.425. "Trade-restrictive" aspects of the measure mean the aspects of the measure that "hav[e] a limiting effect on trade"[687], or that constitute "limiting condition[s]" on trade.[688] The Appellate Body in *US – Tuna II (Mexico)* referred to this meaning as similar to that in the context of Article XI of the GATT 1994, under which the Appellate Body noted that the term "prohibition" is defined as "a legal ban on the trade or importation of a specified commodity".[689]

7.426. Given the broad scope of "trade restriction", we believe that the EU Seal Regime, considered in its entirety, is trade restrictive because it does "hav[e] a limiting effect on trade" by prohibiting certain seal products, including those imported from Canada and Norway, from accessing the EU market. The European Union itself acknowledges that the measure "aims at being very trade-restrictive".[690]

7.427. In this connection, we disagree with the European Union's position that the exceptions under the Regime do not need to be "justified" under Article 2.2 because it is not trade restrictive. As explained in the context of assessing the measure's qualification as a technical regulation, both the ban and exceptions under the EU Seal Regime define the scope of products that are prohibited and allowed on the EU market. The proper assessment of the EU Seal Regime's operation as a technical regulation, including its trade-restrictiveness, is thus based on an examination of the Regime as a whole.

7.428. We next turn to examine the extent to which the measure fulfils the objective of addressing the EU public moral concerns on seal welfare.

7.3.3.3.2 Degree of the EU Seal Regime's fulfilment of the identified objective

7.3.3.3.2.1 Main arguments of the parties

Complainants

7.429. Canada argues that the absence of animal welfare requirements in the conditions of the IC or MRM categories demonstrates that the level of fulfilment was not a high level of fulfilment approaching complete fulfilment of the objective.[691] Rather the design, structure, and operation of the measure indicate that a low level of fulfilment of the animal welfare and alleged public moral concern regarding animal welfare is acceptable to the EU public. Consequently, the level of fulfilment sought, as articulated through the design, structure and expected operation of the measure is also low.

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[685] European Union's first written submission, paras. 357-358.

[686] European Union's first written submission, paras. 357-358; second written submission, paras. 269-270. The European Union submits that the three exceptions could only be regarded as being trade restrictive if they discriminated in favour of domestic seal products or between different sources of imports. However, all and each of the three exceptions are consistent with Article 2.1 of the TBT Agreement. Particularly, the Travellers exception benefits exclusively imports of all origins.

According to the European Union, as the exceptions are not trade-restrictive, they do not require justification under Article 2.2. The exceptions could be relevant for the analysis under Article 2.2 only to the extent that they detracted from the contribution made by the ban to the objectives of the EU Seal Regime.

[687] Appellate Body Reports, *US – Tuna II (Mexico)*, para. 319; *US – COOL*, para. 375.

[688] Appellate Body Report, *China – Raw Materials*, para. 319; Panel Report, *Colombia – Ports of Entry*, paras. 7.232-7.241.

[689] Appellate Body Report, *US – Tuna II (Mexico)*, para. 319 (citing Appellate Body Report, *China – Raw Materials*, para. 319).

[690] European Union's first written submission , paras. 357 and 586.

[691] Canada's second written submission, paras. 310-316.

7.430. Norway submits that the EU Seal Regime does not contribute to the welfare of seals, whether it is considered as a distinct objective or as a component of the alleged "public morals".[692] First, the EU Seal Regime does not condition market access on compliance with animal welfare requirements.[693] Second, the measure does not "contribut[e] to the welfare of seals by reducing the number of seals killed in an inhumane way"[694] because, once the EU Seal Regime is fully implemented, eligible seal products from Greenland will match or exceed the total size of the EU market prior to the ban.[695] Thus, rather than reducing the overall quantity of seal products available within the European Union, the EU Seal Regime simply reduces the list of countries from which such products may be sourced.

7.431. Third, according to Norway, the EU Seal Regime does not "shield … the EU public from being confronted"[696] with seal products, including seal products derived from "an immoral act (the killing of seals in an inhumane way)".[697] Consumers are not even informed of the fact that the products in question contain seal, let alone of whether the seals were caught humanely.[698] Fourth, the EU Seal Regime does not prohibit the "commercial exploitation" of seal products "within the EU territory"[699]: seal products may be placed on the EU market or imported regardless of compliance with animal welfare requirements; seal products eligible for market access under the IC or MRM requirements may be hunted for commercial purposes; and, the EU Seal Regime does not restrict transit across the European Union, processing for export in the European Union under an inward processing procedure, production for export, or sale at auction houses for export, for any seal product irrespective of the type of hunt. In other words, EU citizens are allowed to participate in, and earn money from, the commercial exploitation of seal resources.

7.432. Fifth, with regard to the alleged moral dimension of the objective pursued, the measure does not contribute to the preservation or safeguard ("protection") of morals, which Article XX(a) of the GATT 1994 (being relevant context where "public morals" are invoked as an objective for purposes of Article 2.2 of the TBT Agreement) shows is the relevant public morals objective.[700] The relevant public moral – if it exists – will not be threatened by making seal products available on shop shelves. Hence, a ban is not needed to "protect" that moral – it would remain anyway. If a public moral will not be threatened by trade, a trade ban cannot be justified simply by the need to avoid certain negative "feelings" on the part of consumers. In that regard, Norway recalls that these "feelings" on the part of EU consumers could already be engendered under the EU Seal Regime for consumers who feel strongly about seal welfare irrespective of the type of hunt, because seal products can be sold on the EU market.[701]

[692] Norway's second written submission, paras. 231-238.

[693] Norway's responses to Panel questions Nos. 14, 69, and 72.

[694] European Union's response to Panel question No. 10 (describing the alleged objectives of the measure).

[695] Norway's response to Panel question No. 41. As explained in that response, based on Eurostat data analysed by COWI, the total size of the EU market in 2006 was approximately 110,000 skins. (COWI 2008 Report, p. 106, Table 5.2.3, total of the figures under "Import to EU-27" (including intra-community trade)). In 2006, for example, 109,201 seal skins were traded in Greenland. (Management and Utilization of Seals in Greenland, (Exhibit JE-26), p. 27, Table 3). Export figures for 2004 are even higher, with 115,723 skins sold, of which 71% were sold in the European Union, even in the presence of competition from supplies from non-Greenlandic sources. (Ibid. p. 28, Table 4)

See also Norway's first written submission, para. 690 (citing P. Fitzgerald, "'Morality' May Not Be Enough to Justify the EU Seal Products Ban: Animal Welfare Meets International Trade Law", *Journal of International Wildlife Law and Policy* (2011), Vol. 14, pp. 85-136, (Exhibit NOR-86), p. 128).

[696] European Union's response to Panel question No. 10.

[697] European Union's response to Panel question No. 10.

[698] Norway's first written submission, paras. 705-716; Norway's opening statement at the first meeting of the Panel, paras. 88, 135.

[699] European Union's response to Panel question No. 10, para. 42.

[700] Norway refers to Oxford English Dictionary, OED Online, Oxford University Press, accessed 27 March 2013, http://www.oed.com/view/Entry/153127?redirectedFrom=protect&, *protect*.

[701] Norway notes that, under the EU Seal Regime, many consumers may not experience such "feelings" simply on the basis that they do not know whether a product they are consuming contains seal, since no labelling is required under the EU Seal Regime.

Respondent

7.433. The European Union submits that through the ban, the EU Seal Regime makes a very substantial contribution to its policy objective in two ways.[702]

7.434. First, the ban provides a direct response to the moral concerns of the EU population by prohibiting, as a general rule, the marketing within the EU territory of the products which the EU population regards as morally abhorrent.

7.435. Second, by limiting the global demand for seal products, the ban reduces the number of seals which are killed every year in a manner that may cause them excessive suffering, thereby contributing to the welfare of seals. There are clear indications that the EU Seal Regime, and the bans of the EU member States which preceded it, have had a significant impact on the global demand for products resulting from commercial hunts and, consequently, on the number of seals killed inhumanely every year. The volume of catches declined considerably in both Canada and Norway after 2006, coinciding with the introduction of the first EU member States' bans.[703] Exports from Canada declined even more drastically after 2006.[704] While they have recovered slightly in the last two years, they remain far below the levels reached during the last decade.[705]

7.436. Further, as regards the exceptions under the measure, the European Union asserts that they are not trade restrictive and thus do not have to be justified under Article 2.2. Instead, it is the restrictive effects of the ban which need to be justified under that provision. By focusing exclusively on the conditions attached to the exceptions, the complaining parties seek to draw the Panel's attention away from the obvious fact that the ban does make a major contribution to the achievement of the objective pursued by the EU Seal Regime.

7.437. In any event, the exceptions do not undermine the objective of the EU Seal Regime because they are based on moral grounds; the products falling within the scope of the IC and the MRM exceptions do not raise the same moral concerns as other types of seal products because the suffering inflicted upon seals is outweighed by the benefits to humans (or other animals). Hence the marketing of products complying with those exceptions is allowed. Thus, the fact that the ban is subject to exceptions does not prevent it from making a substantial contribution to its public moral objective in the first of the two ways described above. While the contribution of the EU Seal Regime to the welfare of seals could have been even greater in the absence of any exceptions, this does not mean that the ban aspect of the measure makes no contribution at all to the welfare of seals.

7.438. Further, both the Travellers exception and the MRM exception have been very narrowly defined and apply to a very small volume of trade: as recognized by the complainants, the trade impact of the Travellers exception is "minuscule"[706]; and, the scope of the MRM exception is very limited and thus the trade potentially concerned very small.[707]

7.439. Although the IC exception has, potentially, a broader scope of application than the other two exceptions, the complainants' allegations that, as a result of the IC exception, exports from Greenland will replace exports from Canada and Norway (hence the global demand for seal products and thus the number of seals killed inhumanely will remain unaffected), are speculative and implausible.[708] The IC exception does not seek to promote exports from Greenland, but

[702] European Union's first written submission, paras. 359-366; second written submission, paras. 277-300. See also European Union's first written submission, paras. 360-365 (referring to Canada's first written submission, paras. 480-496, and Norway's first written submission, paras. 677-704).

[703] DFO Commercial Seal Harvest Overview 2011, (Exhibit JE-27), tables 2, 8, 9, and 10. See also *amicus curiae* submission by Anima et al., pp. 61-62 (Exhibit EU-81); complainants' responses to the Panel question Nos. 96 and 99.

[704] DFO Commercial Seal Harvest Overview 2011, (Exhibit JE-27), tables 3-7 and 12-15.

[705] The European Union submits that the Canadian Government has recognized that the EU Seal Regime has had "significant negative impacts on Canada's sealing industry". (Canada's first written submission, paras. 80-81).

[706] Canada's first written submission, para. 286.

[707] Currently the MRM exception is available only with regard to seals hunted in Sweden. In 2011 only 86 seals were hunted in Sweden. (European Union's response to the Panel's question No. 96).

[708] See Canada's first written submission, paras. 487-488; Norway's first written submission, para. 683. The European Union argues that such allegation relies on little else than an unsupported assertion by an

instead to mitigate the necessarily adverse impact of the EU Seal Regime on the Inuit and other indigenous populations to the extent compatible with the animal welfare objectives of the EU Seal Regime.[709] The complainants also assume that any products obtained from seals hunted by any member of an indigenous community will necessarily qualify for the IC exception, which is not the case because there are specific conditions to be met.[710]

7.440. Finally, even if the Panel were to conclude that the EU Seal Regime makes no contribution to its public moral objective in the first of the ways described above, it is beyond question that the EU Seal Regime would still make a material contribution to its public moral objective in the second way.

7.3.3.3.2.2 Analysis by the Panel

7.441. The Appellate Body stated that the question of whether a technical regulation "fulfils a legitimate objective" in Article 2.2 is concerned with the *degree* of contribution that the technical regulation makes toward the achievement of the legitimate objective. The "degree of contribution of the measure" to the fulfilment of the legitimate objective is in turn revealed through the measure itself[711] and "may be discerned from the design, structure, and operation of thetechnical regulation, as well as from evidence relating to the application of the measure".[712] The relevant question is thus the degree of *actual* contribution that the technical regulation, as written and applied, makes to the fulfilment of a legitimate objective(s).[713]

7.442. We must therefore assess the degree of the EU Seal Regime's actual contribution to the fulfilment of its stated objective. In this regard, we recall that the EU Seal Regime as a whole, consisting of both the prohibitive and permissive aspects, was found to constitute a technical regulation within the meaning of the TBT Agreement.[714] It is thus the EU Seal Regime in its entirety that must be assessed for its contribution to the objective, and not just a particular element of it.

7.443. The objective of the EU Seal Regime is to address the public moral concerns on seal welfare in respect of two aspects: first, the EU public's participation as consumers in and exposure to products derived from seals killed inhumanely; and, second, the overall number of seals killed

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individual member of European Parliament (who was the rapporteur for the IMCO Committee during Parliamentary deliberations). As explained above, her views were overwhelmingly rejected by the IMCO Committee and, eventually, by the European Parliament.

[709] The European Union argues that the complainants also overlook that a large part of the seals hunted in Greenland (in some years more than 50%) is used for subsistence purposes and not traded. (See Management and Utilization of Seals in Greenland, (Exhibit JE-26), p. 27).

[710] The European Union argues that the complainants base this assumption on an opinion casually expressed in the COWI 2010 Report. (See COWI 2010 Report, Annex 5, p. 17). According to the European Union, COWI had neither the authority, nor the qualifications nor the mandate to engage in the legal interpretation of the Basic Regulation. The European Union further submits that the Implementing Regulation, which specifies the conditions for qualifying for the IC exception, had not even been adopted at the time when the COWI Report was issued.

We however note that the purpose of the COWI Report was to assist the European Commission in preparing the specific regulations implementing the rules set out in the Basic Regulation. The COWI 2010 Report states in its Executive Summary:

"COWI A/S has been contracted by the European Commission, DG Environment, to undertake a Study on implementing measures for trade in seal products, which provides input to the Commission's process of developing implementing measures for [the Basic] Regulation. Therefore the results of this present study are providing input to the development of a suitable traceability scheme that can ensure that the conditions stipulated in the Regulations are met while defining the implementing rules. The overall purpose of the study is to provide the Commission with additional information in order to draft implementing measures in terms of traceability schemes in accordance with the Regulation on trade in seal products." (COWI 2010 Report, p.iii).

[711] Appellate Body Report, *US – Tuna II (Mexico)*, para. 317.

[712] Appellate Body Reports, *US – Tuna II (Mexico),* para. 317; *US – COOL*, para. 373. See also Appellate Body Reports, *Brazil – Retreaded Tyres*, para. 151 (indicating that contribution to the objective of a measure "could consist of quantitative projections in the future, or qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence"); *EC – Asbestos*, para. 167.

[713] Appellate Body Report, *US – Tuna II (Mexico)*, paras. 317-318. The Appellate Body recalled that as in other situations, such as, for instance, when determining the contribution of a measure to the achievement of a particular objective in the context of Article XX of the GATT 1994, a panel must assess the contribution to the legitimate objective *actually achieved* by the measure at issue.

[714] See section 7.3.1 above.

inhumanely. We assess the degree of the measure's actual contribution to these two aspects in turn. We then make an overall assessment of the measure's contribution to the objective as a whole.

7.444. Regarding the first aspect of the objective, the European Union argues that the measure makes a contribution to its objective in the following manner: the ban ensures that "the EU population does not render itself accomplice to the inhumane killing of seals in the commercial hunts and is not confronted with the products resulting from such immoral killing".[715]

7.445. Based on the evidence before us, we found that the EU public concerns on seal welfare pertained to seal hunting in general; available evidence did not establish that the EU public concerns were linked exclusively to commercial seal hunts or that the EU public found poor animal welfare outcomes in IC and MRM hunts morally justifiable as suggested by the European Union. Therefore, the degree of the measure's actual achievement of the first aspect of the objective must be gauged against whether the measure ensures that the EU citizens do not participate as consumers in products derived from seals killed inhumanely regardless of the type of the hunt.

7.446. As noted above, virtually all of the seal products derived from the hunts in Canada and Norway are denied access to the EU market.[716] To the extent that seals derived from such hunts include seals killed inhumanely, the ban prevents the EU public from purchasing products derived from seals killed inhumanely in Canadian and Norwegian hunts.

7.447. As examined above, however, the animal welfare risks arising from seal hunts in general also exist in IC and MRM hunts, and thus seals may also be killed inhumanely in such hunts. Given that products are allowed on the market under the IC and MRM exceptions regardless of whether they derive from seals killed humanely, these exceptions, based on their design, are incapable of contributing to preventing consumers in the European Union from purchasing or being exposed to products that may have been made of seals killed inhumanely in IC or MRM hunts.[717] Moreover, we observe that the products allowed under the IC and MRM exceptions are not subject to any mechanism or labelling scheme through which consumers can be informed of the presence of seal products on the EU market in general and of whether a specific product contains seal. This suggests that EU consumers are exposed to, and may be purchasing, seal products without knowing that such products may be derived from seals killed inhumanely.

7.448. Overall, based on its design and expected operation, we find that the ban under the EU Seal Regime is capable of making a contribution to preventing the EU public from being exposed on the EU market to products that may have been derived from seals killed inhumanely in Canadian or Norwegian hunts. However, the IC and MRM exceptions under the Regime diminish the degree of the actual contribution made by the ban, as consumers are exposed to seal products that are allowed on the EU market under these IC and MRM exceptions, which may have been derived from seals killed inhumanely in IC or MRM hunts.

7.449. As regards the second aspect of the objective (i.e. the number of seals killed inhumanely), the European Union argues that the ban makes material, but partial, contribution to addressing the animal welfare aspect of the concerns by reducing global demand for seal products resulting from commercial hunts, with the consequence that less seals are killed in an inhumane way.

7.450. First, we look at the design, structure, and expected operation of the measure. A direct impact of the "ban" under the measure is a reduction of the demand for seal products within the European Union. COWI assessed that "the current legislation has been in the pipeline and has created uncertainty about the EU market. Hence, trade numbers are down substantially since 2007 and so is the market price of raw skin (less than half). … Some European markets [for seal oil], Sweden, Denmark, Finland and Germany were emerging but halted in recent years due to the

[715] European Union's response to Panel question No. 9, para. 36.
[716] See section 7.3.2.2 above.
[717] We note that entities from Greenland and Sweden have been approved by the Commission to be recognized bodies under Article 6 of the Implementing Regulation that may issue attesting documents for seal products to be placed on the EU market pursuant to the IC and MRM exceptions. (See European Union's response to Panel question Nos. 156 and 158; Commission decisions of 18 December 2012recognising the Swedish County Administrative Boards, (Exhibit EU-159), and of 25 April 2013 recognizing the Greenland Department of Fisheries, Hunting and Agriculture (APNN), (Exhibit EU-149)).

Regulation."[718] The ban also appears to have had a negative influence on the seal products market in general. For example, according to Norway, "the mere expectation of the adoption of the EU Seal Regime hampered trade."[719]

7.451. We noted however in the context of our analysis of the measure's contribution to the first aspect of the objective that the IC and MRM exceptions have a certain negative impact on the degree of the actual contribution made by the ban. As noted earlier, seal products qualifying under the IC and MRM exceptions are allowed on the EU market regardless of the animal welfare outcomes in such hunts. To that extent, the exceptions would also reduce the degree of contribution made by the ban to reducing the overall demand for seal products within the European Union and consequently the number of seals that may be killed inhumanely in these hunts.

7.452. At the same time, there is evidence indicating that Inuit communities have been adversely impacted by the EU Seal Regime as a whole, in particular the ban under the Regime. There is also evidence showing that while Inuit and other indigenous communities could potentially qualify and export seal products under the IC exception, they have not been able to benefit from the exception. The interplay between the ban and the IC exception may thus limit, to a certain extent, any negative impact of the IC exception on the degree of the contribution of the ban to the objective.

7.453. Furthermore, as described in section 7.2.2 above, the EU Seal Regime allows certain commercial activities relating to the production of seal products derived from commercial hunts. Specifically, the European Union confirmed that the transit and the "inward processing" of seal products derived from commercial seal hunts can take place under the measure.[720] Data provided by the parties confirm the continued trade of seal products after the EU Seal Regime entered into force. This has been explained by the parties as attributable to transhipment, resale, and/or processing activities and representing goods not released for free circulation in the EU customs territory.[721]

7.454. COWI further gives an indication of the economic significance of these activities, estimating that approximately 5 per cent of the global seal fur trade is actually consumed in the European Union, "while a much larger part is passing through the EU either in transit, through auction houses, or for tanning purposes".[722] A document produced by the European Parliamentary Assembly also states, "Europe is the main importer of raw products and *exporter of manufactured goods*".[723] The European Union also clarified that it does not claim that allowing the transit and inward processing of seal products makes a positive contribution to the public morals objective pursued by the EU Seal Regime.[724] In our view, these activities thus facilitate the processing of seals obtained in commercial hunts into final seal products, which in turn may be sold to other

[718] We recall that the first step in the legislative history of the current EU Seal Regime was the EU Parliamentary Declaration on banning seal products in 2006. (See Parliament Declaration, (Exhibit JE-19)).
See also COWI 2010 Report, Annex 5, pp. 16 and 19 (Traceability systems for trade in seal products – Briefing note for workshop participants, 20 October 2009). COWI had warned the European Union before the Commission tabled its original proposal that "[s]ince seal hunting mostly takes place outside the Community territory, any restrictions to market access in the Community will have trade impacts". (COWI 2008 Report, p. 102).

[719] Norway's first written submission, paras. 673-674 (referring to COWI 2010 Report, Annex 5, Briefing note of 2009).

[720] The European Union defines inward processing as the processing under customs control of imported inputs into products intended for export. (European Union's response to Panel question No. 131).

[721] See parties' responses to Panel question No. 98. During 2011, the value of seal products entering the European Union under the inward processing regime amounted to €812,000, of which €713,000 originated in Canada and €99,000 originated in Norway. (European Union's response to Panel question No. 177). Furthermore, data provided by the European Union confirm that tanned or dressed seal skins have been exported from the European Union following the adoption of the EU Seal Regime (possibly as a result of inward processing), though we note that these activities have occurred at reduced levels from previous years. (See Eurostat, exports of seal products from the European Union (2001-2011), (Exhibit EU-87)).

[722] COWI 2010 Report, p. 42. See also Ibid. p. 37 (noting that seal hides and skins were "mainly imported to the EU for tanning or further processing" and then exported, such that "[o]nly limited quantities end up on the EU market").

[723] Council of Europe Recommendation, (Exhibit EU-117), para. 3 (emphasis added)

[724] European Union's response to Panel question No. 131.

markets in the world.[725] Data from Canada's DFO, for example, show that a large value of seal products has been exported to markets outside the European Union[726], primarily consisting of seal oils rather than skins.[727]

7.455. Therefore, while the measure prohibits certain seal products on the EU market based on their link to the potential incidence of inhumane killing of seals, the measure allows commercial activities within the European Union, which is directly connected to the processing of the same products. This incoherency in the measure, in our view, further reduces the contribution of the measure to the reduction of the global demand for seal products derived from inhumane killing. We also consider that this implicit exception under the measure exposes EU citizens to other types of commercial activities directly related to the production and supply of seal products that may have been derived from seals killed inhumanely.[728] By allowing such activities, in our view, the EU Seal Regime undermines its intended objective of addressing the EU public concerns on seal welfare.

7.456. Turning to the actual operation of the measure, particularly in terms of trade statistics concerning seal products, we make a general observation that data provided by the parties are incomplete in terms of product types and import/export countries.[729] As such, we are not in a position to draw any concrete conclusions based on the data before us. Nevertheless, the data show a general trend that seal product imports[730] from the complainants into the EU market have decreased significantly over the last few years as illustrated by the table below.[731]

[725] The European Union points out that the exclusion of transit and inward processing from the ban benefits mainly the complainants' sealing industry and was indeed requested by that industry, with the support of the Canadian authorities. (European Union's response to Panel question No. 131).

There is some evidence indicating that seal products derived from seals hunted in Canada and Norway, including those produced through the inward processing allowed within the European Union, have been diverted to other markets than the European Union since the introduction of the EU Seal Regime. (See, e.g. DFO Commercial Seal Harvest Overview 2011, (Exhibit JE-27), Table 14 (showing destination of seal products outside the European Union); Eurostat, exports of seal products from the European Union (2001-2011), (Exhibit EU-87) (showing exports of seal products *from* the European Union to other destinations)).

[726] However, we note that these values do not exceed peak exports to the respective markets in previous years and further display sharp fluctuations between years.

[727] DFO Commercial Seal Harvest Overview 2011, (Exhibit JE-27), Table 15.

[728] Canada comments that allowing transit and inward processing, insofar as it exposes EU citizens to the presence of morally tainted products based on the EU's own logic, has a detrimental moral impact on the EU public. (Canada's comments on the European Union's response to Panel question No. 131).

[729] The Panel notes that discrete data are unavailable for many of the seal products listed in the European Commission's Technical Guidance Note (Exhibit JE-3), as such products are subsumed under sub-headings of the Combined Nomenclature. (European Union's response to Panel question No. 97, para. 275; European Union's response to Panel question No. 166, para. 262). Specifically, data from the European Union do not include imports of *raw* seal skins (because they are mixed under a heading with other animal skins), which the European Union notes comprised the majority of Canada's exports to the European Union prior to the ban. (European Union's response to Panel question No. 97, para. 276). However, prior to 2007, there were tariff lines exclusively for raw seal skins and the European Union has provided data for these in Exhibit EU-143B (separate table provided in Annex). Conversely, data from Canada's DFO do not include exports of tanned skins because exportation of tanned and dressed seal skin products, whole seal skins or cuttings thereof, and seal skin apparel, are combined with such products derived from other animals. Thus, there are no discrete data for these seal products. (European Union's response to Panel question No. 98, para. 282 (citing Canada's first written submission, para. 78 and confirmed in Canada's response to Panel question No. 96, para. 353)).

The product classifications used by Norway to compile statistical trade data do not generally distinguish between products that may or may not contain seal. Accordingly, there are no available data on the major seal product exports from Norway. (See Norway's response to Panel question No. 96).

[730] Seal skins have historically constituted the majority of seal products traded.

[731] See Canada's and Norway's responses to Panel question No. 99 (acknowledging the decline in trade with the European Union). See also Canada's response to Panel question No. 96.

EU imports of tanned/dressed seal skins from Canada and Norway[732]

Volume (# of units) and value ('000 euro)

	Canada		Norway	
2002	20,016	€689	23,753	€1,627
2003	11,594	€455	10,996	€400
2004	6,169	€347	8,156	€319
2005	5,964	€396	9,046	€300
2006	6,609	€415	3,226	€175
2007	551	€44	5,437	€448
2008	25,892	€464	2,811	€213
2009	549	€48	3,225	€234
2010	10	€1	81	€26
2011	5	€1	36	€2

7.457. In respect of the actual number of seals hunted in the main sealing countries, available data show some reduction in recent years although the data also indicate some fluctuations in the number of seals hunted in 2009 and 2010, for instance in Norway and Namibia.[733]

Number of seals hunted

	2004	2005	2006	2007	2008	2009	2010	2011	2012
Canada[734]	365,971	329,829	354,400	224,745	217,850	76,668	69,101	40,393	-
Norway[735]	14,800	18,000	17,000	14,000	1,263	8,035	4,652	10,334	5,593
Greenland[736]	157,697	191,605	188,939	160,493	156,874	142,384	-	-	-
Namibia[737]	59,500	65,000	83,047	34,728	47,603	41,145	67,799	-	-
Russia[738]	-	22,474	7,107	5,476	-	-	-	-	-
EU[739]	523	594	100	-	-	-	-	-	842

7.458. Further, the entry into force of the EU Seal Regime may not be the only factor explaining a reduction in the number of seals hunted; other factors may also have come into play, including weather conditions that may have contributed to reducing the duration of the hunting season and

[732] Data from Exhibits EU-88 and EU-143B for tanned/dressed fur skins, not assembled (Tariff line 43021949). Tables state "where available" for units (but not for data on value and tonnage), thus indicating possible uncertainty or incompleteness of these data.

[733] Canada has also stated that 90,000 seals were harvested during the 2013 season. (Canada's comments on the European Union's response to Panel question No. 119, footnote 41).

[734] DFO Commercial Seal Harvest Overview 2011, (Exhibit JE-27), Table 8 (data for harp seals).

[735] EFSA Scientific Opinion; COWI 2008 Report; Statistics Norway, (Exhibit NOR-158); and Joint Norwegian/Russian Fisheries Commission, *Report of the Working Group on Seals to the 42th Session – Appendix 8*, (Exhibit NOR-16) (data for harp and hooded seals, though from 2007 only a very small fraction of total seals caught were hooded seals, the large majority being harp seals).

[736] Management and Utilization of Seals in Greenland, (Exhibit JE-26), Table 3 (data for harp, ringed, and hooded seals).

[737] EFSA Scientific Opinion; COWI 2008 Report; and Statistics from Namibian Ministry of Fisheries and Marine Resources, (Exhibit NOR-159) (data for Cape fur seals).

[738] EFSA Scientific Opinion and COWI 2008 Report (data for harp seals).

[739] EFSA Scientific Opinion and COWI 2008 Report (data for grey seals).

the adoption of legislation on trade in seal products in other countries.[740] Thus, based on the data before us, the extent of the connection between the ban aspect of the measure and the reduction in the number of seals killed is not clearly discernible.

7.459. In sum, based on its design, structure, and expected operation, we find that the ban under the measure makes a contribution to reducing the demand for seal products within the European Union and, to a certain extent, to reducing a global demand. Further, based on the data showing the application of the ban, we also observed a downward trend in seal products trade, which also suggests that the measure may have contributed to reducing the demand within the European Union. The degree of contribution made by the ban, however, appears to be diminished by the products imported under the IC and MRM exceptions. We also found that allowing commercial activities relating to the processing of the seal products that are otherwise prohibited under the ban further undermines the objective of the measure.

7.460. In conclusion, we find that the EU Seal Regime is capable of making and does make some contribution to its stated objective of addressing the public moral concerns. The Regime, through its prohibitive aspect, prevents to some extent EU citizens from being exposed to and participating as consumers in commercial activities related to the products derived from seals that may have been killed inhumanely. It also appears to be negatively affecting the demand for seal products within the European Union and globally. At the same time, we observe that the IC and MRM exceptions under the measure have the effect of diminishing the degree of the measure's actual contribution to both aspects of its objective. Further, we find that the capability of the EU Seal Regime to achieve its objective of addressing the EU public moral concerns is further negatively affected because other commercial activities such as the inward processing of seal products are allowed without regard to the welfare of seals from which the products are derived. We also note that the Travellers exception, albeit limited in its scope, does not contribute to achieving the objective of addressing the EU public moral concerns on seal welfare.

7.461. We continue our examination by assessing whether any less trade-restrictive alternative measures exist that can make an equivalent or greater contribution to the objective of the EU Seal Regime, taking into account the risks non-fulfilment of the objective would create.

7.3.3.3.3 Risks non-fulfilment of the objective would create

7.462. The European Union submits that the "risk of non-fulfilment of the objective of protecting public morals is that the EU public would experience the same moral feelings that prompted the adoption of the EU Seal Regime".[741] Specifically, the European Union frames the risks created by non-fulfilment of the objective in terms of the two separate ways that the EU Seal Regime is intended to address public moral concerns on seal welfare (i.e. moral concerns about the inhumane killing of seals as such and EU consumers' contribution to inhumane killing along with exposure to morally tainted products). Thus, non-fulfilment of the objective would create risks of poor seal welfare as well as the community's participation in morally offensive seal hunts and exposure to the by-products of such hunts.[742]

7.463. Canada submits that the risk is that seals would be killed in a way that causes avoidable pain and suffering.[743] With regard to the alleged public moral concerns about the inhumane killing of seals, the risk is that EU citizens would be morally offended or upset about the inhumane killing of seals continuing and the products from those hunts being placed on the EU market. Norway argues that the prevention of certain "moral feelings" is "a remarkably undefined basis on which to base a measure that is both restrictive and discriminatory", and does not suggest that the measure is necessary to "protect" public morals themselves.[744] Rather, the measure appears to be

[740] There is some indication, however, that market demand and price levels can be a factor in the scale of participation in some hunts. (See, e.g. DFO Empirical Base for Canada's Seal and Seal Products Industry, (Exhibit CDA-17), p. 2 ("Participation [in the hunt] varies from year to year, and depends upon ice conditions, *price of pelts*, etc.") (emphasis added)) Canada has similarly argued that the market opportunities potentially afforded by the IC exception will give Greenlandic hunters "a strong incentive to increase the scale of their hunt in order to place more products on the EU market". (Canada's comments on the European Union's response to Panel question No. 119, para. 36).

[741] European Union's response to Panel question No. 44, para. 152.

[742] European Union's response to Panel question No. 44.

[743] Canada's second written submission, para. 329.

[744] Norway's second written submission, paras. 270-274.

necessary to protect EU consumers from certain negative "feelings" that they might not like when shopping.

7.464. The Appellate Body clarified that the "risks non-fulfilment would create" component of Article 2.2 requires an ascertainment of "the nature of the risks at issue and the gravity of the consequences that would arise from non-fulfilment of the legitimate objective".[745]

7.465. Given that the objective of the EU Seal Regime is to address the EU public moral concerns with respect to seal welfare *per se* as well as EU public's wish to not purchase or be exposed to the products derived from seals killed inhumanely, the risks of non-fulfillment of such objective can be linked to these two specific aspects. Failing to achieve these two aspects of the measure's objective will thus expose the EU public to their existing moral concerns on seal welfare and to the products derived from seals that may have been killed inhumanely.

7.466. As we examined in the previous section, however, we found that the degree of the EU Seal Regime's actual contribution to its identified objective is diminished by the scope of the exceptions under the measure and the allowance of certain commercial activities within the European Union. Accordingly, we do not consider that the level of protection actually achieved by the measure is as high as the European Union claims the measure initially aimed to achieve.[746] We will bear this in mind in taking into account the risks non-fulfilment would create in our subsequent analysis of the reasonable availability of a less trade-restrictive alternative measure.

7.3.3.3.4 Whether a less trade-restrictive alternative measure is reasonably available, taking account of the risks non-fulfilment would create

7.467. The Appellate Body has interpreted the second sentence of Article 2.2 of the TBT Agreement to suggest that the existence of "an unnecessary obstacle to international trade" may be established through a comparative analysis with possible alternative measures as "a conceptual tool for the purpose of ascertaining whether a challenged measure is more trade restrictive than necessary".[747] Following guidance by the Appellate Body on the framework of relevant considerations for this comparison[748] we begin our analysis by identifying the alternative measure advanced by the complainants and its trade-restrictiveness. We next assess the degree of contribution by the alternative measure to the relevant objective. Finally, we examine whether the alternative measure is reasonably available taking account of the risks non-fulfilment would create.

7.3.3.3.4.1 Identification of an alternative measure(s)

7.468. Both Canada and Norway propose an alternative measure whereby market access for seal products would be conditioned on compliance with animal welfare standards combined with certification and labelling requirements.[749] This proposed alternative consists of three related components: (1) the establishment of animal welfare requirements in the hunting of seals; (2) certification of conformity with the animal welfare requirements; and (3) labelling seal products to show the certified compliance with the animal welfare requirements.[750]

7.469. The European Union notes that the alternatives advanced by each complainant "appear to be the same" and therefore addresses them together.[751]

[745] Appellate Body Reports, *US – Tuna II (Mexico)*, para. 321; and *US – COOL*, para. 377.
[746] The European Union emphasizes a high level of protection it aims to achieve against the risk that seals will experience excessive suffering when they are killed. (European Union's first written submission, para. 39). The complainants however refer to the low level of contribution of the EU Seal Regime to its objective (i.e. it tolerates a high risk of non-fulfilment).
[747] Appellate Body Report, *US – Tuna II (Mexico)*, para. 320.
[748] Appellate Body Report, *US – Tuna II (Mexico)*, para. 322.
[749] Canada's first written submission, para. 556; Norway's first written submission, para. 779.
[750] Canada's first written submission, paras. 557-560; Norway's first written submission, para. 793.
[751] European Union's first written submission, para. 370. See also European Union's second written submission, para. 301.

7.3.3.3.4.2 Trade-restrictiveness of the alternative measure

7.470. Canada describes this alternative as less trade restrictive because the current EU Seal Regime excludes all non-Inuit commercial seal products from the EU market, whereas the alternative regime would allow such non-Inuit commercial seal products provided they meet the animal welfare requirements.[752] Norway submits that the alternative is less trade restrictive because imports would be permitted provided they comply with animal welfare requirements.[753]

7.471. The European Union argues that seal products qualifying under the EU Seal Regime, namely those from IC hunts, might not have market access under a regime imposing animal welfare requirements.[754]

7.472. We found above that the EU Seal Regime limits trade in seal products, including those imported from the complainants, and thus is trade restrictive.[755] The European Union also acknowledges that the EU Seal Regime was enacted precisely for its trade-restrictive effect.[756] In comparison, the alternative measure could possibly permit seal products from the complainants that are prohibited under the EU Seal Regime.[757] In view of the potentially large quantities of seal products derived from non-IC or MRM hunts, we consider that their potential allowance under the proposed alternative measure makes such proposed measure less trade restrictive.[758]

7.3.3.3.4.3 Degree of contribution of the alternative measure to the objective of the EU Seal Regime

Main arguments of the parties

Complainants

7.473. Both Canada and Norway contend that the EU Seal Regime fails to address animal welfare concerns in that it allows placement on the market of products without regard for the welfare of the seals from which the products are derived. By contrast, the proposed alternative measure would contain explicit animal welfare requirements upon which placement on the market is conditioned and, in combination with certification requirements, would directly contribute to fulfilment of the objective of animal welfare.[759]

7.474. Canada and Norway further argue that an alternative measure directly addressing animal welfare would thereby address any public moral concerns relating to animal welfare.[760] The alternative measure would apply to all seal products consistently, prohibiting products from seals killed in an inhumane manner while granting access to products derived from seals harvested in a manner that respected the animal welfare criteria. This alternative would thus address animal

[752] Canada's first written submission, para. 638. See also Canada's second written submission, para. 326. Canada argues that given that such products comprise the "vast majority of seal products", their potential allowance under the proposed regime makes this a less trade-restrictive alternative measure.

[753] See Norway's responses to Panel questions following the second substantive meeting, Annex I, first row.

[754] European Union's comments on Canada's response to Panel question No. 115; European Union's opening statement at the second meeting of the Panel, para. 64.

[755] The Appellate Body has recognized that an import ban is "by design as trade-restrictive as can be". (Appellate Body Report, *Brazil – Retreaded Tyres*, para. 150).

[756] European Union's first written submission, paras. 36-37, 357, and 586.

[757] See section 7.2.1 above.

[758] We reach this conclusion notwithstanding variation in the precise amounts and proportions of humanely killed seals in commercial hunts. Nor is our conclusion altered by the possibility that some products from IC hunts qualifying under the EU Seal Regime might fail to satisfy animal welfare requirements, as market access would still potentially be open to products from humanely killed seals in IC hunts.

[759] Canada's first written submission, paras. 564-569; second written submission, paras. 319-322, 338; Norway's first written submission, paras. 886-894; opening statement at the first meeting of the Panel, paras. 134 and 141.

[760] Canada's second written submission, para. 318, 330 (referring to European Union's response to Panel question No. 9); opening statement at the second meeting of the Panel, para. 82; Norway's second written submission, para. 308 (referring to European Union's response to Panel question No. 44).

welfare and public moral concerns, as well as the alleged public moral concerns arising from consumers' participation in the economic activity that sustains the market.[761]

7.475. The complainants further submit that the alternative measure would continue to allow market access to products from Inuit or indigenous hunts that were certified to meet animal welfare requirements.[762]

Respondent

7.476. The European Union submits that as it is not feasible to apply and enforce effectively and consistently a humane killing method[763], the proposed alternative measure would allow products on the EU market that were obtained from seals killed in a manner that causes them excessive suffering.[764] Allowing products from humanely killed seals would not meet the concerns that led to the adoption of the EU Seal Regime. Such concerns would persist because, "in order to kill the requisite number of certified seals in a humane way, it would be necessary to kill many other seals in an inhumane way", which in turn "could have the perverse effect of increasing the number of seals killed in an inhumane way".[765]

7.477. With respect to the application of animal welfare requirements to Inuit or other indigenous communities, the European Union argues that the nature of Inuit seal hunting poses particular challenges to applying and monitoring animal welfare.[766]

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[761] Canada's second written submission, paras. 323-325; opening statement at the first meeting of the Panel, paras. 94-96; opening statement at the second meeting of the Panel, para. 83; Norway's second written submission, paras. 276, 305-312.

[762] Canada's first written submission, para. 563; second written submission, para. 328; opening statement at the second meeting of the Panel, para. 85; Norway's first written submission, para. 905; second written submission, para. 312. As to the capacity of Inuit or other indigenous communities to comply with such requirements, the complainants contend that there is no "inherent" reason why animal welfare requirements could not be applied to Inuit or other indigenous communities. (Canada's response to Panel question No. 115, para. 68; Norway's response to Panel question No. 114, para. 84).

In this connection, Canada points out that there are animal welfare requirements applicable to Inuit engaged in sealing in Canada and specifically proposes that Greenlandic seal products could be segregated so that products satisfying animal welfare requirements could be commercially exported while other products (such as those derived from netting) could be diverted to local consumption. (See Canada's second written submission, para. 328; Canada's response to Panel question No. 114; Canada's response to Panel question No. 115, para. 72).

The complainants also submit that the proposed alternative measure would also fulfil what they claim to be other objectives of the EU Seal Regime. Specifically, Canada and Norway assert that the labelling requirement would meet the objective of preventing consumer confusion, whereas the EU Seal Regime allows unlabelled seal products on the market without any indication of their animal welfare compatibility. (Canada's first written submission, paras. 570-574; opening statement at the second meeting of the Panel, para. 84; Norway's first written submission, paras. 895-903; opening statement at the first meeting of the Panel, para. 135). Similarly, Canada and Norway contend that the objective of promoting consumer choice and personal use would be better served by the alternative measure as consumers would be given wider access to seal products on the EU market along with the relevant information as to animal welfare. (Canada's first written submission, paras. 575-577; opening statement at the second meeting of the Panel, para. 84; Norway's first written submission, para. 906; second written submission, para. 276).

As to the sustainable management of marine resources, Canada and Norway claim that the EU Seal Regime contains requirements (e.g. exclusivity of purpose) that undermine this objective, whereas the alternative measure could encourage rather than create disincentives for the sustainable management of marine resources for large hunts conducted for multiple purposes. (Canada's first written submission, paras. 578-581; Norway's first written submission, paras. 912-917; opening statement at the first meeting of the Panel, para. 136).

[763] See European Union's first written submission, Section 2.4.

[764] European Union's first written submission, para. 375. See also European Union's response to Panel question No. 148 (arguing that "the contribution of any given certification system to the intended policy objective is, to a large extent, a function of the underlying substantive requirements and cannot be measured without taking into account the specific content of such requirements").

[765] European Union's second written submission, para. 310.

[766] The European Union further submits that Canada's suggestion of segregating products "would fail to make an equivalent contribution to the objective pursued by the IC exception" given the dynamics of the Greenlandic hunt and domestic market. (European Union's comments on Canada's response to Panel question No. 115. See also European Union's opening statement at the second meeting of the Panel, para. 64). The European Union also comments upon various areas of Canadian seal hunting regulations that exempt the Inuit

Analysis by the Panel

7.478. As an initial matter, we recall that the degree of the actual contribution of the EU Seal Regime to the fulfilment of its objective is ascertained "from the design, structure, and operation of the [EU Seal Regime], as well as from evidence relating to its application".[767] Based on such analysis, we found that the EU Seal Regime is capable of making and does actually make a contribution to the achievement of its stated objective of addressing the public moral concerns. The Regime, through its prohibitive aspect, prevents to a certain extent the EU public from being exposed to and participating as consumers in commercial activities related to the products derived from seals that may have been killed inhumanely. It also appears to have the effect of negatively impacting the global demand for seal products.

7.479. The question with respect to the alternative measure is whether it would make an equivalent or greater contribution to that actually achieved by the EU Seal Regime in the two respects described above.[768]

7.480. We first address the contribution of the alternative measure to preventing or reducing exposure of the EU public to products raising moral concerns. To the extent that the alternative measure could effectively distinguish and label products from humanely and inhumanely killed seals, the direct participation of EU consumers in the market for seal products would theoretically be confined to products that conform to the animal welfare concerns of the EU public. However, given the risks to animal welfare that we have found to exist in all seal hunts, the degree of contribution of the alternative measure would in part depend on the feasibility of meeting adequately defined animal welfare requirements.[769] As acknowledged by the complainants[770], and consistent with the findings of EFSA[771], an indefinite portion of hunted seals may experience pain, distress, or other forms of suffering. Thus, even if the alternative measure succeeded in limiting market access to exclusively those products derived from humanely killed seals, such products would originate in hunts that may have caused poor animal welfare outcomes for some other number of seals. Moreover, the capacity of an alternative measure to effectively (i.e. accurately) differentiate products from humanely and inhumanely killed seals will depend on the practical feasibility of the certification system proposed by the complainants as part of the alternative measure.

7.481. In sum, the degree of contribution achieved by the alternative measure to preventing participation of the EU public as consumers in the inhumane killing of seals depends on the reasonable availability of satisfying adequate animal welfare standards in seal hunts as well as the capability of accurately distinguishing the resulting products for placement on the EU market.

7.482. We next address the reduction of global demand for seal products and number of seals killed. We have found that the EU Seal Regime is capable of contributing to some extent to the decline of the market for seal products. This, in turn, contributes to reduced prices and consumer demand for some seal products (particularly seal skins) that has coincided with some reduction in the number of seals killed in major sealing countries. As mentioned in relation to trade-restrictiveness, the alternative measure would potentially afford market access to seal products from commercial hunts that are currently prohibited under the EU Seal Regime. Although the scale of market access that could be obtained under the alternative measure cannot be precisely determined in the abstract, the alternative measure would potentially reopen an outlet for the

in Canada from animal welfare hunting requirements. (See European Union's comments on Canada's response to Panel question No. 114).

[767] See Appellate Body Reports, *US – Tuna II (Mexico)*, para. 317; *US – COOL*, para. 373.

[768] In this connection, we note the complainants' arguments that there is no requirement for the alternative measure to achieve the level of protection *selected* by the EU legislators if the measure at issue does not fully achieve the objective at that level. (Canada's opening statement at the second meeting of the Panel, para. 90; Norway's second written submission, paras. 274-275, 280-281; opening statement at the first meeting of the Panel, para. 132; response to Panel question No. 147).

[769] See, e.g. Commission Proposal, Explanatory memorandum, (Exhibit JE-9), p. 12 ("Labelling alone of seal products is not an alternative to a ban on trade in those products as labelling would only be relevant to assuage the ethical animal welfare concerns of citizens and consumers as and when the killing and skinning methods in force in the sealing countries would accord with the criteria provided for in this Regulation.").

[770] See Canada's and Norway's responses to Panel question No. 69.

[771] EFSA Scientific Opinion, p. 88 ("there is no perfect killing method that will work at all times, and under all circumstances").

marketing of goods derived from commercial seal hunts on the EU market. This may in turn contribute to sustaining or increasing the overall number of seals killed, which would have the consequence of subjecting a greater number of seals to the animal welfare risks incidental to seal hunting.[772]

7.483. At the same time, the alternative measure could potentially introduce an economic incentive for sealing countries to adopt and enforce the animal welfare standards established by the measure. Thus, although the alternative measure may generate economic incentives to subject a greater number of seals to the welfare risks of seal hunting, this may be counterbalanced in some measure by the encouragement of improved practices in the hunt. For example, the European Commission considered that its Proposal to allow trade in seal products based on compliance with animal welfare requirements would give "incentives to countries concerned to review and improve, where need be, their legislation and practice concerning the methods to be complied with when killing and skinning seals".[773]

7.484. On balance, we consider that the alternative measure may have the capacity of restoring the potential market in the European Union for seal products with the consequence of subjecting a greater number of seals to the risks of poor animal welfare. Although this in itself may be contrary to the European Union's stated objective of reducing global demand for seal products and consequently reducing the number of seals killed inhumanely, the imposition of animal welfare requirements may also promote humane killing practices in seal hunts that could reduce the number of inhumanely killed seals to some extent. The impacts of the alternative measure in this regard are however closely related to the type of animal welfare requirements to be imposed, the feasibility of enforcement of such requirements, and the attendant risks of inhumane killing in seal hunts.

7.485. In light of the inextricable link between the contribution of the alternative measure to the objective and the feasibility of its implementation, we next address the parties' contentions regarding the reasonable availability of the various components of the alternative measure.

7.3.3.3.4.4 Reasonable availability of the alternative measure

Main arguments of the parties

Complainants

7.486. Canada and Norway state that the alternative proposed measure is reasonably available to the European Union for the following four reasons. First, it is feasible to prescribe animal welfare criteria applicable to the hunting of seals based on existing scientific evidence that would ensure the minimization of suffering.[774] Second, once established, animal welfare criteria can be effectively monitored and enforced in the context of seal hunting.[775] Third, a system of certification

[772] We note that the European Parliament responded to the Commission Proposal by concluding that the risks to animal welfare posed by seal hunting were too high for humane killing requirements to be imposed. Parliament Report, (Exhibit JE-4), Justification for Amendment 28, p. 21:

> Commercial seal hunts are inherently inhumane because humane killing methods cannot be effectively and consistently applied in the field environments in which they operate. Moreover, seal hunts occur in remote locations, and are conducted by thousands of individuals over large, inaccessible areas, making effective monitoring of seal hunting impossible. As such only a comprehensive ban without the derogation drafted by the Commission would meet citizens' demands to see an end to the trade in seal products.

[773] Commission Proposal, Explanatory memorandum, (Exhibit JE-9), p. 5. See also Commission Impact Assessment, (Exhibit JE-16), p. 26 (noting that a prohibition subject to animal welfare exceptions "will hurt the economy where it is supposed to hurt – but at the same time benefit 'best practice' seal hunting and therefore provides an incentive to improve the welfare of hunted seal species".).

[774] Canada's first written submission, paras. 582-623; Norway's first written submission, paras. 802-832; second written submission, para. 287. See also Norway's response to Panel question No. 147.

[775] Canada's first written submission, paras. 624-653; Norway's first written submission, paras. 833-851; opening statement at the first meeting of the Panel, paras. 142-144, 147-199. See also Norway's response to Panel question No. 147.

of conformity with animal welfare requirements is feasible and reasonably available.[776] Fourth, animal welfare labelling of seal products is reasonably available contrary to the preamble recital of the EU Seal Regime that a labelling scheme would not be cost effective.[777]

7.487. Further, both Canada and Norway reference the European Union's policy in related product areas as evidence of the feasibility of prescribing animal welfare requirements and monitoring killing for animal welfare compliance.[778] With respect to the certification of animal welfare compliance, Canada and Norway specifically contend that certification would not need to be on a seal-by-seal basis to achieve a level of contribution to seal welfare that is equal to or greater than that of the EU Seal Regime. In this respect, the complainants suggest options drawing upon other certification schemes that include regional/geographic certification and hunter licensing.[779]

Respondent

7.488. The European Union responds that the complainants' proposed alternative is similar to the same measure which had been proposed by the European Commission during the legislative process.[780] However, this measure was deliberately rejected by EU legislators because "although it could be possible, in theory, to prescribe a humane method for killing seals, in practice the unique conditions in which seal hunting takes place would render it impossible to apply and enforce such method in an effective and consistent manner."[781] In particular, the European Union disputes various distinct components of the proposed alternative.

7.489. First, as to the possibility of prescribing humane killing methods, the European Union argues that the animal welfare requirements in question must be capable of being "applied and enforced effectively and consistently, so as to achieve the level of protection selected by the EU legislators".[782] The European Union submits that while many veterinary experts agree that a humane killing method for seals could, in theory, be defined, there is disagreement as to the requirements of such a method as well as to what would constitute an acceptable level or means of effective practice in carrying out such requirements.[783]

7.490. Second, the European Union addresses what it considers to be "the crucial issue" of whether it is possible to effectively and consistently apply and enforce a humane killing method.[784] On this point, the European Union emphasizes that a genuinely humane method cannot be applied on a consistent basis with adequate monitoring and enforcement as a result of inherent obstacles.[785]

7.491. Third, the European Union argues that its measures applied with regard to other animals are not indicative of available alternative measures for seals due to "the major differences between the situations concerned".[786]

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[776] Canada's first written submission, paras. 654-676; Norway's first written submission, paras. 852-868. See also Canada's and Norway's responses to Panel question Nos. 147; parties' responses to Panel question No. 94; Norway's second written submission, paras. 302-304.

[777] Canada's first written submission, paras. 677-685; Norway's first written submission, paras. 869-877.

[778] Norway's first written submission, paras. 878-883. See also Norway's second written submission, paras. 278, 290-294; opening statement at the first meeting of the Panel, para. 145: Canada's first written submission, paras. 611-623, 642-653; Canada's second written submission, paras. 339-344.

[779] See complainants' responses to Panel question No. 147; Canada's opening statement at the second meeting of the Panel, para. 89.

[780] European Union's first written submission, paras. 372; second written submission, para. 304.

[781] European Union's first written submission, para. 373. See also European Union's second written submission, paras. 304-307 (explaining the concern of EU legislators with excessive *unavoidable* suffering in seal hunts as opposed to the Commission's proposal focusing on avoidable suffering).

[782] European Union's first written submission, para. 377.

[783] European Union's first written submission, paras. 377-387; response to Panel question No. 63.

[784] European Union's first written submission, para. 388. See also European Union's opening statement at the first meeting of the Panel, para. 11.

[785] European Union's first written submission, paras. 389-403; second written submission, paras. 312-313.

[786] European Union's first written submission, para. 406. See also European Union's first written submission, paras. 407-413; response to Panel question No. 64; second written submission, paras. 86-91.

7.492. Finally, the European Union disputes that the certification and labelling component of the alternative measure would be viable[787] and submits that the availability of certification cannot be considered independently of the underlying welfare requirements.[788] In particular, the European Union argues that certification would have to be made on a seal-by-seal basis in view of the impossibility of applying animal welfare requirements consistently in seal hunts[789], and the various examples of certification and labelling systems cited by the complainants "lack pertinence" as "the animals concerned are different, the environment is different, the killing methods are different and, consequently, the risks to animal welfare are also very different".[790]

Analysis by the Panel

7.493. As the Appellate Body has stated, "[a]n alternative measure may be found not to be 'reasonably available' … where it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties."[791] In this dispute, the question of reasonable availability presents a key factual disagreement between the parties as to the feasibility of measures that can be taken under the conditions in which seal hunting occurs to fulfil the relevant policy objective. Specifically, we address the parties' contentions regarding: (1) the prescription of animal welfare criteria; (2) the application, monitoring, and enforcement of animal welfare criteria; and (3) certification and labelling of compliance with animal welfare criteria.

7.494. With respect to the prescription of animal welfare criteria, we note that there is some discrepancy between experts and other sources as to what would constitute adequate welfare standards and criteria. There is general recognition of the principle of minimizing animal pain and suffering prior to killing. However, this principle is understood and interpreted differently among expert conclusions, in particular regarding the specific elements of a three-step killing method as adapted to the conditions of seal hunts.[792] More significantly, the principle of *minimizing* animal pain and suffering gives rise to uncertainty regarding what should be considered an acceptable level of such suffering. Some sources have provided recommendations of humane killing to accommodate the practical demands of seal hunting[793], thus tolerating risks to welfare that are rejected by others.[794] One notable example in this regard pertains to delays in the killing process, and there has been explicit acknowledgement by some experts of subjectivity and divergence in what is to be considered an acceptable lapse of time between killing steps.[795]

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[787] European Union's second written submission, paras. 309, 317-321.

[788] European Union's comments on complainants' responses to Panel question No. 147.

[789] European Union's response to Panel question No. 64; second written submission, para. 320; comments on complainants' responses to Panel question No. 147(a).

[790] European Union's second written submission, para. 319. See also European Union's comments on complainants' responses to Panel question No. 147(b).

[791] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156 (citing Appellate Body Report, *US – Gambling*, para. 308).

[792] See, above regarding, for example: disputes as to whether certain stunning techniques can be regarded as achieving death on their own (stun/kill) and the implications of this for later steps; the dispute among experts as to the preferability for checking consciousness with blink tests, skull palpation, or second-stunning; and the suggestion by some that an adequate killing method would contain a fourth step of re-checking.

[793] See, e.g. EFSA Scientific Opinion, p. 10 ("Terms of Reference as provided by the Commission"); IVWG Report (2005) (statement that recommendations should be made in accordance with what can be realistically achieved in the circumstances of the hunt); NAMMCO Report (2009), pp. 5-6.

[794] See, e.g. Butterworth (2007) and Richardson (2007).

[795] See Daoust (2002) and Daoust (2012). This is particularly reflected in the dispute between carrying out the steps "immediately" (e.g. Burdon (2001)) and "as soon as possible" (e.g. EFSA Scientific Opinion and IVWG Report (2005)).

The contentions of Canada and Norway with regard to certain conclusions of Daoust (2012) are illustrative of different levels of tolerance for the risks to animal welfare in characterizing the humaneness of the seal hunt. For instance, the study's most comprehensive observation of the shooting of 278 seals at the 2009 Front yielded the result that fourteen (5.0%) of the seals "were considered to have a poor welfare outcome; these animals were not killed immediately with the first shot and were not shot again before being retrieved, in at least 12 of these cases with a gaff from the vessel". (Daoust (2012), p. 450). Canada favourably cites this finding along with the authors' comment that "[t]his proportion of seals considered to have had a poor welfare outcome is comparable to, or lower than, that in other types of hunt." (Daoust (2012), p. 453; Canada's first written submission, para. 601). Conversely, the European Union highlights the particular

7.495. In our view, these differences in animal welfare requirements and standards stem in part from differing assessments and tolerance of the risks involved in the application and monitoring of killing methods. However, those risks would persist irrespective of the specific standard of animal welfare prescribed in market access requirements of the alternative measure. We therefore address the reasonable availability of the alternative measure in light of the risks incidental to seal hunting as identified above.[796]

7.496. Based on the differing views on what would constitute adequate welfare standards, and absent a clearly articulated standard from the complainants, the requirements under the alternative measure could possibly span a range of different levels of stringency or leniency. In the case of more stringent requirements for humane killing reflecting a high level of animal welfare[797], such requirements may not be practical for hunters to consistently satisfy in light of the conditions in which seal hunting takes pace.[798] Further, although adopting more stringent requirements for humane killing would in principle answer to animal welfare concerns, in order to genuinely assuage such concerns there would need to be a mechanism to verify that the requirements were actually satisfied for seals used to generate products. Assuming that more exacting welfare requirements were imposed that were capable of being verified in the course of a seal hunt, this would imply accurate differentiation between seals killed in accordance with the strict requirements and those falling short of the higher welfare standard. Assessed against the backdrop of the welfare risks of seal hunting, this could give rise to infliction of significant suffering in larger scale hunts in order to kill other seals in accordance with the higher standards of welfare.[799] At the same time, to the extent that the animal welfare requirements and verification of humane killing would be made less stringent to accommodate practical challenges of seal hunting, such an alternative measure may thus directly compromise the welfare of seals. This in turn would diminish the degree of contribution to fulfilment of the objective of addressing public moral concerns.

7.497. Finally, as regards the certification and labelling of compliance with animal welfare criteria, we note that this component of the alternative measure necessarily corresponds to application of the animal welfare standards to be certified. We have found that the conditions and challenges of seal hunting pose the risk that some portion of hunted seals will experience poor animal welfare outcomes. Consequently, a certification system limiting market access to products from humanely killed seals would need to be capable of distinguishing between seals killed in accordance with the relevant standard of animal welfare, and those killed inhumanely. A certification system that did not make this distinction would undermine its own capability of assuring that animal welfare (and

welfare concern implicated by the documented delay in this study, and argues that favourable citation to these results indicates that the authors of Daoust (2012) and the Canadian government regard outcomes as humane that other authorities would consider inhumane. (European Union's first written submission, paras. 389-396; second written submission, paras. 50-53).

[796] We note that the parties have developed their arguments as to humane killing in recognition of its importance to the question of the necessity of the EU Seal Regime and the availability of an alternative measure. (See European Union's first written submission, para. 388 and opening statement at the first meeting of the Panel, para. 11 (citing as "the crucial issue" whether it is possible to effectively and consistently apply and enforce a humane killing method); Canada's second written submission, para. 335 ("defence of the EU Seal Regime depends on acceptance of the notion that there are inherent obstacles to the humane killing of seals"); Norway's second written submission, para. 277 (considering that the European Union "concedes that 'it might be possible to design a genuinely humane method for killing seals'; however, it explains, it is *impossible to apply* such a standard consistently in 'commercial' seal hunts")).

[797] More stringent requirements reflecting a higher standard of animal welfare could include, for example: that each seal have all steps of the killing process performed in immediate succession without any delay; that no seal be hooked or gaffed for retrieval without having first been checked for consciousness; and/or that each seal be irreversibly stunned in the first application of a stunning method.

[798] The IVWG, for instance, which was specially convened to make recommendations for improving humane practice in the Canadian harp seal hunt, recognized that recommendations needed to be "realistic in the context of the hunt, so that sealers will accept and implement them". (IVWG Report (2005), p. 7). At the time of the most recent amendments to Canada's Marine Mammal Regulations, the director general for the DFO's resource management branch gave indications that more stringent requirements risked non-compliance by sealers to explain why only "very minimal changes" were being made to hunting regulations. (Transcript of statements to the radio station CBH-FM (28 December 2008), (Exhibit EU-105), p. 3 ("If you actually go out in any, you know, in any industry, and you make a large-scale change in regulations, the, there is probably a probability that a lot of the regs [*sic*] would not be abided by.")).

[799] See European Union's second written submission, para. 310 (citing *amicus curiae* submission by Anima et al., (Exhibit EU-81)).

by extension public moral concerns) were being addressed.[800] Conversely, an alternative scheme designed to certify that a given seal product was *in fact* derived from a humanely killed seal may impose large costs and/or logistical demands on those participating in the hunt and subsequent marketing of products.[801]

7.498. In this regard, we also find it instructive to consider the Commission Proposal, which the parties have concurred is similar to the proposed alternative measure. The Commission Proposal would have required *inter alia* that "an appropriate scheme is in place whereby seal products … are certified as coming from seals to which" animal welfare requirements have been effectively applied and enforced.[802] This scheme is framed so as to certify only that products "are obtained from seals killed and skinned *in a country where, or by persons to whom*," the stipulated animal welfare requirements would apply.[803] The complainants have argued that a certification system need not be on a seal-by-seal basis, but rather could be achieved through country certification or hunter licensing.[804] However, country or hunter-based schemes would potentially fail to convey accurate information in respect of the seal from which the product was derived[805], thus diminishing the capability of the alternative measure of addressing EU public moral concerns on seal welfare.[806] A

[800] We recall the arguments of Canada and Norway that the exceptions of the EU Seal Regime undermine the objective of animal welfare by allowing market access irrespective of the humaneness with which seals were killed. Inasmuch as inhumanely killed seals were not identified as such under the alternative measure, however, some products would similarly have market access despite being in conflict with the objective of protecting animal welfare.

[801] In this connection, we have also identified certain challenges to effective monitoring and enforcement of animal welfare standards in the context of seal hunting, which can occur over large territories with many participants. We consider that such difficulties of monitoring and enforcement compound the difficulties of aligning criteria for humane killing with the risks of seal hunting in a manner that does not unduly compromise animal welfare. (See paras. 7.219-7.221 above).

Moreover, even if the hunt itself has been accurately monitored for animal welfare, the maintenance of such accuracy would further require some form of traceability of the products to the market. COWI addressed the possibility of a "full chain of custody traceability system" as the most strict (and most effective) option but concluded that it could be costly and inefficient depending on the flexibility of the system. (See COWI 2010 Report, pp. 74-76 regarding Option 3). Although this evaluation was made in respect of the requirements of the Basic Regulation, we consider that it is indicative of the additional burdens of accurate transmission of information regarding regulatory compliance under the alternative measure. Indeed, Canada has also made indications that, after certifying and labelling conforming products from given hunts, there would be subsequent difficulties after the skins are sold and undergo secondary processing to preserve the identifying label. (See Canada's response to Panel question No. 85, para. 329 (regarding identification of seals harvested by Inuit hunters)).

[802] Commission Proposal, (Exhibit JE-9), Article 4(1)(c).

[803] Commission Proposal, (Exhibit JE-9), Article 4(1)(a). (emphasis added) The applicable animal welfare criteria are found in Annex II of the Proposal.

[804] See Canada's and Norway's responses to Panel question No. 147. More specifically, it has been suggested that certification could take place at various levels, including the certification of countries, particular hunts, or vessels.

[805] COWI advised that "identification requirements" comprise the first "key aspect" of being able to track conforming products to the market, and that different criteria (such as the IC and MRM requirements) would entail different "identification requirements" suited to the criteria in question. (See COWI 2010 Report, p. 80). Similarly, we consider that any *animal welfare* critera would demand "identification requirements" suited to the fact that the humaneness of killing will differ among individual seals within the same hunt (which is not the case for assessing compliance with IC or MRM requirements).

[806] The complainants have pointed to various possible certification schemes as evidence for the feasibility of certification in their proposed alternative measure. However, these schemes are of limited assistance in determining the feasibility of a certification system for the alternative measure in that they: are country or hunter-based certification (e.g. the Agreement on International Humane Trapping Standards (Exhibit CDA-28), the EU's leghold trap certification scheme (Exhibits JE-8, NOR-80, NOR-105 and NOR-111) or Australia's kangaroo hunter licensing scheme); unrelated to animal welfare (e.g. the Friend of the Sea scheme for wild catch fisheries (Exhibits NOR-102, NOR-103 and NOR-104) and the Marine Stewardship Council fisheries scheme (Exhibits NOR-97, NOR-98, NOR-99, NOR-100 and NOR-101); or applied to situations and under circumstances that are significantly different from those of the seal hunt setting onto which they would have to be transposed (e.g. the EU Slaughter Regulation (Exhibit CDA-31) and the Agreement on the International Dolphin Conservation Programme (Exhibits NOR-95 and NOR-96) (concerning dolphins, which, unlike seals, are not the primary target of hunters pursued on a potentially large scale)).

Norway has argued that these schemes are intended to "*illustrate* the practical feasibility (i.e., reasonable availability) of implementing one or more of the *aspects* or *components* of Norway's proposed alternative measures. Needless to say, each scheme would have to be adapted to meet the needs of measure aimed at the welfare of seals." (Norway's response to Panel question No. 147, para. 245) (emphasis original) However, based on the fundamental differences in the requirements and/or subject matter of these schemes, it

more rigorous certification scheme, on the other hand, could require exclusion of all seals killed in a way that did not meet the specified welfare requirements, which could lead to more overall hunting to obtain the desired amount of humanely killed seals.

7.499. Thus, certification schemes of greater specificity and rigor may be considered less reasonably available to the extent that they would require greater expenditure and practical challenges of implementation. At the same time, schemes that are not designed to account for the actual welfare *outcomes* of the seals from which products are derived may be considered comparatively more reasonably available.

7.3.3.3.4.5 Overall assessment of the reasonable availability of an alternative measure, taking account of risks of non-fulfilment would create

7.500. Both Canada and Norway assert the suitability of the alternative measure in light of the risks non-fulfilment of the European Union's objectives would create, primarily due to the alleged failure of the EU Seal Regime to fulfil its objectives and the lower risks and consequences that would arise under the alternative measure.[807] Thus, in line with their arguments regarding the contribution to the measure's objective, Canada and Norway submit that the risks non-fulfilment of the objective of the measure would create are accepted under the EU Seal Regime (which allows products from inhumane hunts) and avoided by the alternative measure (which would only allow products meeting specified animal welfare criteria).[808]

7.501. The European Union submits that the "risk of non-fulfilment of the objective of protecting public morals is that the EU public would experience the same moral feelings that prompted the adoption of the EU Seal Regime".[809]

7.502. As described above, the alternative measure as proposed by the complainants appears to span a range of possible regimes of varying stringency and leniency with respect to animal welfare requirements and accuracy of certification. On the one hand, more stringent and accurate regimes would appear to pose precisely the "prohibitive costs or substantial technical difficulties" that can prevent an alternative measure from being considered to be reasonably available.[810] On the other hand, more lenient regimes would call into question the degree to which the alternative measure can contribute to the welfare of seals. Moreover, an alternative measure within this range may give rise to an increase in the number of seals hunted with the accompanying risks to seal welfare through restored market opportunities within the European Union. This may undermine the objective of the EU Seal Regime of reducing the overall number of seals killed inhumanely. We recall in this regard the Appellate Body's guidance that a responding Member cannot be reasonably expected to employ an alternative measure that involves a continuation of the very risk that the challenged measure seeks to halt.[811]

7.503. Further, the complainants' position rests on the premise that the alternative measure could calibrate the conditions of market access to the circumstances and risks existing in seal hunts. The complainants have not specified the substance of the exact regime (including the standard of animal welfare and method of certification) that would comprise their suggested alternative measure.[812] Rather, they emphasize that the alternative measure focuses directly on animal

has not been clearly explained how such adaptation would take shape for seal hunts in a manner that would provide trustworthy assurance that animal welfare had been respected.

[807] Canada's first written submission, paras. 691-695; Norway's first written submission, paras. 909-911.

[808] Canada's second written submission, paras. 329-333; Norway's second written submission, paras. 269-270. We note that Canada considers its view of the risks non-fulfilment would create to be similar to that of the European Union, with the difference that the risk is that seals would be killed in a way that causes *avoidable* (rather than excessive) pain and suffering. Canada's second written submission, para. 329.

[809] European Union's response to Panel question No. 44, para. 152.

[810] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156, citing Appellate Body Report, *US – Gambling*, para. 308.

[811] Appellate Body Report, *EC – Asbestos*, para. 174

[812] See, e.g. Norway's second written submission, para. 283 ("It is not Norway's task to show precisely what standards should be adopted by the European Union in order to address animal welfare through a technical regulation conditioning access to the regulator's market."); Canada's comments on the European Union's response to Panel question No. 148, para. 111 (stating that the possible animal welfare requirements of its alternative measure "include the recommendations from EFSA, the recommendations of the IVWG, and standards applicable in hunts of other wild animals, such as deer and kangaroos").

welfare to allow products from commercial hunts that Canada and Norway contend achieve high levels of humane killing.[813] The complainants do not deny, however, and the evidence before us confirms, that inhumane killing and poor animal welfare outcomes do occur in seal hunts.[814] To that extent, the alternative measure would not be able to address the EU public's moral concerns with respect to their wish to not participate as consumers in products derived from seal hunts in general, and the reopening of the EU market could stimulate global demand so as to incentivize the killing of more seals. Although the contribution of the EU Seal Regime to the fulfilment of its objective is lowered by the implicit and explicit exceptions of the measure, the complainants have not clearly defined an alternative measure in respect of its separate components and their cumulative capability to address the moral concerns of the EU public.

7.504. In view of the evidence of the risks and challenges of seal hunting, and as a result of our assessment above of the proposed alternative with respect to its level of contribution to the relevant objective, we conclude that although the proposed alternative measure can be considered less restrictive of trade, the alternative measure is not reasonably available, taking account of the risks non-fulfilment would create.[815]

7.3.3.3.5 Conclusion

7.505. In light of the above, we conclude that the EU Seal Regime is not more trade restrictive than necessary within the meaning of Article 2.2 of the TBT Agreement. The EU Seal Regime was found to be capable of making and does make contributions to the objective of addressing the EU public concerns on seal welfare. We further found that the alternative measure proposed by the complainants, which may be considered as less trade restrictive than the EU Seal Regime, is not reasonably available to the European Union, taking into account the risks that non-fulfilment of the European Union's objective would create.

7.3.4 Article 5

7.3.4.1 Conformity assessment procedure(s) (CAP): whether the EU Seal Regime is a CAP within the meaning of Annex 1

7.506. Annex 1.3 defines "conformity assessment procedures":

> Any procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled.

7.507. The explanatory note to the provision provides:

> Conformity assessment procedures include, inter alia, procedures for sampling, testing, and inspection; evaluation, verification and assurance of conformity; registration, accreditation and approval as well as their combinations.

7.508. Canada argues that, given that the Basic Regulation constitutes a technical regulation, the process of evaluating whether seal products satisfy the conditions specified in the Regulation, particularly Articles 3, 5, and 6 of the Implementing Regulation, amounts to a conformity

[813] See Canada's and Norway's responses to Panel question No. 145.

[814] See EFSA Scientific Opinion, p. 3 ("[M]any seals can be, and are, killed rapidly and effectively without causing avoidable pain, distress, fear and other forms of suffering, using a variety of methods that aim to destroy sensory brain functions. However, there is strong evidence that, in practice, effective killing does not always occur ...").

[815] This conclusion is not changed by our consideration of measures applied to other product areas. We are mindful that examining enforcement measures applicable to the same behaviour relating to like products "may provide useful input in the course of determining whether an alternative measure which could 'reasonably be expected' to be utilized, is available or not". (Appellate Body Report, *Korea – Various Measures on Beef*, para. 170). However, we have described above the characteristics of seal hunting with respect to the physical environment, seal species, as well as the risks and challenges of seal hunting. We have noted that the evidence does not establish that effective stunning rates in seal hunts are comparable to those in commercial abattoirs, and in any case that the two situations differ significantly in areas of great relevance to the application of humane killing methods. Therefore, we do not consider that the situations to which other measures are applied are sufficiently similar to the circumstances of the seal hunt to assist in determining the availability of alternative measures.

assessment procedure.[816] Norway has not addressed the question of whether the EU Seal Regime is a conformity assessment procedure within the meaning of Annex 1.

7.509. The European Union argues that, because the EU Seal Regime is not a technical regulation within the meaning of Annex 1, the procedural provisions under the Implementing Regulation concerning the operation of the exceptions do not concern compliance with technical regulations and hence do not constitute "conformity assessment procedures" within the meaning of Annex 1.3.[817]

7.510. The Panel found that the EU Seal Regime as a whole is a technical regulation laying down product characteristics. In addition, Articles 3, 5, and 6 of the Implementing Regulation establish the procedure for determining whether the specific requirements under the EU Seal Regime are fulfilled. Accordingly, we find that these provisions under the EU Seal Regime constitute a CAP within the meaning of the TBT Agreement.

7.3.4.2 Article 5.1.2: whether the CAP creates an unnecessary obstacle to international trade

7.511. Article 5.1.2 states:

> Article 5
>
> *Procedures for Assessment of Conformity by Central Government Bodies*
>
> 5.1 Members shall ensure that, in cases where a positive assurance of conformity with technical regulations or standards is required, their central government bodies apply the following provisions to products originating in the territories of other Members:
>
> ...
>
> 5.1.2 conformity assessment procedures are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. This means, inter alia, that conformity assessment procedures shall not be more strict or be applied more strictly than is necessary to give the importing Member adequate confidence that products conform with the applicable technical regulations or standards, taking into account of the risks non-conformity would create.

7.512. The text and structure of Article 5.1.2 indicate that the provision consists of general obligations, set out in the first sentence, and an example of the general obligations, set out in the second sentence.[818]

7.513. More specifically, the general obligations under the first sentence are not to prepare, adopt, or apply conformity assessment procedures with a view to or with the effect of creating unnecessary obstacles to international trade. The second sentence explains the meaning of the general obligations by prescribing a situation where a certain CAP may be found in violation of the obligation under the first sentence.[819] Therefore, a violation of the obligations set out in the first sentence could be established by demonstrating, for instance, that a given CAP has the effect of creating unnecessary obstacles to international trade or by showing a breach of the specific requirement in the second sentence.

[816] Canada's first written submission, paras. 705-708, and 716.
[817] European Union's first written submission, para. 419.
[818] In addition, the chapeau of Article 5.1 establishes the scope of the obligation as applying to situations where "positive assurance of conformity with technical regulations or standards is required". In such cases, Members must ensure that their central government bodies apply the provisions of the sub-paragraphs of Article 5.1. (See Canada's first written submission, para. 710; Norway's first written submission, para. 933; European Union's first written submission, para. 422).
[819] The term "inter alia" in the second sentence signifies that it is only one example of the requirements stemming from the general obligation set out in the first sentence.

7.514. Both Canada and Norway have developed arguments for their claim under Article 5.1.2 that may be analysed under both the first and second sentences of Article 5.1.2.[820] We begin our examination of the complainants' claim under Article 5.1.2 with their contentions made based on the first sentence. We will then evaluate the complainants' arguments that have relevance under the second sentence of Article 5.1.2.

7.3.4.2.1 Whether the CAP creates an unnecessary obstacle to trade by failing to ensure the existence of a body to perform the CAP

7.3.4.2.1.1 Main arguments of the parties

Complainants

7.515. Canada submits that the failure by the European Union to ensure that a competent body exists to assess conformity with conditions that determine market access for qualifying seal products amounts to a violation of Article 5.1.2. Canada argues that in the absence of such a body, the CAP cannot function, thus preventing any trade in seal products satisfying the relevant conditions. Under the measure, third party entities are allowed to request that they be listed as "recognized bodies" that are authorized to verify compliance with the conditions, and to issue documents attesting to that compliance. Unless and until such applications are submitted and approved by the European Union, no attesting documents can be issued (i.e. no seal products can be imported into the European Union for the purpose of placing them on the market). Conditioning market access on the uncertain prospect that a third party entity will apply for, and be recognized by the European Union, as a body authorized to ascertain conformity, and issue a certificate to that effect, creates precisely the kind of uncertainty that the trade rules are meant to reduce.[821]

7.516. Norway also argues that the Commission has prepared and adopted a CAP that lacks an essential element needed to enable trade to occur. Specifically, the Commission's failure to designate a body competent to assess and certify conformity results in an "institutional lacuna" in the CAP that leaves traders in conforming seal products reliant on a third party successfully seeking to become a recognized body. In this regard, Norway contends that a Member cannot make third parties responsible for the performance of its WTO obligations.[822] Consequently, the CAP is ineffective due to this institutional lacuna creating an effective ban on trade in conforming products. This ban is unnecessary because the Commission could have designated a "default" recognized body that would be competent, at all times, to assess and certify conformity.[823]

7.517. Further, Norway submits that an importing Member is responsible for ensuring that a body is available to assess conformity from the date of entry into force of a technical regulation. Thus, in designing and adopting a CAP, an importing Member is obliged to ensure that the system function from the date of its entry into force. If the European Union did not wish to establish a recognized body capable of functioning from the EU Seal Regime's entry into force, it should have given interested third parties an adequate opportunity to apply sufficiently far in advance so as to allow recognized bodies to be established before the entry into force. If no third party had become a recognized body by that date, the European Union was obliged to designate a recognized body no later than the entry into force of the EU Seal Regime. Even if an importing Member were entitled, at the time of adopting a CAP, to await successful application from a third party to serve as a recognized body (*quod non*), such entitlement cannot endure indefinitely. In light of the enduring obligation under Article 5.1.2, if it becomes clear that third parties are unwilling or unable to serve as recognized bodies, an importing Member remains responsible for implementing a

[820] In particular, the Panel considers that the complainants' arguments as to the failure to ensure the existence of a body to perform the CAP relate to obligations under the first sentence of 5.1.2. Additionally, Norway has developed specific arguments based on the elements of a necessity test under the second sentence of Article 5.1.2, and Canada has raised arguments relevant to less trade-restrictive alternative measures.

[821] Canada's first written submission, paras. 718-721.

[822] Norway refers to Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 117; and Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, paras. 7.309-7.310. See also Norway's second written submission, paras. 365-367 (citing the Appellate Body Reports in *Korea – Various Measures on Beef* and *US – Tuna II (Mexico)* to argue that an element of third-party choice does not relieve a Member from, or enable it to "contract out" of, its obligations under the covered agreements).

[823] Norway's first written submission, paras. 944-951. See also Norway's second written submission, paras. 333-335.

conformity assessment system that functions to allow trade to occur in conforming products, for example by designating a recognized body.[824]

Respondent

7.518. The European Union considers that the complainants direct their claim under Article 5.1.2 against the fact that the Implementing Regulation establishes a third-party conformity assessment mechanism. As such, it submits that the Panel is called upon to determine whether Article 5.1.2 precludes the adoption of systems whereby the conformity assessment bodies need to be designated by the central government before issuing certificates of conformity and whereby they must continue to meet the designation conditions for as long as they issue such certificates. While the European Union acknowledges that the requirement to obtain a certificate under the EU Seal Regime, like any other regime requiring certification, constitutes an obstacle, this does not amount to the CAP having been prepared, adopted, or applied with a view to or with the effect of creating *unnecessary obstacles* to international trade.[825] Further, the European Union argues that the CAP takes into account the particularities entailed by the certification of conformity with the IC and MRM exceptions. In the European Union's view, the TBT Agreement not only allows but encourages a number of features adopted in the Implementing Regulation.[826]

7.519. First, the European Union argues that the text of Article 5.1.2 does not impose an obligation to designate a public (central or local government) body in all cases where a positive assurance of conformity with technical regulations or standards is required.[827] Second, the European Union contends that there is no basis in the text of Article 5.1.2 to argue that WTO Members should not allow government and non-governmental bodies from other WTO Members to apply to be recognized conformity assessment bodies.[828]

7.520. Finally, the European Union argues that there is no basis in the text of Article 5.1.2 to require a WTO Member to designate a "back-up" or "default" public (central or local government) body where it decides to put in place a system of designated (public and private) conformity assessment bodies. The European Union refers to the Explanatory note to point 3 of Annex 1 envisioning "registration, accreditation and approval as well as their combinations", concluding that the necessity of any system for accreditation/designation of certifying bodies must be assessed based on its own merits. This interpretation is supported by subsequent practice in the considerable diversity between the systems for accreditation/designation of conformity assessment bodies between WTO Members. While the European Union does not exclude the possibility that the designation of a public body may be a desirable approach in some cases, it calls on the Panel to reject a reading of the TBT Agreement whereby doing so would be a generalised obligation applicable to all conformity assessment procedures.[829]

[824] Norway's second written submission, paras. 355-380. Specifically, Norway argues that "even if the European Union was not obliged to designate a recognized body when the conformity assessment procedures were adopted in August 2010 (*quod non*), the failings of the system have since become manifest, compelling the European Union to take action by designating a recognized body." (Ibid., para. 361. See also Norway's response to Panel question No. 87, para. 426).

[825] Despite its concession that certification constitutes an obstacle on some level, the European Union argues that the specific requirement to be included on the list of recognized bodies under Article 6 of the Implementing Regulation does not pose an obstacle, but rather facilitates international trade by providing an accessible authoritative reference to all market operators both within and outside the territory of the European Union. The European Union also notes that Canada and Norway do not challenge the specific requirements that a recognized body must meet under Article 6 of the Implementing Regulation, and that the requirements for the issuance of attesting documents are necessary to give the European Union adequate confidence that imported seal products satisfy the relevant conditions. (European Union's first written submission, paras. 441-452).

[826] European Union's first written submission, paras. 431-437.

[827] The European Union refers to Article 8 of the TBT Agreement, which in its view constitutes relevant context for the interpretation of Article 5, to show that WTO Members may confer conformity assessment procedures to non-governmental (i.e. private) bodies.

[828] The European Union notes that Canada and Norway do not explicitly make such an argument, but submits that such a reading can be implied in their argument that a "default" body must exist at all times for as long as a CAP is in place. In this regard, the European Union cites Article 6 of the TBT Agreement concerning the recognition of conformity assessment in other Members by central government bodies.

[829] European Union's first written submission, paras. 447-462.

7.3.4.2.1.2 Analysis by the Panel

7.521. To assess the complainants' claim under the first sentence of Article 5.1.2, we must examine the following points of contention between the parties: first, whether Article 5.1.2 permits a CAP that requires third-party accreditation and conformity assessment without creating or designating a default body independent of third-party approval; and, second, whether a CAP must be capable of allowing trade in conforming products to occur from the date of entry into force of a given measure.

7.522. Beginning with the first question, we first note that the text of Article 5.1.2 contains no precise indication of permitted and prohibited types of CAP. Thus, the text provides no direct prescription as to the permissibility of third-party accreditation, nor does it indicate whether such accreditation would require creation or designation of a default and/or back-up body.

7.523. Further, the context provided in other provisions of the TBT Agreement supports the view that there is some flexibility as to permissible CAP regimes, particularly with respect to the possibility of third-party accreditation. For example, the definition of a CAP in Annex 1 of the TBT Agreement encompasses, in addition to inspection and verification procedures, procedures for "registration, accreditation and approval as well as their combinations".[830] We note that this explicit provision for accreditation does not contain any limitation as to the type of entity to be accredited. Moreover, the use of the term "inter alia" and the stipulation "as well as their combinations" suggest wide versatility in the types of regime that may be considered a CAP under the TBT Agreement.[831] We also note that Article 6 of the TBT Agreement provides for Members' *recognition* of conformity assessment from other Members "provided they are satisfied that those procedures offer an assurance of conformity … equivalent to their own procedures".[832] To this end, it is explicitly contemplated that the system for recognizing conformity assessment from other Members may entail "limitation of the acceptance of conformity assessment results to those produced by designated bodies in the exporting Member".[833]

7.524. Therefore, based on our examination of the terms of Article 5.1.2, as well as its relevant context provided in other provisions of the TBT Agreement, we consider that Article 5.1.2 permits a system of third-party accreditation as part of a CAP. Accordingly, we do not consider that the third-party accreditation system under the EU Seal Regime (the CAP) violates Article 5.1.2. Nor do we find from the relevant text and context of Article 5.1.2 an obligation on the part of a responding Member to create or designate a default body pending accreditation or recognition of third-party entities to perform a CAP.

7.525. We next turn to the second question, namely whether, under the first sentence of Article 5.1.2, a CAP must be capable of allowing trade in conforming products to occur from the date of its entry into force. In other words, the question is whether failure to have in place a mechanism through which trade in regulated products can occur from the date of entry into force of a CAP results in a violation of the obligation under Article 5.1.2.

7.526. With respect to the circumstances of the measure at issue, the Implementing Regulation entered into force on 20 August 2010, which is the same day of the application of the Basic Regulation.[834] This means that Article 3 of the Basic Regulation containing the IC and MRM exceptions also applied from 20 August 2010.[835] The requirements of the CAP stipulated in the Implementing Regulation were published in the Official Journal of the European Union on 17 August 2010, three days prior to their entry into force along with Article 3 of the Basic Regulation. A system of third-party accreditation logically requires some time in processing the applications from their review and until ultimate approval. Given that the CAP requirements were published three days before their application with no other mechanism available, the earliest opportunity for

[830] TBT Agreement, Annex 1.3, Explanatory Note.

[831] We note that the European Union has submitted evidence that other WTO Members, including Canada and Norway, have types of CAP in place with designation/accreditation of third-party certifying bodies. (See European Union's first written submission, para. 451; Exhibits EU-71, 72, 73). The complainants have also acknowledged that third-party conformity assessment schemes are "not uncommon". (See Canada's and Norway's responses to Panel question No. 87).

[832] Article 6.1 of the TBT Agreement.

[833] Article 6.1.2 of the TBT Agreement.

[834] See European Union's response to Panel question No. 149.

[835] Basic Regulation, Article 8.

potential applicants to *initiate* this process would have been just shortly before the day of entry into force of the Implementing Regulation. Further, based on the numerous requirements in Article 6 of the Implementing Regulation, it would not have been reasonable to expect that the CAP could be completed prior to the Regime's entry into force.[836]

7.527. Consequently, as of the effective date of the EU Seal Regime, it was not possible for seal products to be examined or processed pursuant to the necessary CAP. Although third-party bodies could apply to become a recognized body under the EU Seal Regime upon its entry into force, the specific CAP established by the Implementing Regulation imposed the additional time necessary to examine and approve such a body according to specific criteria. Because of this period of review required for each application for inclusion in the list of recognized bodies, trade in qualifying seal products was practically not possible for some period of time following the entry into force of the EU Seal Regime.

7.528. The particular facts and circumstances described above therefore show that the measure in question was established such that the CAP was not capable of allowing trade in conforming products to occur on the date of its entry into force. In light of this, we conclude that the CAP had the effect of creating unnecessary obstacles to international trade inconsistently with the first sentence of Article 5.1.2.[837]

7.529. We next turn to whether the EU Seal Regime CAP creates an unnecessary obstacle to international trade because it is more strict or applied more strictly than necessary within the meaning of the second sentence.

7.3.4.2.2 Whether the CAP creates an unnecessary obstacle to trade because it is "more strict or … applied more strictly than is necessary to give the importing Member adequate confidence" of conformity

7.3.4.2.2.1 Main arguments of the parties

Complainants

7.530. Norway submits that the parties do not disagree that the CAP set forth in the EU Seal Regime is, by definition, trade-restrictive. Moreover, given that applications to become a recognized body could not be made, much less approved, before entry into force of the EU Seal Regime, the CAP necessarily gave rise to a ban on trade in conforming seal products, which could not demonstrate compliance with the relevant requirements.[838]

7.531. Norway contends that the European Union's omission to establish a recognized body, which necessarily prevented lawful trade in conforming seal products, does not contribute to giving the European Union confidence that conforming seal products meet the relevant requirements. Rather than ensuring that a conformity assessment system operates effectively to give confidence to the

[836] This finds additional support in the time taken to review and process applications actually received, as discussed in the subsequent section on Article 5.2.1.

[837] We note in this regard the suggestion by Norway that the European Union could have provided for advance notice and/or opportunity for interested parties to apply for recognition. (See, e.g. Norway's response to Panel question No. 50, para. 264). Although the European Union has referenced consultations conducted during the legislative process, the evidence in this regard does not reveal any specific engagement as to conformity assessment. Further, we note that these consultations took place prior to the adoption of the Basic Regulation (and thus before the requirements of the CAP were established). (See Canada's and Norway's comments on the European Union's response to Panel question No. 149).

We are also mindful of the fact that certain entities have applied and been approved as recognized bodies by the Commission. This subsequent approval, however, does not alter the fact that the CAP under the EU Seal Regime was initially incapable of assessing conforming products, irrespective of third-party action or inaction. Given the circumstances of this dispute, we are not able to make specific findings as to measures that may have been available to the European Union to enable the assessment of conformity under the EU Seal Regime from its entry into force.

[838] Norway's second written submission, paras. 340-345. See also Norway's first written submission, para. 949 (citing Panel Report, *Brazil – Retreaded Tyres*, para. 7.114) ("A ban on the importation of conforming seal products is, of course, the most trade-restrictive obstacle to trade in these products that can be envisaged"). We note that Norway equates "strictness" with "trade-restrictiveness". (See Norway's second written submission, para. 340 (focusing on "the strictness (or, put another way, trade-restrictiveness) of the measure or its application")).

importing Member, the European Union's omission necessarily renders the system ineffective. Thus, the procedures have been designed in a manner that deprives the European Union of any opportunity to verify that conforming seal products meet the relevant requirements. Further, traders seeking access to the EU market are deprived of any opportunity to demonstrate that their products meet the requirements.[839]

7.532. Norway proposes that the European Union could have adopted a less-trade restrictive alternative by designating a recognized body that would be competent, at all times (or at least in the absence of third-party recognized bodies), to assess and certify conformity. According to Norway, this body could have been designated at the level of the European Union, including the Commission itself, or the Commission could have established a series of regional bodies within the European Union. Such a system would ensure that the CAP would always function to enable traders to secure approval for conforming seal products, irrespective of third party action, and would fully achieve the European Union's objective of giving itself confidence that imported seal products meet the relevant requirements.[840]

7.533. Canada states that evaluation of the CAP would include consideration of reasonably available, less trade-restrictive alternative measures, "such as supplier declaration of conformity, rather than a third party conformity assessment (3PCA) procedure".[841] Canada further asserts that where product safety is not the central concern of a technical regulation, schemes based on supplier declaration of conformity are more common than third-party conformity assessment.[842]

Respondent

7.534. The European Union argues that the very requirement to obtain a certificate constitutes an obstacle. In the case of the EU Seal Regime CAP, however, the degree of trade-restrictiveness is not more than necessary for the relevant purpose.[843]

7.535. The European Union argues that the CAP serves the purpose of providing adequate assurance that the only seal products placed on the market are those that comply with the exceptions established under the EU Seal Regime. In particular, the requirements of the Implementing Regulation ensure that recognized bodies are both impartial and capable of verifying and attesting that the requirements to benefit from an exception have been fulfilled.[844]

7.536. Regarding the alternative measures proposed by the complainants, the European Union argues that Canada neither presents any concrete alternative nor shows how such an alternative would be equally effective and less trade restrictive than the mechanism put in place by the Implementing Regulation.[845] Specifically, Canada has failed to establish that supplier declaration of conformity would give the European Union, "as the importing Member, adequate confidence that products conform with the applicable regulation" taking into account the risks of non-conformity.[846]

7.537. The European Union argues that Norway failed to demonstrate why the proposed alternative would be equally effective in determining the product's conformity with the regulation concerned, and less trade restrictive than the CAP at issue.[847] The European Union contends that in a context, like the one at issue, where certification can entail inspections of compliance with requirements (such as those of the IC and MRM exceptions) at the place of origin of the product, the designation of a default public authority in the European Union could have a greater trade distortive effect than the CAP under the Implementing Regulation. In particular, the issuance of certificates of compliance by a single central government authority would probably entail a less efficient and costlier certification mechanism for operators.[848] In this light, what Norway describes

[839] Norway's second written submission, paras. 346-348.
[840] Norway's second written submission, paras. 349-354.
[841] Canada's response to Panel question No. 49, para. 192.
[842] Canada's response to Panel question No. 87, para. 333.
[843] European Union's first written submission, paras. 431-434, 445.
[844] European Union's first written submission, paras. 432, 441-446.
[845] European Union's first written submission, para. 438.
[846] European Union's second written submission, para. 323.
[847] European Union's first written submission, para. 439.
[848] The European Union notes in this respect that pursuant to Article 5.2.5 of the TBT Agreement, conformity assessment authorities are entitled to charge for "communication, transportation and other costs

as an "institutional lacuna" is rather a mechanism to ensure a level playing field and avoid giving an inherent systemic advantage to trade in seals products that would originate in the European Union or its immediate proximity.[849]

7.538. Lastly, the European Union comments upon the complainants' acknowledgement that no Canadian or Norwegian entities have applied to become recognized bodies, and interprets the reasons given to be grounded in the lack of desire of the potential beneficiaries to make use of the system rather than in alleged deficiencies in the set-up of the system itself. On this basis, the European Union contends that the existence of a default recognized body would not have altered the considerations motivating the decision of Canadian and Norwegian entities not to submit a request.[850]

7.3.4.2.2.2 Analysis by the Panel

7.539. Given the similarities in its text and structure to the second sentence of Article 2.2 of the TBT Agreement, the Panel considers, and the parties do not dispute, that the requirement under the second sentence of Article 5.1.2 calls for a relational analysis similar to that applied in Article 2.2, namely a weighing and balancing of a measure's trade-restrictiveness, degree of its contribution to an objective, and possible less trade-restrictive alternative measures. In the context of a claim under Article 5.1.2, however, the analysis relates to the fulfilment of only one objective: giving positive assurance that the relevant requirements of the technical regulation are fulfilled.

7.540. With respect to trade-restrictiveness, it is undisputed that the CAP necessarily has some restrictive effect to the extent that it imposes additional conditions in order for the trade in seal products to be permitted. In this case, the obligation to obtain attesting documentation from a body that has applied and been approved for recognition comprises an obstacle for those wishing to place seal products on the EU market pursuant to the exceptions of the EU Seal Regime. However, the question of whether the CAP amounts to an *unnecessary* obstacle to international trade depends on the other factors of the analysis to be weighed and balanced.

7.541. Turning to the contribution of the CAP to the assurance of conformity, we recall that the categories of seal products allowed on the EU market are addressed under Article 3 of the Basic Regulation and Articles 3, 4, and 5 of the Implementing Regulation. For seal products potentially qualifying under these exceptions, we initially note that the CAP covers the assessment of products from activities that are conducted in locations outside and remote from the European Union.

7.542. Any entity seeking approval to be a recognized body under the EU Seal Regime must demonstrate that it meets the requirements set out in Article 6 of the Implementing Regulation. Given the inherent nature of third-party accreditation, we consider that the degree of contribution to assurance of conformity is to be judged with regard for the *capability* and *credibility* of an authorized body in providing positive assurance of conformity with the substantive requirements of the EU Seal Regime.[851] In this vein, the CAP expressly addresses the relevant capabilities of an applicant body by requiring "the capacity to ascertain that the requirements of" the IC or MRM exceptions are met; "the ability to monitor compliance with the requirements" of the IC and MRM exceptions; and "the capacity to issue and manage attesting documents … as well as process and archive records".[852] Further, other provisions answer to the credibility of an applicant entity by requiring that the entity be able to avoid conflicts of interest in addition to being subject to an independent third-party audit.[853]

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arising from differences between the location of facilities of the applicant and the conformity assessment body".

[849] European Union's first written submission, paras. 463-468.

[850] European Union's second written submission, paras. 330-332.

[851] See European Union's first written submission, para. 442 (explaining that the purpose of the application and criteria for recognition "is to ensure that the entity is and remains: *capable* of verifying and attesting that the requirements to benefit from an exception have been fulfilled; and *impartial*"). (emphasis original)

[852] Implementing Regulation, Article 6(1)(b), (c) and (e).

[853] Implementing Regulation, Article 6(1)(d) and (g).

7.543. In this connection, we observe that the primary function of recognized bodies under the CAP pertains to inspection and certification of conformity with IC and MRM requirements.[854] In view of the particular function of recognized bodies, we consider that the EU Seal Regime CAP contributes to the assurance of conformity with the relevant requirements of the EU Seal Regime through its provision for the capacity and impartiality of applicant entities.

7.544. We next consider the reasonable availability of less-trade restrictive alternative measures. The comparison of a possible alternative CAP under Article 5.1.2 should examine whether the alternative CAP is less trade restrictive than the CAP in question and would provide an equivalent assurance of conformity. We recall in this regard that the complainants bear the burden of identifying a possible alternative measure.[855] Canada proposes a supplier declaration of conformity, and Norway proposes the designation of a recognized body in the absence of third-party recognized bodies.

7.545. With respect to Canada's suggested alternative of supplier declaration of conformity, such an alternative would appear to be less restrictive in that it would dispense with suppliers' dependence on third-party accreditation to assess conformity. However, Canada has not provided specific arguments as to how such an alternative would provide an equivalent assurance of conformity as the current CAP. Moreover, Canada has not indicated whether such suppliers would be subject to some form of approval based on capacity/credibility, or instead would have automatic and undifferentiated eligibility to make conformity declarations. Therefore, we do not consider that Canada has made a *prima facie* case establishing that an alternative of supplier declaration of conformity would be less trade restrictive and make an equivalent contribution to assuring conformity.

7.546. We observe that Norway's suggested alternative does not fundamentally differ from the EU Seal Regime CAP, but rather would supplement the existing CAP with a designated entity to enable trade in conforming seal products. In this regard, Norway specifies that the designated body in the alternative CAP would exist within the European Union. As mentioned, the function of a recognized body under the EU Seal Regime CAP pertains to the verification and inspection of seal products for compliance with IC and MRM requirements. Further, as pointed out by the European Union, certification of conformity in the present context may require verification and inspection at the place of origin of the product in order to obtain positive assurance that all requirements are met. An entity based in the European Union would therefore be required to manage the added difficulties of assessing the conformity of products that are potentially derived from hunts occurring at considerable distances outside the European Union. In our view, this may have implications for the level of contribution to fulfilment of the relevant objective by Norway's alternative CAP, and we have not been provided any evidence or arguments as to how such an entity would make an equivalent contribution to confidence of conformity. Furthermore, the difference of location between applicants and the conformity assessment body may result in the imposition of additional costs and burdens in order to verify compliance.[856]

7.547. In conclusion, we do not consider that Canada and Norway have established that an alternative CAP would make a contribution to confidence of conformity at the same level as the current CAP. We therefore reject the complainants' claim that the EU Seal Regime CAP is more strict or applied more strictly than is necessary to give adequate confidence of conformity with the applicable technical regulations within the meaning of the second sentence of Article 5.1.2.

[854] This role is distinct from the more limited responsibilities of "competent authorities" under Article 9 of the Implementing Regulation, which provides for narrowly defined functions for verification, control, and repository. The European Union also notes that competent authorities would be precluded from serving as recognized bodies due to the Implementing Regulation's prohibitions on conflicts of interest. (European Union's response to Panel question No. 86, paras. 243-247).

[855] See, e.g. Appellate Body Reports, *US – Tuna II (Mexico)*, para. 323; *US – Gambling*, para. 309; *China – Publications and Audiovisual Products*, para. 319.

[856] In this regard, we also note that Article 5.2.5 of the TBT Agreement addresses "fees imposed for assessing the conformity of products originating in the territories of other Members" and provides that such fees may be imposed "taking into account communication, transportation and other costs arising from differences between location of facilities of the applicant and the conformity assessment body". (See also European Union's first written submission, para. 467).

7.3.4.3 Article 5.2.1: whether the EU Seal Regime is "undertaken and completed as expeditiously as possible"

7.3.4.3.1 Main argument of the parties

7.3.4.3.1.1 Complainants

7.548. The complainants contend that the obligation in Article 5.2.1 is similar to that found in Annex C(1)(a) of the SPS Agreement which requires control, inspection and approval procedures to be "undertaken and completed without undue delay". The complainants accordingly cite to the interpretation of the panel in *EC – Approval and Marketing of Biotech Products* in the context of the SPS Agreement to further develop the meaning of the provisions in Article 5.2.1. In particular, the complainants note that the SPS Agreement was found to allow Members "the time that is reasonably needed to determine with adequate confidence whether their relevant SPS requirements are fulfilled".[857] Notwithstanding this allowance, the requirement to carry out such actions "without undue delay" means that "approval procedures be undertaken and completed with no unjustifiable loss of time".[858] They also describe the ordinary meaning of the word "expeditiously" to refer to the performance of an action as quickly as possible without compromising the effectiveness of the action.[859]

7.549. Against the interpretive benchmark of unjustifiable delay or loss of time, Canada and Norway emphasize that Article 5.2.1 requires that conformity assessment procedures be undertaken *and* completed "as expeditiously as possible".[860] The complainants contend that the EU Seal Regime violates this obligation by failing to create or designate a body capable of conducting the conformity assessment, instead leaving it to other entities to seek authorization for the performance of this task. In the complainants' view, this results in the effective impossibility of determining conformity with the requirements set out in the EU Seal Regime.[861]

7.550. Canada additionally asserts that, even if the "failure to create a designated body itself does not *per se* give rise to a violation of Article 5.2.1", the sheer lapse of time during which no bodies have been recognized as competent to issue attesting documents "amounts to a failure to ensure that the conformity assessment procedure established by the Implementing Regulation can be undertaken and completed as expeditiously as possible".[862]

7.551. Highlighting the lapse of more than two years for the approval of a Greenlandic applicant, Norway argues that Article 5.2.1 suggests that a violation of this provision is established only if the more rapid conduct of a CAP is "possible". Norway reiterates its view that it would be "possible" for the European Union to conduct its procedures more rapidly than under the current Regime by designating a body that could act in a timely fashion, without making its procedures depend on the desire of a third party entity to seek, and secure, approval as a recognized body.[863]

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[857] Canada's first written submission, para. 725 (citing Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1498); Norway's first written submission, para. 955 (citing a similar statement made in Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1499).

[858] Canada's first written submission, para. 725 (citing Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1495). See also Norway's first written submission, para. 954.

[859] Canada's first written submission, para. 724 ("a requirement to undertake and complete something 'as expeditiously as possible' means that the action must be performed as quickly as possible without compromising the effectiveness of the action, having regard to its purpose and the surrounding circumstances"); Norway's first written submission, para. 954 ("The ordinary meaning of the term 'expeditiously' refers to action taken as speedily as possible, without compromising the quality or effectiveness of the action at issue".).

[860] Canada's first written submission, para. 727; Norway's first written submission, para. 957; Norway's second written submission, para. 385.

[861] Canada's first written submission, paras. 728-731 (asserting that "it is legally and practically impossible for seal products to be certified as conforming with the conditions, even if, as a matter of fact, they do"); Norway's first written submission, paras. 958-961 (describing the practical consequences of the "institutional lacuna" left by the EU Seal Regime conformity assessment procedures).

[862] Canada's first written submission, para. 732.

[863] Norway's second written submission, paras. 387-393.

7.3.4.3.1.2 Respondent

7.552. The European Union agrees that the jurisprudence on Annex C(1)(a) of the SPS Agreement is relevant in interpreting the obligation under Article 5.2.1.[864] Specifically, the European Union refers to the panel's findings in *EC – Approval and Marketing of Biotech Products* that "the phrase 'undertake and complete' covers all stages of approval procedures and should be taken as meaning that, *once an application has been received*, approval procedures must be started and then carried out from beginning to end".[865] The European Union concurs with the complainants in citing to the requirement that there be "no unjustifiable loss of time"[866], but additionally cites to the finding that "*delays attributable to action, or inaction, of an applicant must not be held against a Member*" in a panel's determination of "undue delay".[867]

7.553. On these foundations, the European Union addresses the complainants' arguments as consisting of claims against the Implementing Regulation *as such* and *as applied.*[868] Regarding the claim against the Implementing Regulation as such, that European Union argues that the TBT Agreement does not oblige Members to create "default" conformity assessment bodies. Moreover, the phrase "undertake and complete" as interpreted by the panel in *EC – Approval and Marketing of Biotech Products* establishes that obligations are triggered only once an application for conformity assessment has been received. According to the European Union, despite providing for broad potential eligibility under the Implementing Regulation, it has received "only twelve applications to be added on the list of recognized bodies". The European Union contends it has discharged the duties of good faith under Article 5.2.1 and the low interest of other public authorities and private entities is not attributable to the European Union.[869]

7.554. As to the separate claim by Canada against the Implementing Regulation as applied, the European Union first argues that such a claim is outside the Panel's terms of reference based on the text of Canada's panel request.[870] Alternatively, the European Union argues that any delays in processing applications to date are not imputable to the European Union as they are due to the deficiency of the application referenced by Canada (i.e. from Greenland).[871]

7.3.4.3.2 Analysis by the Panel

7.555. Article 5.2.1 provides:

> 5.2 When implementing the provisions of paragraph 1, Members shall ensure that:
>
> 5.2.1 conformity assessment procedures are undertaken and completed *as expeditiously as possible* and in a no less favourable order for products originating in the territories of other Members than for like domestic products; (emphasis added)

7.556. The chapeau of Article 5.2 directly references Article 5.1 and clarifies the relationship between the obligations in the sub-paragraphs of the two provisions. Specifically, Article 5.2 provides that "[w]hen *implementing* the provisions of" Article 5.1, Members must adhere to the specific obligations laid out in the sub-paragraphs of Article 5.2 with respect to the implementation of the CAP.[872] Among the detailed rules contained in Article 5.2, the complainants have raised a challenge as to whether the EU Seal Regime CAP is "undertaken and completed as expeditiously as possible" within the meaning of the first clause of Article 5.2.1.

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[864] European Union's first written submission, para. 475.
[865] European Union's first written submission, para. 476 (citing Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1494) (emphasis added by the European Union)
[866] European Union's's first written submission, para. 477 (citing Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1495).
[867] European Union's's first written submission, para. 478 (citing Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1497) (emphasis added by the European Union)
[868] European Union's's first written submission, paras. 471-472.
[869] European Union's's first written submission, paras. 479-484; second written submission, paras. 330-332.
[870] European Union's's first written submission, para. 485.
[871] European Union's first written submission, paras. 486-487.
[872] See also Canada's response to Panel question No. 50; Norway's response to Panel question No. 50; second written submission, paras. 381-382.

7.557. To assess the complainants' claim under Article 5.2.1, we must therefore examine the meaning of the phrase "undertaken and completed as expeditiously as possible".

7.558. First, we address the question concerning the precise point in time when the obligation to "undertake and complete" a CAP is triggered during the implementation process of a CAP. The parties dispute whether this obligation predates the receipt of an application for recognition under the CAP.

7.559. In our view, the chapeau of Article 5.2 dictates that the detailed obligations of the sub-paragraphs are confined to the *implementation* of the more general obligations under Article 5.1. While Article 5.1.2 covers the entire process in which a CAP is "prepared, adopted or applied", Article 5.2.1 applies only to the implementation stage of the process. This means that the obligations of Article 5.2 are not coterminous with those of Article 5.1, but limited to the application of a CAP.

7.560. We further note that the SPS Agreement contains a similar obligation as that contained in Article 5.2.1 of the TBT Agreement; Annex C(1)(a) of the SPS Agreement provides:

> Members shall ensure, with respect to any procedure to check and ensure the fulfilment of sanitary or phytosanitary measures, that … such procedures are undertaken and completed *without undue delay*. (emphasis added)

7.561. Given the similarity in the text, we agree with the parties that there are certain parallels in the terms and scope of Article 5.2.1 of the TBT Agreement and Annex C(1)(a) of the SPS Agreement. Both provisions pertain to procedures adopted to ensure fulfilment of specific requirements contained in a measure falling under the TBT Agreement or the SPS Agreement, respectively.[873]

7.562. Regarding the phrase "undertaken and completed" in particular, the panel in *EC – Approval and Marketing of Biotech Products* concluded:

> [t]he verb 'undertake' makes clear that Members are required *to begin, or start, approval procedures after receiving an application for approval*.[874] … Thus, in our view, the phrase 'undertake and complete' covers all stages of approval procedures and should be taken as meaning that, *once an application has been received*, approval procedures must be started and then carried out from beginning to end.[875] (emphasis added)

7.563. Based upon the relevant text and context of Article 5.2.1, and consistent with the interpretive guidance of the same phrase in the SPS Agreement, we consider that "undertaken and completed" in Article 5.2.1 applies to the implementation of a CAP from the moment when an application for recognition has been received and through the completion of the process. In the present dispute, the application in question is for inclusion on the list of recognized bodies under Article 6 of the Implementing Regulation. Our understanding of the temporal scope of the obligation in Article 5.2.1 is unaltered by the fact that the application is for accreditation to perform conformity assessment, rather than a direct application for certification of conformity to an existing authorized entity.[876]

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[873] There is also overlap in the indicative terms provided in the explanatory notes for "conformity assessment procedures" under the TBT Agreement and "control, inspection and approval procedures" under the SPS Agreement. In particular, these terms and their explanatory notes coincide with respect to "sampling", "testing", and "inspection", and the inclusion of "*inter alia*" to indicate the non-exhaustive nature of the list.

[874] The dictionary meanings of the verb "undertake" include "[t]ake on (an obligation, duty, task, etc.); commit oneself to perform; begin (an undertaking, enterprise, etc.)". The *New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. II, p. 3476. The French and Spanish versions of Annex C(1)(a), first clause, also support this reading. The French version uses the verb "engager", the Spanish version the verb "iniciar". (footnote original)

[875] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1494 (emphasis added)

[876] See, e.g. Japan's third-party submission, para. 58 (distinguishing the present dispute from *EC – Approval and Marketing of Biotech Products* where "the issue did not relate to the designation of the certifying body but rather to a *de facto* moratorium on approvals").

7.564. Further, we observe that the adverb "expeditiously" indicates that the obligation relates to the speed and/or timing of the performance of a CAP.[877] At the same time, the term "expeditiously" is qualified by the phrase "as possible". We take this qualification to be based on the fundamental purpose of any CAP to secure "a positive assurance of conformity with technical regulations"[878], and recognition that doing so may necessarily entail some time to determine that relevant requirements are fulfilled.

7.565. In this connection, we also take note of the interpretation by the panel in *EC – Approval and Marketing of Biotech Products* of the phrase "without undue delay" to mean that approval procedures were required to be undertaken and completed "with no unjustifiable loss of time".[879] The panel similarly accounted for the function of approval procedures to check and ensure fulfilment of SPS requirements, and reasoned on this basis that "Members applying such procedures must in principle be allowed to take the time that is reasonably needed to determine with adequate confidence whether their relevant SPS requirements are fulfilled".[880]

7.566. We agree with the approach of the panel in *EC – Approval and Marketing of Biotech Products*. While the duty of expeditious conformity assessment prescribed in Article 5.2.1 must be carried out so as not to create an unnecessary obstacle to trade, such duty of the regulating Members must be balanced against the regulating Members' need and practical ability to make an adequate conformity assessment.[881] Therefore, in our view, Article 5.2.1 permits the time that is reasonably required to assess conformity with technical requirements.

7.567. Turning to the question of whether the CAP in question has been undertaken "as expeditiously as possible" in the particular circumstances of this dispute, the parties' arguments mainly concern the issue of the justifiability and attribution of delay caused under the CAP.

7.568. First, the complainants criticize the design of the CAP as creating an absence, attributable to the European Union, of any body competent to "undertake and complete" the required CAP. In other words, we understand the complainants' arguments to be based on the same grounds as those raised in the context of their claim under Article 5.1.2, namely the absence of a default body (i.e. an "institutional lacuna"). We recall our finding above on this question that Article 5.1.2 does not impose an obligation to create or designate a default body pending accreditation or recognition of third-party entities to perform a CAP. In light of this finding, we are not persuaded of the complainants' contention that the absence of a default body in the CAP leads to a violation of Article 5.2.1.[882]

7.569. Next, regarding the arguments based on the actual time taken for the European Union to process conformity assessment applications, the European Union attributes delay in the application process to the complainants themselves for failing to initiate the procedures that would prompt the European Union's obligation to undertake and complete the CAP as expeditiously as possible. The European Union also contends that delays in the processing of requests from Sweden and Greenland cannot be considered attributable to the European Union.[883] We must thus assess the evidence relating to the application of the CAP with respect to those applications that were submitted to the Commission. On the basis of our assessment, we evaluate whether the CAP, as applied in those cases, was not undertaken and completed as expeditiously as possible in compliance with Article 5.2.1.

[877] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 898 ("1. Speedily performed or given; conducive to speed performance").

[878] Article 5.1 of the TBT Agreement.

[879] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1495.

[880] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1498. The panel further stated: "Put another way, we view Annex C(1)(a), first clause, essentially as a good faith obligation requiring Members to proceed with their approval procedures as promptly as possible, taking account of the need to check and ensure the fulfilment of their relevant SPS requirements."

[881] See Annex 1.3 of the TBT Agreement (definition of "conformity assessment procedures").

[882] We note that that there has not been any contention that the European Union has prevented the submission or receipt of applications in its administration of the CAP, but rather that there were inadequate incentives to apply because of the substantive requirements of the EU Seal Regime. (See Canada's and Norway's responses to Panel question Nos. 84 and 85). Because no applications for recognition from Canadian or Norwegian entities have ever been submitted, we do not consider the obligations of Article 5.2.1 to have been breached by the European Union in respect of the non-approval of such entities where it was not possible to "undertake" the CAP in the first place.

[883] See, e.g. European Union's second written submission, para. 327.

7.570. Regarding the application from Greenland, on 21 February 2011, the Greenlandic government notified that its Department for Fisheries, Hunting, and Agriculture (APNN) would serve as certifying authority under Article 6 of Implementing Regulation.[884] On 7 July 2011, the Commission sent a formal deficiency letter stating that, although there was no evidence that the entity was ineligible, there was insufficient documentary evidence to demonstrate fulfilment of all of the requirements of Article 6 of Implementing Regulation.[885] The Greenlandic authorities provided an initial reply letter on 5 January 2012 with supporting documentation[886] and subsequently provided supplementary information on 1 November 2012[887] and 29 January 2013.[888] The Commission issued its decision recognising the APNN of Greenland on 25 April 2013.[889]

7.571. With respect to the applications received from Swedish entities under the CAP, the first applications were received on 20 January 2011 from 11 county administrative boards designated by the Swedish government.[890] A formal deficiency letter was sent on 7 July 2011 (the same date as the letter to Greenland) similarly stating that there was no evidence that the applicants were ineligible and detailing documentary insufficiencies of the application.[891] The Swedish authorities replied on 6 October 2011 with an item-by-item response to the Commission's deficiency letter[892], and the Commission issued its decision recognising the Swedish bodies on 18 December 2012.[893]

7.572. It is thus clear that there were some delays of varying length in the exchanges between the Commission and the respective applicant bodies in Sweden and Greenland.

7.573. In the case of Greenland, we observe the multiple exchanges of information with Greenlandic authorities in the course of the recognition process. The formal deficiency letters from the Commission, sent several months after the applications, itemize the deficiencies of each application with specific reference to the enumerated requirements of Article 6 of the Implementing Regulation. The letters also contain references to information provided in the original applications and request elaboration and additional documentation on certain points with indications of the type of evidence that would be suitable, such as legal references or factual explanations.

7.574. The first response from Greenland to the deficiency letter was submitted approximately six months afterwards and acknowledges "the tardy reply, which is the result of internal discussion and the number and scope of the questions". This response goes on to provide extensive explanation of export authorizations as well as the licensing and monitoring scheme of the commercial seal hunt.

7.575. Subsequent communications elaborate upon relevant laws and monitoring functions, while also indicating that there may have been meetings and exchanges outside the exchange of written correspondence and documentation.[894] Given the multiple submissions of documentation made to the Commission as well as indications of other forms of engagement, the evidence regarding the Greenlandic application does not enable us to make a precise assessment of the cause or attribution of the overall length of the proceedings. Nor have the complainants provided a sufficient basis for us to conclude that the procedures under the CAP with respect to the specific applications from Greenland were not undertaken and completed as expeditiously as possible within the meaning of Article 5.2.1

[884] Greenland's request pursuant to Article 6(2) of the Implementing Regulation, (Exhibit EU-148).
[885] Deficiency letter to Greenland of 7 July 2011, (Exhibit EU-150).
[886] Greenland's response of 5 January 2012, (Exhibit EU-151) and Supporting documentation to the submission of 5 January 2012, (Exhibit EU-152).
[887] Supplementary document received from Greenland on 1 November 2012, (Exhibit EU-153).
[888] Submission by Greenland of 29 January 2013, (Exhibit EU-154) and annexes, (Exhibit EU-155).
[889] Commission decision of 25 April 2013 recognising the Greenland Department of Fisheries, Hunting and Agriculture (APNN), (Exhibit EU-149).
[890] Sweden's request pursuant to Article 6(2) of the Implementing Regulation, (Exhibit EU-156).
[891] Deficiency letter to Sweden of 7 July 2011, (Exhibit EU-157) (also indicating the decision to treat the applications of the 11 county administrative boards jointly).
[892] Sweden's response of 6 October 2011, (Exhibit EU-158).
[893] Commission decision of 18 December 2012 recognising the Swedish County Administrative Boards, (Exhibit EU-159).
[894] See, e.g. Submission by Greenland of 29 January 2013 , (Exhibit EU-154) (referring to a meeting with a Commission official in Brussels in December 2012).

7.576. With respect to the Swedish application, the Commission sent a formal deficiency letter to the applicants about 6 months from receipt of the applications. The nature and content of the deficiency letter appears to be similar to that sent to the applicants from Greenland. The applicants then sent a reply to this deficiency letter roughly three months later containing an item-by-item response with extensive reference to Swedish legislation and an explanation of the function of county administrative boards. As was the case with respect to the applications from Greenland, we are not presented with any specific explanation regarding the time taken from receiving the applications to responding to the applicants with a deficiency letter. Nor do we find any additional evidence of activity regarding the Swedish application prior to recognition over one year later.[895]

7.577. As a general observation based on the factual circumstances described above, the CAP conducted with respect to both the Greenlandic and the Swedish applications took some time until their completion. Particularly, the circumstances surrounding the Swedish applications reveal a delay greater than one year from receipt of the applicants' responses to the Commission's deficiency letter until the final approval by the Commission. The amount of time taken in this specific instance, without sufficient justification, would not therefore seem "expeditious" within the meaning of Article 5.2.1.

7.578. In addressing the length of time taken to approve a recognized body under the CAP, the complainants have referred simply to the lapse of time from the effective date of the EU Seal Regime until the approval of the applications from Greenland and Sweden. They have not otherwise explained how specifically the CAP was not as expeditious as possible in undertaking and completing the applications concerned in this dispute.

7.579. We first recall our consideration above that the obligations of Article 5.2.1 apply upon *receipt* of an application. Accordingly, we do not consider the effective date of the EU Seal Regime, as suggested by the complainants, to be the correct benchmark against which the time taken for the undertaking and completion of the CAP is to be judged. Further, in our view, a violation of Article 5.2.1 must be examined in light of the specific circumstances relating to a given CAP. This would entail an evaluation of not only the entire period of time taken from receipt of an application until completion of a CAP, but also the specific time taken for each procedural step (e.g. correspondences between an applicant and the Commission) during the course of the undertaking and completion of a CAP. This would allow us to objectively assess whether the time taken for the conformity assessment of a given application was "as expeditious as possible". As noted above, in the present dispute, however, the complainants have not provided any specific argument as to how the CAP was *not* conducted in the concerned instances as expeditiously as possible within the meaning of Article 5.2.1.[896]

7.580. Therefore, in spite of our concern expressed above regarding the time taken with respect to the Swedish applications, we have not been provided a sufficient basis to conclude that the CAP was not undertaken and completed as expeditiously as possible within the meaning of Article 5.2.1 of the TBT Agreement.

7.4 Non-discrimination claims under the GATT 1994

7.4.1 Relationship between the GATT 1994 and the TBT Agreement

7.581. The complainants in this dispute presented claims under both the GATT 1994 and the TBT Agreement, including claims concerning the non-discrimination obligations. As we already addressed Canada's non-discrimination claim under Article 2.1 of the TBT Agreement, we find it useful to review the relationship between, and the legal standards under, the GATT 1994 and the

[895] Although the European Union has asserted that it "explained why the processing of the request made by entities from Sweden took as long as it took", the reference to its first written submission allegedly doing so merely recounts what transpired in October 2011 and then in December 2012, without accounting for the intervening period of time. (European Union's second written submission, para. 327).

[896] We observe that the panel in *EC – Approval and Marketing of Biotech Products* considered that, although "a Member is not legally responsible for delays which are not attributable to it", it would be sufficient to establish that the general *de facto* moratorium on approvals "caused undue delay in at least one instance". (Panel Report, *EC – Approval and Marketing of Biotech Products*, paras. 7.1497 and 7.1504). However, in contrast to the present dispute, the parties in that case had developed extensive arguments concerning specific actions that could have been taken to prevent the delays at issue and the justifiability of the reasons for which such actions were not taken.

TBT Agreement before we begin our examination of the parties' non-discrimination claims under the GATT 1994.

7.582. In the recent trilogy of disputes involving the claims under the TBT Agreement and the GATT 1994, the Appellate Body provided guidance on the relationship between the obligations under these two Agreements.[897] Based on the text of the second recital of the preamble of the TBT Agreement, the Appellate Body observed, "the TBT Agreement expands on the pre-existing GATT disciplines and emphasizes that the two Agreements should be interpreted in a coherent and consistent manner."[898]

7.583. More specifically, the Appellate Body stated that the balance set out in the preamble of the TBT Agreement between, on the one hand, the desire to avoid creating unnecessary obstacles to international trade under the fifth recital and, on the other hand, 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.[899]

7.584. In the context of addressing the national treatment obligation under Article 2.1 of the TBT Agreement , the Appellate Body made the following observations: first, the similar formulation of the provisions under Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994[900]; second, the overlap in their scope of application in respect of technical regulations[901]; and third, the absence of a general exceptions clause in the TBT Agreement that resembles a general exceptions clause in Article XX contained in the GATT 1994.[902] Based on these observations, the Appellate Body considered that Article III:4 of the GATT 1994 provides relevant context for the interpretation of the national treatment obligation of Article 2.1 of the TBT Agreement. However, noting the scope of the TBT Agreement as an agreement governing "technical regulations"[903]; the sixth recital of the preamble of the TBT Agreement[904]; and the object and purpose of the TBT Agreement to strike a balance between the objective of trade liberalization and Members' right to regulate, the Appellate Body concluded that Article 2.1 should not be interpreted as prohibiting any detrimental impact on competitive opportunities for imports in cases where such detrimental impact on imports stems exclusively from a legitimate regulatory distinction.

7.585. Therefore, the Appellate Body clarified the legal standards for the non-discrimination provisions under the GATT 1994 (Articles I:1 and III:4) and the TBT Agreement (Article 2.1): under the GATT 1994, the "treatment no less favourable" standard prohibits WTO Members from modifying the conditions of competition in the marketplace to the detriment of the group of imported products *vis-à-vis* the group of domestic like products, whereas under the TBT Agreement , the "treatment no less favourable" standard does not prohibit detrimental impact on imports that stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products.[905] The additional element (i.e. legitimate regulatory distinction) that the Appellate Body considered as necessary to complete an analysis under Article 2.1 of the TBT Agreement reflects the Appellate Body's earlier observation regarding the absence in the TBT Agreement of a general exceptions clause equivalent to Article XX in the GATT 1994.

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[897] See Appellate Body Reports, *US – Clove Cigarettes*, *US – Tuna II (Mexico)*, and *US – COOL*.

[898] Appellate Body Report, *US – Clove Cigarettes*, paras. 90-91. The Appellate Body further read the sixth recital of the preamble of the TBT Agreement as counterbalancing the trade-liberalization objective expressed in the fifth recital. Specifically it found that the sixth recital "recognizes" Members' right to regulate versus the "desire" to avoid creating unnecessary obstacles to international trade, expressed in the fifth recital. Thus, according to the Appellate Body, the sixth recital suggests that Members have a right to use technical regulations in pursuit of their legitimate objectives, provided that they do so in an even-handed manner and in a manner that is otherwise in accordance with the provisions of the TBT Agreement. (Appellate Body Report, *US – Clove Cigarettes*, para. 95).

[899] Appellate Body Report, *US – Clove Cigarettes*, para. 96.

[900] Appellate Body Report, *US – Clove Cigarettes*, para. 99.

[901] Appellate Body Report, *US – Clove Cigarettes*, para. 100.

[902] Appellate Body Report, *US – Clove Cigarettes*, para. 100.

[903] Appellate Body Report, *US – Clove Cigarettes*, para. 169. The Appellate Body also found support for this interpretation in the obligations under Article 2.2 as well as the sixth recital of the preamble of the TBT Agreement (paras. 170-173).

[904] Appellate Body Report, *US – Clove Cigarettes*, para. 173.

[905] Appellate Body Report, *US – Clove Cigarettes*, paras. 180-182, 215; *US – Tuna II (Mexico)*, para. 215.

7.586. Therefore, we do not consider that the legal standard with respect to the non-discrimination obligation under Article 2.1 of the TBT Agreement "equally applies" to claims under Articles I:1 and III:4 of the GATT 1994 as argued by the European Union.[906] As noted by the Appellate Body, under the GATT 1994, the objective of trade liberalization, including Members' obligation to respect non-discrimination obligations as embodied in Articles I:1 and III:4, are balanced against Members' right to regulate under the separate general exceptions clause of Article XX.

7.587. Bearing the above in mind, we begin our analysis of whether certain aspects of the EU Seal Regime modify the conditions of competition for Canadian and Norwegian imports of seals products on the EU market *vis-à-vis* Greenlandic and EU domestic seal products within the meaning of Articles I:1 and III:4 respectively. If we find in the affirmative, we will then examine whether the European Union has demonstrated why such aspects of the EU Seal Regime are nevertheless justified under Article XX.

7.4.2 Article I:1

7.4.2.1 Main arguments of the parties

7.588. As Canada's arguments under Article I:1 of the GATT 1994 largely resemble those under Article 2.1 of the TBT Agreement, we summarize in this section Norway's arguments only. To recall, Norway did not present a claim under Article 2.1 of the TBT Agreement. We will however cross-reference Canada's arguments to the extent relevant and appropriate in the context of our analysis.

7.589. Like Canada, Norway argues that the EU Seal Regime violates Article I.1 of the GATT 1994 because it grants a market access advantage to certain seal products from Greenland without extending such advantage "immediately and unconditionally" to "like" seal products from Canada and Norway.[907]

7.590. Norway further argues that the conditions of the IC exception discriminate on grounds of origin by establishing explicit links between importation and the territory of production.[908] In respect of both its express wording and the necessary implications of the terms used, the EU Seal Regime restricts market access advantages to a "limited" and "closed" group of countries under the IC exception.[909] Norway argues that the IC exception benefits predominantly one single country out of the list of countries identified, namely Greenland.[910] Further, the measure is expected to operate, in practice, in a manner that confers little or no benefit on seal products

[906] European Union's first written submission, para. 528. See, for instance, Canada's opening statement at the first meeting of the Panel, paras. 51-53, 55; Norway's opening statement at the first meeting of the Panel, paras. 23-25.

See, for instance, *US – Tuna II (Mexico)*, para. 405 where the Appellate Body notes that the scope and content of Article 2.1 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994 are not the same.

[907] Canada's opening statement at the second meeting with the Panel, para. 31; Norway's first written submission, para. 286. In making its argument, Norway distinguishes between "finished" and "intermediate" products. (See Norway's first written submission, paras. 369-371 and 372-375, respectively).

[908] Norway's first written submission, para. 286. It should be noted that Norway is not making a claim of *de jure* discrimination *per se*. However, Norway notes in its submission that "[t]he facts set forth … in support of Norway's claim that the European Union Seal Regime *de facto* discriminates contrary to Article I:1 of the GATT 1994 would also support a finding by the Panel that the European Union Seal Regime is indeed *de jure* inconsistent with Article I:1 of the GATT 1994, since it necessarily limits the extension of a relevant "advantage" to a defined and closed group of countries." (Norway's first written submission, para. 377, footnote 595).

[909] Norway notes that the Basic Seal Regulation expressly names certain Members or territories of Members as qualifying under this aspect of the IC exception. In particular, Article 2(4) of the Basic Regulation lists the following six Inuit Communities: Inupiat, Yupik (Alaska), Inuit, Inuvialuit (Canada), Kalaallit (Greenland) and Yupik (Russia). As regards the definition of "indigenous communities" in Article 2(1) of the Implementing Regulation, Norway argues that it also establishes a "closed group" because an indigenous community must have inhabited the territory of the Member in question "at the time of the conquest or colonisation or the establishment of present State boundaries". (Norway's first written submission, paras. 378-380).

[910] Norway's first written submission, para. 389.

originating in Norway.[911] Norway further contends that by conditioning market access on the existence of a tradition of producing certain goods in the country; of belonging to a certain people that has long resided in the country; or on factors such as the partial use of the product in the country of production, the European Union conditions market access on the "situation or conduct" of the exporting countries.[912] This reflects a failure to extend the advantage of market access "unconditionally" to like products originating in all WTO Members, as required by Article I:1 of the GATT 1994.[913]

7.591. The European Union does not contest that the EU Seal Regime, through the IC exception, confers an "advantage" in the sense of Article I:1 of the GATT 1994 to the extent that it permits the placing on the EU market of seal products that would otherwise be excluded through the general prohibition.[914] In response to Norway's argument, the EU asserts that the conditions under the IC exception are origin-neutral as they refer to the type and purpose of the hunt, rather than to a defined origin.[915] The reference to country names where Inuit and indigenous communities currently live does not imply that the IC exception applies only to a "limited" or "closed" list of countries.[916] In the EU's view, the fact that hunts conducted by Inuit and other indigenous communities in countries such as Canada and Norway represent a lower percentage than in other countries, such as Greenland, cannot be found to be discriminatory *per se*.[917] The European Union also disagrees with Norway's contention that the advantage under Article I:1 may not be granted subject to conditions relating to the situation or conduct of other countries; if the conditions to obtain a certain advantage are drafted in an origin-neutral manner, the requirement of such conditions would not be discriminatory.[918]

7.4.2.2 Analysis by the Panel

7.592. Article I:1 of the GATT 1994 provides that:

> With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any [Member] to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other [Members].

7.593. Based on this provision, three elements must be satisfied in order to demonstrate an inconsistency with Article I:1 of the GATT 1994: (i) there must be an "advantage, favour, privilege or immunity" of the type covered by Article I:1; (ii) the advantage is not granted "immediately and unconditionally"; (iii) to like products originating in or destined for all other WTO Members.[919]

7.594. In the context of Canada's claims under Article 2.1 of the TBT Agreement, the Panel addressed the question of whether Canadian seal products are "like" seal products of other origin (Greenland). We found in section 7.3.2.1 above that the seal products belonging to these different groups are like products, irrespective of whether they conform or not to the requirements under the EU Seal Regime. We recall that the parties do not dispute that conforming and non-conforming seal products are like.

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[911] It is not clear from Norway's submission whether they are referring to their seal products derived from Inuit or from commercial hunts.

[912] Norway's first written submission, para. 388 (referring to *Canada – Autos*, para. 10.23).

[913] Norway's first written submission, para. 388.

[914] European Union's first written submission, para. 542.

[915] According to the European Union, the terms "Inuit" and "indigenous communities" defined in the Basic and Implementing Regulations, respectively, are not indicative of a particular origin. In fact, these communities are widely spread around the world. (See European Union's first written submission, paras. 280-283 and 547).

[916] European Union's first written submission, para. 557.

[917] European Union's first written submission, para. 289.

[918] European Union's first written submission, para. 538.

[919] Panel Reports, *Indonesia – Autos*, para. 14.138; and *EU – Footwear*, para. 7.99.

7.595. The term "advantage" in Article I:1 is broad and applies to all matters referred to in paragraphs 2 and 4 of Article III of the GATT 1994. Article III:4 applies in turn to all "laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use [of a product]." The EU Seal Regime is undoubtedly a "law or regulation" within the meaning of Article III:4 of the GATT 1994 and therefore, the measure also falls within the scope of Article I:1 of the GATT 1994.

7.596. Furthermore, the advantage granted by the EU Seal Regime is in the form of market access; it is granted to seal products that meet the conditions under the IC exception. The EU Seal Regime affects the placing on the market of seal products and therefore the "internal sale", "offering for sale", "distribution" and "purchase" of seal products.

7.597. With respect to the third element of Article I:1, the MFN obligation contained therein requires that once seal products from Greenland are granted the advantage of access to the European Union market, such advantage be extended "immediately and unconditionally" to Canadian and Norwegian seal products that are found to be "like".[920] As explained above, the evidence suggests that this has not been the case because the vast majority of seal products from Canada and Norway do not meet the IC requirements for placing on the market under the EU Seal Regime.[921] In contrast, virtually all of Greenlandic seal products are likely to qualify under the IC exception for placing on the market.[922] Thus, in terms of its design, structure, and expected operation, the EU Seal Regime detrimentally affects the conditions of competition on the market of Canadian and Norwegian origin as compared to seal products of Greenlandic origin.

7.598. Bearing in mind this finding, we address Norway's argument that the IC requirements give rise to origin-based discrimination. Norway argues that in order to qualify under the IC exception, seal products must originate in one of a limited number of countries inhabited by an indigenous community that meets the specific terms of the conditions.[923] According to Norway, the origin of seal products that are likely to qualify under the IC exception can be determined by necessary implication.[924] First, based on Norway's arguments in this regard, it is not clear whether Norway is presenting a *de jure* claim with respect to the IC exception in this dispute. Although Norway refers to the term "*de jure*" in a footnote in the context of its arguments relating to Article I:1, it has not fully developed a *de jure* claim, as a separate and additional claim from its *de facto* claim with respect to the IC exception. Furthermore, to the extent we already found a *de facto* violation with respect to the IC exception above, we do not find it necessary to make a finding on a *de jure* claim.

7.599. We note that several countries, including non-EU member States, have Inuit or indigenous communities living in their territory.[925] For instance, Canada's Inuit and Inuvialuit populations are specifically mentioned in the Basic Regulation[926]; there is also evidence that Norway's Sami

[920] For the purpose of this analysis, the groups of products compared are all Norwegian seal products and all Greenlandic seal products (i.e. with reference to Table 1 above, cells B+G are compared to cells D+I).

[921] The evidence before us shows that roughly 5% of Canada's seal harvest and less than 4.5% of Norway's seal harvest are likely to comply with the requirements of the IC exception. (See Canada's first written submission, para. 286 and footnote 391; Norway's first written submission, para. 391, Table 1 citing COWI 2010 Report, (Exhibit JE-21), pp. 27, 30-31; Nunavut Report (2012), (Exhibit JE-30), p. 1; and Norwegian Ministry of Fisheries and Coastal Affairs, Facts about Fisheries and Aquaculture 2010 (Exhibit NOR-63), p. 21).

[922] It is estimated that 100% of Greenland's seal products would qualify under the IC exception. (See Norway's first written submission, paras. 391-394, citing COWI 2010 Report, (Exhibit JE-21), section 3.1, pp. 28-30 and Management and Utilization of Seals in Greenland (Exhibit JE-26), p. 13; and European Union's response to Panel question No. 156 (where the European Union notes that entities from Greenland have been authorized as "designated bodies" that could deliver attesting documents for the purpose of placing Greenlandic seal products on the EU market)).

[923] We note that Norway submits this argument in the context of its *de facto* discrimination claims while noting that the same arguments would support a claim of *de jure* discrimination to the extent that the EU Seal Regime limits the extension of a relevant "advantage" to a defined and closed group of countries. (See Norway's first written submission, para. 377, footnote 595).

[924] Norway's opening statement at the first meeting of the Panel, paras. 43-44. As noted, it is unclear to the Panel whether Norway is arguing that the EU Seal Regime is *de jure* discriminatory against Norwegian imports of seal products. (Norway's first written submission, footnote 595; opening statement at the first meeting of the Panel, para. 43).

[925] European Union's first written submission, paras. 283-284.

[926] The definition of "Inuit" in Article 2(4) contains a reference to these two populations.

population would qualify as an "indigenous community" within the meaning of the definition in Article 2(1) of the Implementing Regulation. The COWI 2010 Report identifies a number of countries whose Inuit or indigenous populations are likely to meet the requirements of the IC exception.[927] The IC requirements permit the placing on the market based on conditions relating to the characteristics of seal hunts as opposed to a "closed list" of countries. We also note that some of the communities whose seal products may qualify under the exception are not concentrated in one single country.[928] In light of these considerations, we do not believe that the EU Seal Regime gives rise to discrimination based on origin *per se*.

7.600. Based on our findings in paragraph section 7.3.2.2.2 above, we consider that the measure at issue does not "immediately and unconditionally" extend the same market access advantage on the EU market to the complainants' imports as they do to seal products originating from Greenland and thus is inconsistent with the obligation under Article I:1 of the GATT 1994.

7.4.3 Article III:4

7.4.3.1 Main arguments of the parties

7.601. As in the case of Canada's claim under Article 1:1, Canada's arguments under Article III:4 largely resemble those under Article 2.1 of the TBT Agreement. Thus, we summarize below Norway's arguments under Article III:4 of the GATT 1994 by cross-referencing as appropriate to Canada's arguments under Article 2.1 of the TBT Agreement.

7.602. Like Canada, Norway argues that the EU Seal Regime violates Article III:4 of the GATT 1994 because through the requirements of the MRM exception, the Regime accords to imported seal products from Norway (and Canada) a treatment that is less favourable to that accorded to like domestic seal products.[929] Specifically, Norway argues that by introducing the "non-systematic", "non-profit", and "sole purpose" requirements, the European Union has tailored the MRM exception to the realities of the seal hunt in the European Union.[930] In contrast, Norway's seal products are ineligible under the MRM exception despite the fact that the hunts are conducted in accordance with sustainability principles.[931] Unlike the seal hunts conducted in the European Union, the hunt in Norway is not merely incidental to other fishing activities; as such, it cannot be carried out on condition that no profit is derived from the hunt.[932] In addition, the treatment of subsidies in the EU definition of "non-profit" serves to further exclude Norwegian products from the EU market while allowing seal products from the European Union.[933]

[927] COWI 2010 Report, p. 30.

[928] The evidence before the Panel suggests that Inuit and indigenous populations may occupy the territories of adjacent countries. (See, e.g. European Union's first written submission, paras. 283-284). The European Union gives the example of Sami communities who live and hunt in both Norway and Sweden. (See COWI 2010 Report, p. 33).

[929] Norway's first written submission, para. 424.

[930] Norway's first written submission, para. 430 (citing Comments from EU Member States on Proposal for a Regulation of the European Parliament and of the Council concerning trade in seal products, (Exhibit JE-10), pp. 16 and 18; and European Parliament Debates, (Exhibit JE-12), p. 72). Norway notes that according to scientific literature, the problem posed by seals to the fishing activities of Finland, Latvia, Lithuania, and Sweden relates essentially to seals' attacks on fishing gear. (Norway's first written submission, para. 431 (referring to Finnish Game and Fisheries Research Institute, *Symposium on Biology and Management of Seals in the Baltic Area held in Helsinki* (2005), (Exhibit NOR-64)).

[931] Norway's first written submission, paras. 434-441. Norway does not contend that the first requirement under the MRM exception (i.e. that seal products must derive from hunts conducted under a natural resources management plan which uses scientific population models of marine resources and applies the ecosystem-based approach, and that the seal catch must not exceed the total allowable catch quota established under the plan) is discriminatory. Norway further notes that it expects the products of its seal hunt to meet this requirement under the MRM exception because the hunt in Norway is conducted "based on ecosystem management principles". (Norway's second written submission, paras. 81-82 (citing COWI 2010 Report, Annex 5, p. 13)).

[932] Norway's first written submission, paras. 444-445.

[933] Norway notes that "[i]n order to allow the long-term viability of the seal hunt and maintain the professional capabilities necessary to carry out the hunt, Norway does provide a subsidy in relation to the hunt." Norway adds that "[t]he purpose of the subsidy is to ensure that the recommended TAC quotas are taken." (Norway's first written submission, paras. 448-449 and footnote 708).

7.603. The European Union argues that the MRM exception does not modify the conditions of competition to the detriment of Norway's (and Canada's) seal products.[934] The EU Seal Regime equally affects seal products resulting from hunts for commercial purposes (non-conforming) and seal products resulting from hunts for marine resource management purposes (conforming).[935] The European Union further argues that the MRM exception is based on considerations that are completely unrelated to the domestic origin of seal products.[936]

7.4.3.2 Analysis by the Panel

7.604. Article III:4 of the GATT 1994 provides that:

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

7.605. There are three elements that must be examined to assess a measure's consistency with Article III:4 of the GATT 1994: (i) whether the measure is a law, regulation or requirement affecting the internal sale, offering for sale, purchase or use of goods; (ii) whether the products at issue are like; and (iii) whether imported products are accorded less favourable treatment than that accorded to like domestic products.[937]

7.606. With respect to the first element of Article III:4, we note that the EU Seal Regime is undoubtedly a "law" or "regulation" affecting the internal sale, offering for sale, purchase, distribution and use of seal products within the meaning of Article III:4.

7.607. As regards the second element of Article III:4, we found in the context of Canada's claims under Article 2.1 of the TBT Agreement that seal products are "like" irrespective of whether they conform or not to the requirements under the EU Seal Regime. We also recall that the parties do not dispute that conforming and non-conforming seal products are like.

7.608. With respect to the third element under Article III:4, the national treatment obligation contained therein requires that imported products from Canada and Norway receive a treatment no less favourable than that accorded to domestic seal products.[938] Based on the evidence before the Panel, it appears that the vast majority of seal products from Canada and Norway are excluded from the EU market by the terms of the MRM exception.[939] In contrast, evidence shows that virtually all domestic seal products are likely to qualify for placing on the market.[940]

7.609. In light of the above considerations, we conclude that the measure at issue grants Canadian and Norwegian seal products a treatment less favourable than that accorded to EU seal products within the meaning of Article III:4 of the GATT 1994.

7.4.4 The European Union's justification of the EU Seal Regime under Article XX

7.4.4.1 Introduction

7.610. Article XX of the GATT 1994 provides:

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[934] European Union's first written submission, paras. 500-525; second written submission, paras. 235-263 and 369-372.

[935] European Union's second written submission, para. 370.

[936] European Union's first written submission, para. 323; second written submission, paras. 207, 247 and 370.

[937] Appellate Body Report, *Korea – Various Measures on Beef*, para. 133.

[938] For the purpose of this analysis, the groups of products compared are all Norwegian seal products and all EU seal products (i.e. with reference to Table 1 above, cells B+G are compared to cells A+F).

[939] We note, for instance, that although Norway's hunts take place under a natural resources management plan which uses scientific population models of marine resources and applies the ecosystem-based approach, Norway's seal products would not meet the "non-profit", "non-systematic" and "sole purpose" requirements under the MRM exception (See COWI 2010 Report, Annex 4, p. 3 as discussed in Norway's first written submission, paras. 263-265). Regarding Canada's arguments that its seal products would not be eligible under the MRM exception, we refer to our analysis in section 7.3.2.2 above.

[940] See, for instance, COWI 2008 Report, p. 117.

> 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:
>
> (a) necessary to protect public morals;
>
> (b) necessary to protect human, animal or plant life or health …

7.611. As noted above, under the GATT 1994, the objective of trade liberalization through principles such as non-discrimination is balanced against Members' right to regulate to pursue the policy objectives listed in Article XX.

7.612. We found that the IC exception and the MRM exception under the EU Seal Regime are inconsistent with the obligations under Articles I:1 and III:4 by modifying the conditions of competition for Canadian and Norwegian seal products *vis-à-vis* like products of Greenlandic and EU domestic origins on the EU market. The European Union alleges that these exceptions are based on "regulatory differences"[941] that are "necessary" to achieve the objectives invoked by the European Union under Article XX(a) and XX(b). Accordingly, we must examine whether the European Union has established its case under Article XX by demonstrating two elements: first, the measure falls within the scope of, and meets the requirements under paragraph (a) and/or paragraph (b) of Article XX; and, second, the measure satisfies the requirements of the chapeau of Article XX.[942]

7.613. In this connection, we recall that "the GATT 1994 and the TBT Agreement should be interpreted in a coherent and consistent manner".[943] Under the TBT Agreement, we found that the EU Seal Regime as a technical regulation, contributes, to a certain extent, to the objective of addressing the public moral concerns on seal welfare within the meaning of Article 2.2.[944] We further found under Article 2.1 of the TBT Agreement that the IC and MRM exceptions under the Regime caused detrimental impacts on Canadian and Norwegian seal products, which was found not to stem exclusively from legitimate regulatory distinctions.[945] All of these considerations under the TBT Agreement are therefore relevant to our examination of the European Union's claim under Article XX of the GATT 1994. We are however mindful that the obligations under these two Agreements are not the same.[946]

7.614. Having the above in mind, we start by examining the specific aspects of the measure that must be considered in our analysis of Article XX in this dispute.

7.4.4.2 Aspects of the EU Seal Regime to be considered

7.4.4.2.1 Main arguments of the parties

7.615. According to the European Union, the analysis should focus on whether the "regulatory differences" upon which the finding of less favourable treatment is based are "necessary" in order to achieve the objectives at the level of protection chosen by the responding Member. In this case, the alleged less favourable treatment "results from the interplay between the General Ban and the IC and MRM exceptions".[947] Thus, the Panel should examine whether the "regulatory differences"

[941] We note that the European Union uses the term "regulatory *differences*" rather than "regulatory *distinctions*" in the context of Article XX of the GATT 1994.
[942] Appellate Body Report, *US – Shrimp*, para. 119.
[943] Appellate Body Report, *US – Clove Cigarettes*, para. 91.
[944] See section 7.3.3.3.2 above.
[945] See section 7.3.2 above.
[946] For instance, Article XX of the GATT 1994 is a general exceptions provision under which a measure found inconsistent with one or more provisions of the GATT 1994 can be justified. Accordingly, the burden of proving a case under Article XX of the GATT 1994 rests with the respondent. As observed by the Appellate Body, the TBT Agreement does not contain a general exceptions provision. In light of the similarities in the text between the GATT 1994 and the TBT Agreement, and given the overlap in their coverage, the Appellate Body addressed the absence of a general exceptions provision in the TBT Agreement by clarifying the specific requirements to be established under Article 2.1 of the TBT Agreement. See section 7.4.1 above.
[947] European Union's second written submission, para. 382.

between the General Ban and the two exceptions are "necessary" in order to achieve the objectives invoked by the European Union.[948] Specifically, the European Union submits that the following must be shown: (a) the treatment provided by the General Ban is "necessary" to achieve the objective at the selected level of protection; and (b) it is not "necessary", in order to achieve the objective at the same level of protection, to extend the same treatment provided under the General Ban to seal products falling under the MRM exception or the IC exception.[949]

7.616. Canada similarly submits that the focus of the analysis under Article XX(a) and (b) justifying an inconsistency with provisions under the GATT 1994 should be on whether the discriminatory treatment based on the regulatory differences is necessary.[950] To Canada, the relevant regulatory differences are found in the expected operation of the three categories under which seal products will qualify for market access. Thus, the conditions that restrict market access for seal products under the IC, MRM, and Travellers categories must be necessary in order for the EU Seal Regime to be found provisionally justified under Article XX. Specifically, the European Union is required to show how the discriminatory treatment of Canadian seal products makes a material contribution to the achievement of its objectives.[951]

7.617. Norway contends that "what the EU must justify under Articles XX(a) and XX(b) is the *discrimination on grounds of origin* that violates Article I:1 and III:4".[952] Norway considers that the European Union only defends the "General Ban" aspect of the measure, whereas "it is the restrictive conditions of the IC and [MRM] requirements that favour certain origins".[953]

7.4.4.2.2 Analysis by the Panel

7.618. In examining Members' right to regulate under Article XX of the GATT 1994, a question arises as to what aspects of a measure must be analysed under the legal framework of Article XX.[954] Based on their submissions, the parties in this dispute appear to be in agreement that it is the aspect of a measure infringing the GATT 1994 that must be *justified* under Article XX. However, this does not mean that a panel can consider only that aspect of the measure to determine the measure's justifiability under Article XX.

7.619. In our view, the question concerning the specific aspects of a measure that must be considered for a claim under Article XX should be dealt with in light of the specific circumstances of a given dispute.[955] Such circumstances include the nature and characteristics of a measure at

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[948] European Union's second written submission, para. 383.

[949] European Union's response to Panel question Nos. 43 and 139.

[950] Canada's response to Panel question No. 43, para. 167.

[951] Canada's response to Panel question No. 43

[952] Norway's response to Panel question No. 43, para. 224 (relying on Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 177) (emphasis original)

[953] Norway's response to Panel question No. 43, para. 225.

[954] In *US – Gasoline*, the Appellate Body touched upon the meaning and scope of the term "measures" as referenced in the chapeau and paragraph (g) of Article XX. (See Appellate Body Report, *US – Gasoline*, pp. 12-13). While not providing a concrete view on this question, the Appellate Body observed that "the Panel [in that dispute] was following the practice of earlier panels in applying Article XX to provisions found to be inconsistent with Article III:4: the 'measures' to be analyzed under Article XX are the same provisions infringing Article III:4. These earlier panels had not interpreted "measures" more broadly under Article XX to include provisions not themselves found inconsistent with Article III:4."

See also Appellate Body Report in *Thailand – Cigarettes (Philippines)*, citing GATT Panel Report, *US – Section 337 Tariff Act*. The Appellate Body stated that when Article XX(d) is invoked to justify an inconsistency with Article III:4, "what must be shown to be 'necessary' is the treatment giving rise to the finding of less favourable treatment." (Appellate Body Report, *Thailand – Cigarettes (Philippines)*, paras. 177 and 179). The Appellate Body further stated, "when less favourable treatment is found based on differences in the regulation of imports and of like domestic products, the analysis of an Article XX(d) defence should focus on whether those regulatory differences are 'necessary' to secure compliance with 'laws or regulations' that are not GATT-inconsistent." The Appellate Body observed that "in putting forth its defence, Thailand sought to justify administrative requirements relating to VAT liability generally, rather than to justify the *differential treatment* afforded to imported versus domestic cigarettes under its measure".

[955] The Appellate Body in *US – Gasoline* states:

The relationship between the affirmative commitments set out in, e.g. Articles I, III and XI, and the policies and interests embodied in the "General Exceptions" listed in Article XX, can be given meaning within the framework of the *General Agreement* and its objective and purpose by a treaty interpreter only *on a case-by-case basis*, *by careful scrutiny of the factual and legal context in a given dispute*, without disregarding the

issue, the manner in which the complainants present their claims with respect to the measure, and the relationship between the GATT 1994 and other WTO covered agreements that were also examined with respect to the measure concerned.

7.620. Regarding the nature and characteristics of the measure at issue in the present dispute, the two components (i.e. a ban and exceptions) comprising the EU Seal Regime are closely connected to each other. As discussed in section 7.3.1 above, we considered that the IC and MRM exceptions cannot operate in isolation without the ban. For example, similar factual circumstances were also present in *US – Gasoline.* In that dispute, the Appellate Body examined how the discriminatory aspect of the measure (baseline establishment rules for refiners, blenders, and importers of gasoline) was to be analysed under Article XX(g) with respect to other parts of the measure. The Appellate Body stated:

> The baseline establishment rules, taken as a whole …, need to be related to the "non-degradation" requirements set out elsewhere in the Gasoline Rule. Those provisions can scarcely be understood if scrutinized strictly by themselves, totally divorced from other sections of the Gasoline Rule which certainly constitute part of the context of these provisions. … Without baselines of some kind, such scrutiny would not be possible and the Gasoline Rule's objective of stabilizing and preventing further deterioration of the level of air pollution prevailing in 1990, would be substantially frustrated. The relationship between the baseline establishment rules and the "non-degradation" requirements of the Gasoline Rule is not negated by the inconsistency, found by the Panel, of the baseline establishment rules with the terms of Article III:4. We consider that, given that substantial relationship, the baseline establishment rules cannot be regarded as merely incidentally or inadvertently aimed at the conservation of clean air in the United States for the purposes of Article XX(g). [956]

7.621. Although the analysis above was conducted in the context of paragraph (g) rather than (a) or (b) of Article XX, we do not see any reason why it would not be relevant to our examination of the EU Seal Regime under paragraphs (a) and (b) of Article XX. Specifically, we find guidance in the manner in which the Appellate Body weighed and considered the interrelationship of different components of the measure for the purpose of a sub-paragraph of Article XX.

7.622. Like the measure in question in *US – Gasoline*, the IC and MRM exceptions have a "substantial" relationship with the ban given that the *exceptions* cannot exist without the ban and that the exceptions inform the scope of the ban. Accordingly, the IC and MRM exceptions can "scarcely be understood if scrutinized strictly by themselves, totally divorced from" the ban of the EU Seal Regime.[957] We also consider that this relationship between the exceptions and the ban "is not negated by the inconsistency" of the exceptions aspect of the EU Seal Regime with the terms of Articles I:1 and III:4.[958]

7.623. Furthermore, as discussed in section 7.3.1 above, the EU Seal Regime in its entirety, comprising both the ban and the exceptions, was found to constitute a technical regulation within the meaning of Annex 1.1 of the TBT Agreement. A legitimate policy objective pursued by the EU Seal Regime as a technical regulation was determined to be "addressing the EU public moral concerns on seal welfare". Having found as such, the EU Seal Regime as a whole was examined for the necessity of its trade-restrictiveness in fulfilling the identified policy objective under Article 2.2, whereas the justification of the detrimental impacts caused by the IC and MRM exceptions (regulatory distinctions) on the imported products was examined under Article 2.1.

7.624. Under these circumstances, we consider that although it is the aspects of the EU Seal Regime infringing the GATT 1994 (i.e. the IC and MRM exceptions) that must be *justified* under Article XX, our *analysis* under paragraphs (a) and (b) should first focus on the EU Seal Regime as a whole; it is the EU Seal Regime as a whole that pursues the European Union's identified objective, rather than the exceptions on their own independently from the ban. We must then examine whether the EU Seal Regime, in particular the distinctions drawn in the form of the IC and

words actually used by the WTO Members themselves to express their intent and purpose. (Appellate Body Report, *US – Gasoline*, p. 17) (emphasis added)

[956] Appellate Body Report, *US – Gasoline*, p. 19.

[957] Appellate Body Report, *US – Gasoline*, p. 17.

[958] See Appellate Body Report, *US – Gasoline*, p. 19.

MRM exceptions, are applied in a manner consistent with the requirements under the chapeau of Article XX. This approach is justified in our view by the fact that an exception to a general rule, by definition, would hardly be considered as "necessary", when considered on its own, to achieve a policy objective of the general rule.[959]

7.4.4.3 Paragraph (a) of Article XX

7.4.4.3.1 Main arguments of the parties

7.625. In support of its claim that the EU Seal Regime is "necessary to protect public morals" within the meaning of Article XX(a)[960], the European Union largely refers back to its arguments on Article 2.2 of the TBT Agreement.[961] The European Union emphasizes that moral concern with regard to the protection of animals is regarded as a value of high importance in the European Union, which is now expressly enshrined in its constitutional treaties.[962] Regarding the measure's restrictive effect on trade, the European Union concedes that the EU Seal Regime aims at being very trade-restrictive, consistently with the desired high level of fulfilment of the policy objective.[963]

7.626. The European Union argues that the EU Seal Regime makes a substantial contribution to its policy objective. Further, none of the alternative measures as suggested by the complainants in the context of Article 2.2 is apt to make an equivalent contribution to the policy objective sought by the EU Seal Regime.[964]

7.627. Canada argues that the EU Seal Regime does not fall within the scope of the protection of public morals. Article XX(a) of the GATT 1994 requires a moral norm that is a standard of conduct applied generally throughout the community or society and broadly accepted within the community. Canada contends that the European Union has not set out a clearly discernible and unambiguous rule of moral conduct, particularly with respect to the claimed distinction between "commercial" and "non-commercial" hunts. The public "concerns" cited by the European Union do not rise to the level of public morals, and the idea that the EU Seal Regime addressed public moral concerns rests on a false premise that the commercial seal hunt is inherently inhumane.[965]

7.628. Canada further submits that, even if the EU Seal Regime falls within the scope of Article XX(a), it is not necessary to protect public morals. The *protection* of public morals requires the prevention of some type of harm to a public moral within the territory of the Member whose measure is at issue. Although this is in principle a highly important interest or value, Canada questions the seriousness of the harm that might be expected to arise to public morals in the absence of the EU Seal Regime. In addition, the claim that the measure makes a material contribution to the EU public's moral concerns is dependent on the artificial distinction between commercial and non-commercial seal hunts, and between Inuit and non-Inuit hunts. Finally, the EU Seal Regime imposes the most trade-restrictive type of measure and a less trade-restrictive

[959] See footnote 454 above.
[960] European Union's first written submission, paras. 578-590. See also European Union's response to Panel question No. 43 (noting that what must be found to be necessary are the "regulatory differences" in the EU Seal Regime, namely that it is not necessary to extend the same treatment provided under the General Ban to seal products falling under the MRM or IC exceptions).
[961] See European Union's response to Panel question No. 139 (explaining that it cross-references its arguments under Article 2.2 of the TBT Agreement to show a substantial contribution to the policy objective and that alternative measures do not make an equivalent contribution; specifically that "the arguments put forward under Article 2.2 of the TBT Agreement are equally relevant and valid under Article XX(a) of the GATT"); European Union's comments on the complainants responses to Panel question No. 139, para. 93 ("The reasons why it is not "necessary", in order to achieve the objectives mentioned in Article XX(a) or XX(b), to extend the General Ban to the marketing of seal products falling within the IC exception and the MRM exception are essentially the same as the reasons that render the regulatory distinction between those categories "legitimate" for the purposes of both Articles I:1 and III:4 of the GATT and Article 2.1 of the TBT Agreement.").
[962] European Union's first written submission, para. 585. Moreover, the measure at issue was adopted in response to longstanding public demands and with the support of the vast majority of the members of both the European Parliament and the EU Council. The measure is also supported by a very large majority of the European population.
[963] European Union's first written submission, para. 586.
[964] European Union's first written submission, paras. 587-589.
[965] Canada's second written submission, paras. 130-169.

alternative of animal welfare criteria with a certification and compulsory labelling scheme is reasonably available.[966]

7.629. Norway argues that the European Union has failed to meet its burden to show that the violation of the GATT 1994 resulting from the IC and MRM exceptions is necessary to protect public morals. With respect to the arguments of the European Union under Article 2.2 of the TBT Agreement, Norway submits that the legal standards and the allocation of the burden of proof are not the same under Article XX of the GATT 1994 and Article 2.2 of the TBT Agreement.[967]

7.4.4.3.2 Analysis by the Panel

7.630. The necessity of a measure within the meaning of Article XX(a) is determined through "a process of weighing and balancing" of "all the relevant factors, particularly the extent of the contribution to the achievement of a measure's objective and its trade restrictiveness, in the light of the importance of the interests or values at stake".[968] The more vital or important the values or interests furthered by a measure are, the easier it will be to accept that measure as necessary.[969] According to the Appellate Body, "if this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with its possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective pursued".[970]

7.631. With this guidance in mind, we begin our analysis by considering whether the European Union's policy objective pursued through the EU Seal Regime falls within the range of policies designed to protect public morals as prescribed in Article XX(a). We recall our conclusion in section 7.3.3.1 that the European Union seeks to address the public moral concerns on seal welfare through the EU Seal Regime. We reached this conclusion by confirming, based on the evidence before us, the existence of the EU public concerns on seal welfare in general and by finding that such concerns are of a moral nature within the European Union. In this connection, we followed the guidance provided by previous panels concerning the scope of the notion "public morals" as stipulated in Article XX(a) of the GATT 1994 and Article XIV(a) of the GATS. In light of these considerations, we find that the policy objective pursued by the European Union ("addressing the EU public moral concerns on seal welfare") falls within the scope of Article XX(a) ("to protect public morals").

7.632. The European Union submits that the "moral concern with regard to the protection of animals" is regarded as a value of high importance in the European Union.[971] We consider, and the parties do not dispute, that the protection of such public moral concerns is indeed an important value or interest.[972]

7.633. Next, in assessing a measure's contribution to the objective pursued under Article XX of the GATT 1994, the Appellate Body stated that such a contribution exists when there is a genuine relationship of ends and means between the objective pursued and the measure at issue.

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[966] Canada's second written submission, para. 170-203. See Canada's second written submission, para. 196 ("Although this alternative measure was asserted in Canada's claim under Article 2.2 of the TBT Agreement, the reasons why the alternative is a less trade-restrictive alternative under that provision apply *mutatis mutandis* to the less trade-restrictive alternative element of the the necessity test under Article XX(a)."). See also Canada's response to Panel question No. 43.

[967] Norway's second written submission, paras. 126-134. See also Norway's response to Panel question Nos. 17, 18, 43, and 139.

[968] Appellate Body Reports, *Brazil – Retreaded Tyres*, para. 156; *Korea – Various Measures on Beef*, para. 164; *EC – Asbestos*, para. 172, *US – Gambling*, para. 306, *Dominican Republic – Import and Sale of Cigarettes*, para. 70.

[969] Appellate Body Report, *Korea – Various Measures on Beef*, para. 162.

[970] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156.

[971] This part of the Article XX analysis may be comparable to the risks of non-fulfilment under Article 2.2 of the TBT Agreement.

[972] The European Union also refers to the panel statement in *China – Audiovisual Products* that the protection of public morals "ranks among the most important values or interests pursued by members as a matter of public policy". (Panel report, *China – Audiovisual Products*, para. 7.817).

The panel elaborated that "we do not consider it simply accident that the exception relating to 'public morals' is the first exception identified in the ten subparagraphs of Article XX. We therefore concur that the protection of public morals is a highly important value or interest." (Panel Report, *China –Audiovisual Products*, para. 7.817).

Regarding the methodology used to make an assessment of the measure's contribution, the Appellate Body clarified that it ultimately depends on the nature, quantity, and quality of evidence existing at the time the analysis is made.[973] Further, the analysis of the contribution can be done either in quantitative or qualitative terms.[974]

7.634. Given the close relationship between the GATT 1994 and the TBT Agreement and the need to interpret relevant provisions under both Agreements in a consistent and harmonious manner, we consider that an analysis of a measure's contribution to an objective under Article 2.2 of the TBT Agreement is also relevant to such analysis under Article XX of the GATT 1994. The Appellate Body in *US – Tuna II (Mexico)* recalled that in assessing the necessity of a measure under Article 2.2, a panel must assess the contribution to the legitimate objective *actually achieved* by the measure at issue as in other situations, such as for instance when determining the contribution of a measure to the achievement of a particular objective in the context of Article XX.[975] Accordingly, we will refer back to our relevant analysis under Article 2.2 of the TBT Agreement to the extent necessary for the analysis of the measure's contribution under Article XX(a) of the GATT 1994.

7.635. Before beginning our analysis, we address one additional element in relation to the measure's contribution in the context of Article XX of the GATT 1994: trade-restrictiveness of a measure. The Appellate Body stated in the context of Article XX(b) that when a measure produces restrictive effects on international trade as severe as those resulting from an import ban, 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.[976] Thus, the trade-restrictiveness of a measure is closely linked to the extent of the measure's contribution to the objective that must be proved in assessing the overall necessity of a measure in the context Article XX of the GATT 1994.[977]

7.636. In light of the particular circumstances of the present dispute, and given the guidance by the Appellate Body, we consider that, for a preliminary finding that the measure as a whole is "necessary" within the meaning of paragraph (a), the contribution made by the "ban" to the identified objective must be shown to be at least material given the extent of its trade-restrictiveness. As discussed under Article 2.2 of the TBT Agreement, the actual degree of the contribution by the ban must also be assessed by taking account of the impact of the explicit and implicit exceptions on the operation of the ban. This will allow us to objectively evaluate the necessity of the measure against any reasonably available GATT-consistent or less trade-restrictive alternative measures that make an equivalent or greater contribution to the objective than the measure in question.

7.637. With respect to the ban aspect of the EU Seal Regime, we recall our earlier finding that the ban does contribute to the European Union's objective by reducing, to a certain extent, the global demand for seal products and by helping the EU public avoid being exposed to seal products on the EU market that may have been derived from seals killed inhumanely.[978] To the extent that such seal products are prohibited from the EU market[979], we find that the ban makes a material contribution to the objective of the measure.

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[973] Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 145-157.

[974] According to the Appellate Body, the same applies to the analysis of the existence of a risk (in the case of Article XX(b)) that the measure aims to prevent. (Appellate Body Report, *Brazil – Retreaded Tyres*, para. 146).

[975] Appellate Body Report, *US – Tuna II (Mexico),* para. 317. (emphasis added) Accordingly, we followed the analytical approach taken for the assessment of a measure's contribution under Article XX in previous disputes for the purpose of our analysis of the measure's contribution under Article 2.2 of the TBT Agreement.

[976] Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 150-151.

[977] By contrast, under Article 2.2 of the TBT Agreement, the Appellate Body did not consider that a certain threshold degree of contribution exists. For example, in *US – Tuna II (Mexico)* and *US – COOL*, the necessity test by the Appellate Body in the context of Article 2.2 entailed an assessment of the "*degree* of contribution" by a measure without necessarily determining whether the actual degree of contribution by the measure reaches a certain minimum threshold such as a *material* or *significant* contribution.

[978] See section 7.3.3.3.2 above.

[979] We recall that the EU market constituted an important market for seal products from Canada and Norway prior to the introduction of the EU Seal Regime. (See, for example, Canada's response to Panel question No. 96). For Canada, Norway and the European Union were the two main markets for raw seal skins,

7.638. However, as discussed in section 7.3.3.3.2 in detail, the degree of the contribution made by the ban is diminished by both the explicit and implicit exceptions under the measure. Specifically, with respect to the IC and MRM exceptions, we considered that the exceptions, combined with the absence of any mechanism under the measure to inform consumers of the presence of seal products on the EU market, reduced the effectiveness of the ban under the measure by allowing seal products access to the EU market. Further, the implicit exceptions provided under the measure through certain commercial activities such as transit and inward processing for export were also found to undermine the measure's fulfilment of the objective. Overall, with respect to the EU Seal Regime as a whole, however, we found that it contributed to a certain extent to its objective of addressing the EU public moral concerns on seal welfare.

7.639. Based on the assessment above, the EU Seal Regime can be provisionally deemed "necessary" within the meaning of Article XX(a) of the GATT 1994, unless it is demonstrated that the European Union could have adopted a GATT-consistent or less trade-restrictive measure as an alternative to the EU Seal Regime. For the reasons discussed in detail in section 7.3.3.3.4 above, however, we concluded that the alternative measure proposed by the complainants was not reasonably available to the European Union given *inter alia* the animal welfare risks and challenges found to exist in seal hunting in general. Therefore, we consider that the EU Seal Regime is provisionally deemed necessary within the meaning of Article XX(a) of the GATT 1994.

7.4.4.4 Paragraph (b) of Article XX

7.640. We have taken note of the European Union's argument that the EU Seal Regime, to the extent that it addresses the moral concerns of the EU population by reducing the number of seals that are killed, also falls within the scope of Article XX(b) because it contributes to protecting the health of seals.[980] The European Union never submitted in this dispute that the protection of seal welfare as such was the objective of the EU Seal Regime. Based on the examination of the measure at issue as well as other available evidence before us, we determined that the objective of the EU Seal Regime was to address the EU public *moral concerns* on seal welfare.[981] We further found this objective to fall within the scope of the policy objective governed by Article XX(a). Under these circumstances, and given the limited extent of the European Union's arguments under Article XX(b), we consider that the European Union has failed to establish a *prima facie* case for its claim under Article XX(b).

7.4.4.5 Chapeau of Article XX

7.4.4.5.1 Main arguments of the parties

7.641. The European Union argues that the EU Seal Regime is not applied in a manner that constitutes "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" because it applies indistinctly irrespective of the country of origin of the products.[982]

7.642. Canada notes that the focus under the chapeau is on the cause or rationale for the discrimination in the light of the policy objective, and contends that the regulatory distinctions introduced by the IC and MRM categories do not bear any rational relationship to the two policy objectives advanced by the European Union. According to Canada, the rigidity with which the EU Seal Regime is applied and the disregard for differing regulatory conditions in sealing countries demonstrates that the EU Seal Regime, as applied, constitutes arbitrary and unjustifiable discrimination between countries where the same conditions prevail.[983]

7.643. Norway submits that under the chapeau of Article XX a panel may consider both the substantive content and the application of a measure. Although the chapeau of Article XX refers to the application of a measure, this does not mean that substantive content (design and structure) is irrelevant. In Norway's view, the manner of application of a measure will be heavily influenced,

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fats and oils, etc. during the period of 2000-2010 with the European Union receiving 50% of all Canadian exports.

[980] European Union's first written submission, para. 591; Canada's second written submission, para. 204; Norway's second written submission, paras. 126-134.

[981] See section 7.3.3.1 above.

[982] European Union's first written submission, para. 590.

[983] Canada's second written submission, paras. 218-226.

possibly decisively so, by the substantive content of the measure. Thus, while the legal standards of discrimination under the provisions are not the same, in this case the same elements considered under Articles I and III also lead to the measure failing to meet the requirements of the chapeau of Article XX. Norway also cites arbitrary and unjustifiable discrimination between countries where the same animal welfare and resource management conditions prevail, and the European Union's failure to engage in international negotiations (referencing *US – Shrimp*).[984]

7.4.4.5.2 Analysis by the Panel

7.644. Having found that the EU Seal Regime as a whole is "necessary" within the meaning of Article XX(a), we examine its consistency with the requirements under the chapeau of the provision. The chapeau of Article XX provides:

> 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 …

7.645. The focus of the chapeau, according to the Appellate Body, is on the application of a measure already found inconsistent with an obligation of the GATT 1994 but falling within one of the paragraphs of Article XX.[985] Specifically, the existence of one of the three types of situations regarding the application of measures might lead to an inconsistency with the chapeau of Article XX: (a) arbitrary discrimination between countries where the same conditions prevail; (b) unjustifiable discrimination between countries where the same conditions prevail; or (c) a disguised restriction on international trade.[986] We observe that in previous disputes, the first two situations (i.e. arbitrary or unjustifiable discrimination) were often addressed together.[987] We are also mindful of the Appellate Body's guidance that "the fundamental theme – when interpreting the chapeau – is to be found in the purpose and object of avoiding abuse or illegitimate use of the *exceptions* to substantive rules available in Article XX".[988]

7.646. Based on this guidance, the focus of our analysis under the chapeau with respect to the EU Seal Regime is whether the EU Seal Regime, in particular the distinctions drawn in the form of the IC and MRM exceptions, are applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination.

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[984] Norway's response to Panel question No. 146.

[985] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 215. Further, the Appellate Body emphasizes the principle of good faith embodied in the chapeau: "[t]he chapeau serves to ensure that Members' rights to avail themselves of exceptions are exercised in good faith to protect interests considered legitimate under Article XX, not as a means to circumvent one Member's obligations towards other WTO Members." (Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 215 and 224).

> The Appellate Body further states in this regard:
> [t]he function of the chapeau is the prevention of abuse of the exceptions specified in the paragraphs of Article XX. … "[t]he chapeau of Article XX is, in fact, but one expression of the principle of good faith." … "[o]ne application of this general principle … prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right 'impinges on the field covered by [a] treaty obligation, it must be exercised *bona fide*, that is to say, reasonably'." Accordingly, the task of interpreting and applying the chapeau is "the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g. Article XI) of the GATT 1994 …" The location of this line of equilibrium may move "as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ". (Appellate Body Report, *Brazil – Retreaded Tyres*, para. 224 (citing Appellate Body Report, *US - Shrimp*)) (footnotes omitted)

[986] Appellate Body Report, *US – Shrimp*, para. 184.

[987] See, for instance, Appellate Body Reports, *US – Gasoline*, *US – Shrimp (Article 21.5 – Malaysia)*, *US – Gambling*, and *Brazil – Retreaded Tyres*; and Panel Reports, *US – Gambling*, *EC – Tariff Preferences*, *EC – Asbestos*, and *Brazil – Retreaded Tyres*.

[988] Appellate Body Report, *US – Gasoline*, p. 25 (emphasis added); Panel Report, *Brazil – Retreaded Tyres*, para. 7.221.

7.647. First, with respect to the existence of "discrimination" within the meaning of the chapeau, we find it useful to recall the panel's finding in *Brazil – Retreaded Tyres*:

> [t]he initial violation identified in relation to this measure is a prohibition or restriction on importation within the meaning of Article XI. This type of measure (an import ban in this instance), does not necessarily *ipso facto* result in discrimination, as an inconsistency with Articles I or III would. Thus, any discrimination alleged to exist in the application of the measure would arise, in this case, in addition to the restriction that is inherently present in the measure by its very nature.[989]

7.648. As in that dispute, the measure in question here also consists of a ban, albeit formulated in positive forms, and exceptions. We note however that, unlike the measure in *Brazil – Retreaded Tyres*, the IC and MRM exceptions are embedded in the measure itself rather than arising from the subsequent application of the measure. In our view, this is merely a formal difference that does not change the substantive character of a measure consisting of a ban with discriminatory exceptions.[990] Therefore, under the circumstances of this dispute, we consider that discrimination alleged to exist in the application of the EU Seal Regime within the meaning of the chapeau results from the discriminatory impact found in the IC and MRM exceptions under Articles I:1 and III:4.[991]

7.649. Accordingly, we proceed to examine whether such discrimination is arbitrary or unjustifiable within the meaning of the chapeau of Article XX and arises between countries where the same conditions prevail. An assessment of this question leads us to recall our analysis of the legitimacy of the regulatory distinctions drawn in the IC and MRM exceptions under Article 2.1 of the TBT Agreement. As noted in section 7.4.1, the Appellate Body clarified the legal standard under Article 2.1 of the TBT Agreement (i.e. "legitimate regulatory distinction") based on *inter alia* its observation regarding the relationship between the GATT 1994 and the TBT Agreement and the absence in the TBT Agreement of a general exceptions clause equivalent to Article XX in the GATT 1994.[992] This means, in our view, that our analyses under Article 2.1 of the TBT Agreement regarding the legitimacy of the IC and MRM exceptions are relevant and applicable to the assessment of the exceptions for its consistency with the requirements under the chapeau.

7.650. More specifically, under Article 2.1 of the TBT Agreement, we examined, first, whether the regulatory distinctions drawn between commercial and IC/MRM hunts were rationally connected to the objective of the EU Seal Regime as a whole or otherwise based on justifiable grounds, and, second, whether such distinctions, as reflected in the IC and MRM exceptions under measure, were designed and applied in an even-handed manner among the potential beneficiaries.[993] For the IC exception, given the recognized benefits to Inuit, we found the distinction between commercial and IC hunts (and hence the products regulated based on that distinction) to be justifiable despite the lack of a rational connection to the measure's objective. For the same reasons discussed under the TBT Agreement, however, we find that due to the lack of even-handedness in the design and application of the IC exception, the IC exception does not meet the requirements under the chapeau of Article XX. Regarding the MRM exception, we found that the distinction between commercial and MRM hunts is neither rationally connected to the objective nor based on any justifiable grounds. Further, consistent with our view under the TBT Agreement, the MRM exception is not designed and applied in an even-handed manner and hence is inconsistent with the requirements of the chapeau of Article XX.

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[989] Panel Report, *Brazil – Retreaded Tyres*, para. 7.229. We note that in *Brazil – Retreaded Tyres* the complainant raised a claim against the ban under Article XI of the GATT 1994.

[990] This was also taken into account in our consideration of the EU Seal Regime's qualification as a technical regulation. (See, above section 7.3.1).

[991] We are mindful that "the 'nature and quality' of the discrimination referenced in the chapeau of Article XX is different from the discrimination in the treatment of products that might already have been found to be inconsistent with one of the substantive obligations of the GATT 1994". Panel Report, *Brazil – Retreaded Tyres*, para. 7.229 (referring to Appellate Body Report, *US – Gasoline*, p. 21) However, we consider that the circumstances in the present dispute support our approach here. Specifically, such circumstances include the following: the character of the measure having exceptions to a ban that result in discrimination; the manner in which the complainants framed their contentions by focusing on the exceptions aspect of the measure; and the need to read relevant provisions of the TBT Agreement (e.g. preamble and Articles 2.1 and 2.2) and of the GATT 1994 in a consistent and harmonious manner.

[992] See section 7.3.2.3 above.

[993] See sections 7.3.2.3.3 and 7.3.2.3.4 above.

7.651. Therefore, we conclude that the European Union has failed to establish that the discriminatory impact found in the IC and MRM exceptions under the EU Seal Regime is justified under Article XX(a) of the GATT 1994.

7.5 Claims under Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture

7.5.1 Article XI:1 of the GATT 1994

7.5.1.1 Summary of the parties' arguments

7.652. In their respective first written submissions, the complainants argue that the "EU Seal Regime" is inconsistent with the European Union's obligations under Article XI:1 of the GATT 1994.[994] Specifically, Canada argues that the EU Seal Regime is a border measure that operates as a quantitative restriction for foreign seal products, and as an import prohibition on Canadian seal products derived from commercial hunts.[995] Norway also asserts that the EU Seal Regime effectively operates as a border measure that is inconsistent with Article XI:1 to the extent that importation of seal products is permitted only if the products conform to one of the three exceptions imposed under the Seal Regime.[996]

7.653. In the subsequent stages of the proceedings, however, the complainants argue that each of the IC, MRM, and Travellers exceptions under the Regime, rather than the EU Seal Regime as a whole, violates Article XI:1 of the GATT 1994 because they all impose quantitative restrictions on the importation of Canadian and Norwegian seal products.[997] Seal products can only be placed on the EU market if they satisfy the conditions of one of the exceptions; as such, each of the exceptions has a "limiting effect" on the importation of seal products, which amounts to a restriction on imports within the meaning of Article XI:1.[998]

7.654. More specifically, according to the complainants, the IC and Travellers exceptions do not apply to domestic seal products as the conditions only apply to seal products at the point of import.[999] The nature and quantity of the seal products imported under the Travellers exception cannot be such as to indicate that the products are being imported for commercial reasons[1000], and the conditions of the IC exception effectively apply only to imported seal products.[1001]

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[994] In its panel request, Canada states, "each of the measures referred to above [the Regulations] is inconsistent with … Article XI:1 of the GATT 1994 because the measures result in a prohibition or restriction on the importation of seal products from Canada into the European Union." (Canada's request for the establishment of a panel, p. 2). We also observe that Canada argued that "the measure" operates *de facto* as a border measure imposing a discriminatory restriction on the importation of seal products, in violation of Articles I:1 and XI:1 of the GATT 1994, rather than as an internal measure. (Canada's response to Panel question No. 1).

Norway states in its panel request, "by restricting the importation of seal products, the EU Seal Regime appears to violate Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture." For its claims under Articles I:1 and III:4, by contrast, Norway refers to "the general prohibition and the exceptions set out [in the EU Seal Regime]" in its panel request. (Norway's request for the establishment of a panel, p. 2).

[995] Canada's first written submission, para. 281.

[996] Norway's first written submission, para. 457.

[997] Canada's second written submission, para. 121; Norway's second written submission, para. 94; Parties' responses to Panel question No. 3. The complainants submit that different aspects of a measure may affect the competitive opportunities of imported products "in different ways"; it is therefore appropriate to examine these aspects under different provisions. The IC, MRM, and Travellers exceptions under the EU Seal Regime may thus be assessed on their own for the purpose of determining the specific GATT article under which they should be examined.

[998] Canada's second written submission, paras. 124-129; Norway's second written submission, paras. 114-125.

[999] Canada's second written submission, paras.124-126; Norway's second written submission, paras. 102, 105-106; response to Panel question No. 3, paras. 16-17. Seal products qualifying under the Travellers exception are acquired outside of the European Union and can only be "imported" for personal use of travellers or their families. (Canada's second written submission, para. 124; Norway's second written submission, para. 115 (referring to Basic Regulation, Article 3(2)(a))).

[1000] Canada's second written submission, para. 124; Norway's second written submission, para. 116.

[1001] Canada and Norway argue that in any event, the IC category violates Article I:1 of the GATT 1994. The complainants note in respect of the IC exception that their claims under Article I:1 are not alternative to

7.655. Further, the complainants indicate that their claims under Article III:4 and Article XI:1 of the GATT 1994 with respect to the MRM exception are alternative claims. The complainants assert that the application of Article III:4 or XI:1 of the GATT 1994 depends on a factual determination as to whether the restrictive conditions of the MRM exception apply effectively to the placing on the market of seal products of EU origin.[1002]

7.656. The European Union argues that the measure does not fall within the scope of Article XI:1; the EU Seal Regime is not a border measure but an internal measure that applies indistinctly to foreign and domestic products.[1003] The Regime imposes a "General Ban" on seal products, and the IC and MRM exceptions apply to both imported and "like" domestic seal products. With respect to the Travellers exception, which applies only to imports, it provides "more favourable treatment" by way of derogation from the "General Ban".[1004] The exceptions under the EU Seal Regime are not trade restrictive and thus cannot amount to import restrictions under Article XI:1 of the GATT 1994.[1005] The European Union notes that "the fact that the EU Seal Regime is enforced at the border is merely for administrative convenience in order to ensure effective enforcement."[1006]

7.5.1.2 Analysis by the Panel

7.657. Article XI:1 of the GATT 1994 requires that WTO Members not institute or maintain any "prohibitions or restrictions other than duties, taxes, or other charges, whether made effective through quotas, import or export licences or other measures … on the importation of any product of the territory of any other [Member]."[1007]

7.658. The complainants contend that each of the IC, MRM, and Travellers exceptions, considered individually, imposes quantitative limitations on imported seal products in violation of Article XI:1 of the GATT 1994.[1008] Therefore, we do not understand the complainants to be claiming that the EU Seal Regime as a whole has a restrictive impact on imported seal products inconsistently with Article XI:1 of the GATT 1994; rather, they contend that each exception results in a limiting effect on imports and thus violates Article XI:1.

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their claims under Article XI:1. (Canada's second written submission, para. 126; Norway's response to Panel question No. 3).

[1002] See the complainants' responses to Panel question No. 3; Canada's second written submission, paras. 127-129; Norway's second written submission, paras. 94-95.

In the complainants' view, the MRM exception operates "in effect" as a border measure. The design, structure and expected operation of the MRM exception are such that none of the restrictive conditions under that exception "applies to … the like domestic product" in the sense of the *Ad* Note to Article III; therefore, the "real impact" of the MRM requirements can only be felt by imported products.

[1003] European Union's first written submission, paras. 488-499; second written submission, para. 374.

[1004] European Union's second written submission, para. 378.

[1005] European Union's second written submission, para. 379.

[1006] European Union's second written submission, para. 376.

[1007] The guidance provided in previous disputes regarding its scope suggests that Article XI:1 does not apply to internal regulations affecting imported products that also apply to the like domestic products; instead, according to the *Ad* Note to Article III of the GATT 1994, these are dealt with under Article III.

The *Ad* Note to Article III of the GATT 1994 reads as follows:

> Any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in paragraph 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.

See, for instance, Panel Report, *India – Autos*, para. 7.220 (referring to GATT Panel Report, *Canada – FIRA*, para. 5.14) ("… the General Agreement distinguishes between measures affecting the 'importation' of products, which are regulated in Article XI:1, and those affecting 'imported products', which are dealt with in Article III. If Article XI:1 were interpreted broadly to cover also internal requirements, Article III would be partly superfluous.").

[1008] With respect to the MRM exception, the complainants explain that their claim under Article XI:1 is alternative to their claim under Article III:4 in light of the *Ad* Note to Article III, to the extent that the MRM exception can be considered as applying to domestic products. At the same time, in the context of Article XI:1, the complainants argue that the conditions under the MRM exception do not apply *de facto* to the European Union's domestic seal products.

7.659. In our understanding, the complainants' claims under Article XI:1 of the GATT 1994 are linked to their position, as discussed in section 7.2.2 above, that the EU Seal Regime consists of three sets of requirements (IC, MRM, and Travellers), rather than a ban with exceptions. For the complainants, each of these three sets of requirements can independently violate different provisions of the GATT 1994 such as Articles I:1, III:4, and XI:1, as they "affect the competitive opportunities for imported products in different ways".[1009] For example, the allegedly discriminatory impact of the IC and MRM exceptions was presented in the complainants' claims under Articles I:1 and III:4 of the GATT 1994, respectively.

7.660. We recall our finding above regarding the characterization of the EU Seal Regime as a measure containing both prohibitive and permissive aspects, namely a ban and exceptions.[1010] In reaching this conclusion, we found that the prohibitive aspect of the measure, namely the ban on the placing on the market and importation of seal products, was implied in the terms and expected operation of the provisions under the Basic Regulation. Specifically, we observed that the importation and placing on the market of seal products are *allowed* under the measure only through the three exceptions.[1011] Consequently, the measure works effectively as a ban on seal products, including imports, in any other situation.

7.661. Hence, it is the implicit prohibitive aspect of the measure, the scope of which is informed by the exceptions, that restricts imported seal products rather than the exceptions considered individually.[1012] In the factual circumstances of this dispute, a restriction on imported products is imposed in the form of an implicit ban under the measure rather than through the individual exceptions as claimed by the complainants.[1013] In other words, it is the EU Seal Regime as a whole, providing for specific exceptions to a ban, that results in a restrictive impact on the importation of products from certain sources.

7.662. In this dispute, the complainants focused on the discriminatory aspects of the Regime, particularly with respect to the IC and MRM exceptions of the Regime, rather than the measure in its entirety as an import "prohibition or restriction" within the meaning of Article XI:1 of the GATT 1994.[1014] The complainants consider that each individual exception is an independent source

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[1009] See, e.g. Canada's second written submission, para. 121; Norway's second written submission, para. 106

[1010] See section 7.2.2 above.

[1011] We also observed above that certain commercial activities such as transit and inward processing of seal products that are otherwise prohibited under the measure are implicitly allowed under the Regime. (See para. 7.53 above).

[1012] This is not to say that different aspects of a measure cannot be examined under different provisions of the WTO Agreement, as we clarified in para. 7.27 above.

See Panel Report, *India – Autos*, para. 7.223. The panel in *India – Autos* noted that it saw "merit in the proposition that there may be circumstances in which specific measures may have a range of effects. In appropriate circumstances they may have an impact both in relation to the conditions of importation of a product [Article XI:1] and in respect of the competitive conditions of imported products on the internal market within the meaning of Article III:4." (Panel Report, *India – Autos*, paras. 7.223 and 7.296). Accordingly, added the panel, any analysis of the applicability of either Article III:4 or XI:1 should thus be based on the principles within Article 3.2 of the DSU. (Panel Report, *India – Autos*, para. 7.224)

The panel in *India – Autos* exercised judicial economy for the United States' claim under Article III:4 with respect to the measure that was already found inconsistent with Article XI:1; the panel did not consider it necessary to separately consider the United States' general claim that the measure was also inconsistent with Article III:4. While the panel thus refrained from further consideration of the broader application of Article III:4 to the same features of the measure dealt with in the Article XI analysis, it nevertheless found it appropriate to make a separate ruling on *one distinct element* of the (same) measure, which was alleged by the complainants to constitute a violation of Article III:4 but was not considered in the panel's Article XI analysis.

[1013] See section 7.2.2 above.

[1014] As noted in above, in its first submission, both Canada and Norway argued that the EU Seal Regime as a whole is a quantitative restriction on importation for purposes of Article XI:1. However, in the subsequent phases of the proceedings, Canada and Norway focus on the restrictive effect of the requirements under the IC, MRM, and Travellers exceptions respectively.

We note that in *EC – Asbestos*, where the measure at issue also consisted of a ban and exceptions to the ban, Canada argued that Article XI:1 applies to the ban on imports (one component of the EC measure), whereas the European Union considered that as the import ban is merely the logical corollary of the general prohibition on the use of asbestos and asbestos-containing products, Article III:4 must be assessed in the light of Note *Ad Article III*. Canada put forward several propositions in sequential order with respect to its claims: (a) first, the EC measure comes *in part* under Article III:4 and *in part* under Article XI:1; (b) if the panel were to reject that proposition, then the whole of the EC measure at issue should fall under Article XI:1; or (c) if the panel were also to reject that approach, the whole of the EC measure should then fall under Article III:4.

of restrictiveness for imports. For the reasons explained above, however, we disagree with the complainants. With respect to the Travellers exception, the complainants did not present any other specific claim than Article XI:1 of the GATT 1994. However, we do not consider that the Travellers exception, considered on its own, imposes an import restriction within the meaning of Article XI:1 of the GATT 1994. As a derogation from the implicit ban, the Travellers exception allows travellers to bring into the European Union seal products that are otherwise prohibited under the measure.[1015]

7.663. Based on our considerations above, we are not persuaded by the complainants' argument that each of the IC, MRM, and Travellers exceptions individually imposes an import restriction in violation of Article XI:1 of the GATT 1994. Thus, the Panel rejects the complainants' claims under Article XI:1 of the GATT 1994 with respect to all three exceptions under the EU Seal Regime.

7.5.2 Article 4:2 of the Agreement on Agriculture (Norway)

7.664. Norway argues that the "EU Seal Regime" violates Article 4.2 of the Agreement on Agriculture.[1016] Norway asserts that if the "EU Seal Regime" is found to violate Article XI:1 of the GATT 1994, then it would also violate Article 4.2 of the Agreement on Agriculture, because a quantitative restriction on importation for purposes of Article XI:1 would also constitute a "quantitative import restriction" on agricultural products prohibited under Article 4.2 of the Agreement on Agriculture.[1017] The European Union requests the Panel to reject Norway's claim because the EU Seal Regime is not a border measure subject to Article XI:1 of the GATT 1994, but an internal regulatory measure that applies to both domestic and imported seal products.[1018]

7.665. In light of Norway's reliance on Article XI:1 of the GATT 1994 for its claim under Article 4.2 of the Agreement of Agriculture, and given our finding above in the context of Article XI:1 of the GATT 1994, the Panel rejects Norway's claim under Article 4.2 of the Agreement on Agriculture.

7.6 Non-violation claim under Article XXIII:1(b) of the GATT 1994

7.666. Having addressed the complainants' claims of inconsistency with the TBT Agreement and the GATT 1994, we now turn to the complainants' non-violation claims under Article XXIII:1(b) of the GATT 1994.[1019]

The panel in *EC – Asbestos* commented that it was difficult to tell, based on Canada's arguments, whether Canada was claiming a cumulative application of Articles III:4 and XI:1 to the part of the measure banning imports. It then further stated that "[i]f Canada does in fact make such a claim …, we do not consider that this forms part of the terms of reference given to the Panel by the DSB and, even if that were the case, Canada's arguments do not make a prima facie case in the sense given to this concept by the Appellate Body." The panel consequently did not consider it necessary to examine this point any further. (Panel Report, *EC – Asbestos*, paras. 8.83-8.100).

[1015] Further, see footnote 71 above for the definition of the term "import" under the EU Seal Regime. Given the scope and use of the term "import" in the measure, combined with the nature of the Travellers requirements, the scope of seal products allowed to "enter into the customs territory of the Community" under the Travellers exception seems to have a fundamentally different character (i.e. being "exclusively … for … *personal use*") than seal products governed by the ban and the IC and MRM exceptions of the EU Seal Regime.

[1016] Norway argues that for the same reasons that these requirements constitute restrictions prohibited under Article XI:1, they also constitute a "quantitative import restriction" on agricultural products that is prohibited under Article 4.2 of the Agreement on Agriculture. (Norway's second written submission, para. 118). Norway considers that the Agreement on Agriculture is applicable to seal products restricted by the EU Seal Regime because all the products covered by the EU Seal Regime are listed in Annex 1 of the Agreement on Agriculture as falling within the scope of the Agreement. These products are listed in the European Commission's Technical Guidance Note issued pursuant to Article 3(3) of the Basic Regulation (Exhibit JE-3).

[1017] Norway refers to the finding of the panel in *Korea – Various Measures on Beef* that "… the general prohibition against import restrictions contained in Article XI and its *Ad* Note find a more specific application in Article 4.2 of the Agreement on Agriculture together with its footnote with regard to agricultural products." (Norway's first written submission, paras. 465-466 (citing Panel Report, *Korea – Various Measures on Beef*, footnote 400)).

[1018] European Union's first written submission, paras. 623 and 625.

[1019] We note that this follows the sequence in which the complainants have presented their claims, and is in keeping with the general priority to be accorded to addressing violation as opposed to non-violation claims. (See Panel Reports, *US – COOL*, para. 7.888; *Japan – Film*, para. 10.26 ("traditionally in cases involving both violation and non-violation claims, panels first address claims of inconsistency with a covered

7.6.1 Main arguments of the parties

7.667. As referenced by all three parties[1020], the panel in *Japan – Film* laid out the three required elements of a claim under Article XXIII:1(b) that are applicable in the current dispute:

> The text of Article XXIII:1(b) establishes three elements that a complaining part must demonstrate in order to make out a cognizable claim under Article XXIII:1(b): (1) application of a measure by a WTO Member; (2) a benefit accruing under the relevant agreement; and (3) nullification or impairment of the benefit as a result of the application of the measure.[1021]

7.668. With regards to the first element, both Canada and Norway argue, and the European Union does not dispute, that the EU Seal Regime is a measure within the meaning of Article XXIII:1(b) that has been applied by the European Union.[1022]

7.669. Regarding the second element, both Canada and Norway rely on the conception of "benefit" under Article XXIII:1(b) as "that of legitimate expectations of improved market-access opportunities arising out of relevant tariff concessions".[1023] Additionally, both complainants recognize in their arguments that "in order for expectations of a benefit to be legitimate, the challenged measures must not have been reasonably anticipated at the time the tariff concession was negotiated."[1024]

7.670. As to the relevant tariff concessions, Canada and Norway identify concessions granted by the European Union for the seal products listed in Exhibit JE-42.[1025] Regarding the legitimacy of their expectations of improved market-access opportunities, both Canada and Norway invoke the rebuttable presumption articulated by the panel in *Japan – Film* that measures introduced *after* the conclusion of tariff negotiations are *not* reasonably anticipated by a complainant.[1026] In the case at hand, the complainants indicate that the relevant tariff concessions were granted at the close of the Tokyo and Uruguay negotiating rounds, both of which were concluded years before the adoption of the Basic Regulation in 2009.[1027] Consequently, the complainants state that the burden is on the European Union to show that Canada and Norway should have anticipated the adoption of measures similar to the EU Seal Regime.[1028]

7.671. The European Union counters that "recourse to GATT Article XXIII:1(b) should be treated as 'particularly exceptional' in relation to measures justified by Article XX(b)".[1029] The European Union generally relies on the conclusions of the panel in *EC – Asbestos*, which found that "situations that fall under Article XX justify a stricter burden of proof being applied…, particularly with regard to the existence of legitimate expectations".[1030] As a consequence, the panel declined

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agreement pursuant to Article XXIII:1(a), before moving on to consider claims of non-violation nullification or impairment under Article XXIII:1(b)").

[1020] See Canada's first written submission, para. 736; Norway's first written submission, paras. 975; European Union's first written submission, para. 592.

[1021] Panel Report, *Japan – Film*, para. 10.41.

[1022] Canada's first written submission, paras. 738-739; Norway's first written submission, paras. 1007-1008.

[1023] Panel Report, *Japan – Film*, para. 10.61. See Canada's first written submission, para. 741; Norway's first written submission, para. 980.

[1024] Panel Report, *Japan – Film*, para. 10.76. See Canada's first written submission, para. 741; Norway's first written submission, para. 985.

[1025] Canada's first written submission, para. 743; Norway's first written submission, para. 1009.

[1026] Panel Report, *Japan – Film*, para. 10.79. See Canada's first written submission, para. 741; Norway's first written submission, para. 990.

In this connection, the complainants dispute the position taken by the panel in *EC – Asbestos* that there is no such rebuttable presumption for measures justified under Article XX of the GATT 1994, arguing *inter alia* that this is contrary to relevant treaty text and past jurisprudence. (See Canada's and Norway's responses to Panel question No. 51).

[1027] Canada's first written submission, para. 743; Norway's first written submission, para. 1011.

[1028] Canada's first written submission, para. 744; Canada's second written submission, para. 352; Norway's first written submission, para. 1012; Norway's second written submission, paras. 406-409.

[1029] European Union's first written submission, para. 597, citing Panel Report, *EC – Asbestos*, para. 8.272.

[1030] Panel Report, *EC – Asbestos*, para. 8.282; European Union's first written submission, para. 601. The panel went on to state that "Members have recognized *a priori* the possibility that the benefits they derive from

to apply the rebuttable presumption of *Japan – Film* as it did "not consider such a presumption to be consistent with the standard of proof … applicable … in the case of an allegation of a non-violation nullification concerning measures falling under Article XX of the GATT 1994".[1031]

7.672. Under this burden of proof, and absent the rebuttable presumption described in *Japan – Film*, the European Union contends that the complainants could have reasonably anticipated the measure due to long-standing public concern about seal hunts and corresponding legislation, both internationally and within Canada and Norway specifically.[1032]

7.673. Canada submits that the history of anti-sealing activities cited by the European Union to show concerns about the Canadian hunt fails to explain the nature of those concerns and to acknowledge that they were addressed by the Canadian government.[1033] Norway argues that the circumstances surrounding the adoption of the EU Seal Regime[1034] as well as its "design, structure, and operation"[1035] demonstrate that such measures could not have been reasonably anticipated, and distinguishes various past measures relating to seals from the EU Seal Regime.[1036]

7.674. Finally, under the third element, Canada and Norway adhere to the explanation of this element by the panel in *Japan – Film* that "it must be demonstrated that the competitive position of the imported products subject to and benefitting from a relevant market access (tariff) concession is being *upset by* ('nullified or impaired … as the result of') the application of a measure not reasonably anticipated".[1037] The complainants likewise follow the interpretation that this element concerns a causal connection between the measure and the nullification or impairment which must be more than *de minimis*.[1038]

7.675. Norway cites the statement by the panel in *EC – Asbestos* that "[b]y its very nature, an import ban constitutes a denial of any opportunity for competition"[1039], and both complainants argue that the EU Seal Regime indeed results in the denial of competitive opportunity for their products in the European Union market.[1040] Canada and Norway allege that the discriminatory nature and impacts of the EU Seal Regime are further evidence of the contribution to nullification or impairment of benefits[1041], with Canada adding that European Union legislators specifically intended to target imports of Canadian seal products.[1042]

7.676. In response, the European Union reiterates its position that "the EU Seal Regime does not discriminate, either *de iure* or *de facto*, between domestic and imported like products" and

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certain concessions may eventually be nullified or impaired at some future time for reasons recognized as being of overriding importance. […] Moreover, the nature and importance of certain measures falling under Article XX can also justify their being taken at any time, which militates in favour of a stricter treatment of actions brought against them on the basis of Article XXIII:1(b)". Panel Report, *EC – Asbestos*, para. 8.281; European Union's first written submission, para. 602.

[1031] Panel Report, *EC – Asbestos*, para. 8.291; European Union's first written submission, para. 604.

[1032] European Union's first written submission, paras. 608-618.

[1033] Canada's second written submission, para. 353-357. Canada refers to the focus of past anti-sealing activity on seal pups that are no longer hunted in Canada, as well as regulatory improvements that Canada has made over the years.

[1034] Norway's first written submission, paras. 1015-1024. In particular, Norway discusses the contemporary recognition of the novelty of the matter and substantial amendment over the course of the legislative process

[1035] Norway's first written submission, paras. 1025-1028. Norway specifically argues that it could not have anticipated a measure having contradictory results in the pursuit of animal welfare (i.e. allowing products from inhumanely killed seals while banning products from humanely killed seals).

[1036] See Norway's second written submission, paras. 410-431.

[1037] See Panel Report, *Japan – Film*, para. 10.82 (emphasis in original); Canada's first written submission, para. 745; Canada's second written submission, para. 346; Norway's first written submission, para. 1002.

[1038] See Panel Report, *Japan – Film*, para. 10.84; Canada's first written submission, paras. 745, 747; Canada's second written submission, para. 346; Norway's first written submission, para. 1000.

[1039] Norway's first written submission, para. 1001, citing Panel Report, *EC – Asbestos*, para. 8.289. See also Norway's second written submission, para. 434 (clarifying that the effect of the EU Seal Regime is to ban imports of seal products from Norway, even though other products are permitted).

[1040] Canada's first written submission, para. 747; Canada's second written submission, para. 347; Norway's first written submission, para. 1034.

[1041] Canada's first written submission, paras. 748-749; Canada's second written submission, para. 347; Norway's first written submission, para. 1035; Norway's second written submission, paras. 435-437.

[1042] Canada's first written submission, para. 750.

therefore the complainants have not shown that the EU Seal Regime upsets the competitive relationship between them.[1043]

7.6.2 Analysis by the Panel

7.677. The Appellate Body has endorsed the rationale for non-violation complaints identified in GATT precedent that "[t]he idea underlying [the provisions of Article XXIII:1(b)] is that the improved competitive opportunities that can legitimately be expected from a tariff concession can be frustrated not only by measures proscribed by the General Agreement but also by measures consistent with that Agreement."[1044] At the same time, however, the Appellate Body has confirmed that "the remedy in Article XXIII:1(b) 'should be approached with caution and should remain an exceptional remedy".[1045]

7.678. In this connection, we also note that the panel in *Japan – Film* underscored that under Article XXIII:1(b) "each case should be examined on its own merits" involving an assessment of the particular circumstances of each dispute.[1046]

7.679. We recall that we have found that the IC and MRM exceptions violate Articles I:1 and III:4 of the GATT 1994, respectively, and are not justified under Article XX(a) of the GATT 1994. Additionally, both exceptions were also found to be in violation Article 2.1 of the TBT Agreement.[1047] In light of these findings, we must consider whether it is necessary for us to additionally address the complainants' non-violation claim under Article XXIII:1(b) of the GATT 1994.

7.680. In previous disputes where a similar non-violation claim was addressed, a finding of violation of the provisions of the GATT 1994 was considered to render an examination of non-violation nullification or impairment of benefits unnecessary, for example "if compliance by the [respondent] with the finding on Article III:4 would necessarily remove the basis of the … claim of nullification or impairment".[1048] Similarly, the relevant question in the present dispute is whether compliance by the European Union with the above-mentioned findings of violation would remove the basis of the complainants' non-violation claims.

7.681. We observe certain parallels between the elements of the legal tests under Articles I:1 and III:4, and Article XXIII:1(b) of the GATT 1994. The panel in *Japan – Film*, after reviewing WTO/GATT case law under Articles I and III of the GATT 1994 concerning *de facto* discrimination, considered that "the reasoning contained therein appears to be equally applicable in addressing the question of *de facto* discrimination with respect to claims of non-violation nullification or impairment".[1049] In identifying this similarity, the panel stated that non-violation claims relate not to "equality of competitive conditions" but to the upsetting of "relative conditions of competition" created by tariff concessions.[1050] The panel further elaborated this statement as follows:

> [I]t could be argued that the standard we enunciated and applied under Article XXIII:1(b) – that of 'upsetting the competitive relationship' – may be different from the standard of 'upsetting effective equality of competitive opportunities' applicable to Article III:4. However, we do not see any significant distinction between the two standards apart from the fact that this Article III:4 standard calls for no less favourable treatment for imported products in general, whereas the Article XXIII:1(b) standard calls for a comparison of the competitive relationship between foreign and

[1043] European Union's first written submission, paras. 606-607.
[1044] Appellate Body Report, *EC – Asbestos*, para. 185 (citing GATT Panel Report, *EEC – Oilseeds*, para. 144). See also Panel Report, *Japan – Film*, para. 10.35.
[1045] Appellate Body Report, *EC – Asbestos*, para. 186 (citing Panel Report, *Japan – Film*, para. 10.37). The Appellate Body cited with approval the explanation given by the panel in *Japan – Film* that "Members negotiate the rules that they agree to follow and only exceptionally would expect to be challenged for actions not in contravention of those rules". Panel Report, *Japan – Film*, para. 10.36.
[1046] Panel Report, *Japan – Film*, para. 10.37. See also Panel Report, *US – COOL*, para. 7.902.
[1047] This finding is confined to the dispute brought by Canada only.
[1048] Panel Report, *US – COOL*, para. 7.904 (citing GATT Panel Report, *ECC – Oilseeds I*, para. 142).
[1049] Panel Report, *Japan – Film*, para. 10.86.
[1050] Panel Report, *Japan – Film*, para. 10.86.

> domestic products at two specific points in time, i.e. when the concession was granted and currently.[1051]

7.682. We note that the parties have each cross-referenced their own arguments regarding the discriminatory nature of the EU Seal Regime under Articles I:1 and III:4 of the GATT 1994 to support their respective positions as to the nullification or impairment of benefits under Article XXIII:1(b) of the GATT 1994.[1052] Moreover, on the specific question of the upsetting of "relative conditions of competition", both complainants premise their claim of nullification or impairment on the fact that domestic and other foreign products may continue to have access to the EU market *under the IC and MRM exceptions*.[1053] In our view, the "relative conditions of competition" that the complainants claim are upset by the IC and MRM exceptions are precisely those that have been addressed in our findings of violations under Articles I:1 and III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement.

7.683. Therefore, compliance by the European Union with our findings of violations under Articles I:1 and III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement would remove the basis of the complainants' non-violation claims of nullification or impairment. Accordingly, we refrain from examining the complainants' non-violation claims under Article XXIII:1(b) of the GATT 1994.

[1051] Panel Report, *Japan – Film*, para. 10.380.

[1052] See Canada's first written submission, para. 748; European Union's first written submission, para. 607; Norway's first written submission, para. 1035.

[1053] See Canada's second written submission, para. 347; Norway's second written submission, paras. 435-436.

We note that Norway has also raised the competitive position of Norwegian seal products vis-à-vis "non-seal products that compete with seal products". Norway's second written submission, para. 435. Although Norway asserts that "[s]eal products are in competitive relationships with other products" (para. 437), Norway has not developed arguments or put forward evidence as to the nature and extent of such competitive relationship. In the absence of such evidence and argument, we are unable to determine the "relative conditions of competition" between such products and, consequently, whether such conditions have been upset as a result of the EU Seal Regime.

8 CONCLUSIONS AND RECOMMENDATIONS

8.1 Complaint by Canada (DS400): Conclusions and recommendations

8.1. Canada has made claims with regard to certain aspects of the EU Seal Regime under Articles 2.1, 2.2, 5.1.2, and 5.2.1 of the TBT Agreement and Articles I:1, III:4, XI:1, and XXIII:1(b) of the GATT 1994.

8.2. With respect to Canada's claims under the TBT Agreement, we conclude that:

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

b. the IC exception and the 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 the EU public moral concerns on 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 as the EU Seal Regime;

d. the European Union has 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 has not demonstrated that the European Union acted inconsistently with its obligations under Article 5.2.1.

8.3. With respect to Canada's claims under the GATT 1994, we conclude that:

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 the like products originating in Canada;

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 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; 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 has failed to make a *prima facie* case for its claim.

8.4. Finally, in light of the above findings of violation, we have refrained from examining Canada's non-violation claim under Article XXIII:1(b) of the GATT 1994.

8.5. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent that the European Union has acted inconsistently with Articles 2.1 and 5.1.2 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994, it has nullified or impaired benefits accruing to Canada under these agreements.

8.6. Pursuant to Article 19.1 of the DSU, we recommend that the Dispute Settlement Body request the European Union to bring the inconsistent measures into conformity with its obligations under the TBT Agreement and the GATT 1994.

8.1 Complaint by Norway (DS401): Conclusions and recommendations

8.1. Norway has made claims with regard to certain aspects of the EU Seal Regime under Articles 2.2, 5.1.2, and 5.2.1 of the TBT Agreement; Articles I:1, III:4, XI:1, and XXIII:1(b) of the GATT 1994; and Article 4.2 of the Agreement on Agriculture.

8.2. With respect to Norway's claims under the TBT Agreement, we conclude that:

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

b. the EU Seal Regime is not inconsistent with Article 2.2 because it fulfils the objective of addressing the EU public moral concerns on 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 as the EU Seal Regime;

c. European Union has 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

d. Norway has not demonstrated that the European Union acted inconsistently with its obligations under Article 5.2.1.

8.3. With respect to Norway's claims under the GATT 1994, we conclude that:

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 the like products originating in 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 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; 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 has failed to make a *prima facie* case for its claim.

8.4. Given our finding on Article XI:1 of the GATT 1994 above, we reject Norway's claim under Article 4.2 of the Agreement on Agriculture that the EU Seal Regime constitutes a quantitative import restriction on agricultural products.

8.5. Finally, in light of the above findings of violation, we have refrained from examining Norway's non-violation claim under Article XXIII:1(b) of the GATT 1994.

8.6. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent that the European Union has acted inconsistently with Article 5.1.2 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994, it has nullified or impaired benefits accruing to Norway under these agreements.

8.7. Pursuant to Article 19.1 of the DSU, we recommend that the Dispute Settlement Body request the European Union to bring the inconsistent measures into conformity with its obligations under the TBT Agreement and the GATT 1994.

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WORLD TRADE ORGANIZATION

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EUROPEAN COMMUNITIES – MEASURES PROHIBITING THE IMPORTATION AND MARKETING OF SEAL PRODUCTS

REPORTS OF THE PANEL

Addendum

This *addendum* contains Annexes A to C to the Reports of the Panel to be found in documents WT/DS400/R, WT/DS401/R.

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LIST OF ANNEXES

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WORKING PROCEDURES OF THE PANEL

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ANNEX A

WORKING PROCEDURES OF THE PANEL

ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 23 October 2012

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. The Panel shall conduct its internal deliberations in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it. The Panel shall open its meetings with the parties to the public, subject to appropriate procedures to be adopted by the Panel after consulting the parties. These procedures shall include measures to protect the personal safety of delegates and WTO officials.

4. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

5. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

6. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If the complainants request such a ruling, the respondent shall submit its response to the request in its first written submission. If the respondent requests such a ruling, the complainants shall submit their response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

7. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party(ies). Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party(ies) a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

8. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised in writing as promptly as possible. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

9. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions attached as Annex 1, to the extent that it is practical to do so.

10. To maintain transparency between the proceedings in DS400 and DS401, the parties to these disputes shall make their written submissions prior to the first substantive meeting available to all third parties in both disputes at the time the parties transmit them to the Panel.

11. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by Canada could be numbered CAN-1, CAN-2, etc. If the last exhibit in connection with the first submission was numbered CAN-5, the first exhibit of the next submission thus would be numbered CAN-6. To avoid the duplication of exhibits, the parties may submit joint exhibits by numbering them as JE-1, JE-2, etc. Each party may also cross-refer to an exhibit submitted by the other parties by using the number attributed to the exhibit.

Questions

12. The Panel may at any time during the proceedings pose questions to the parties and third parties, either orally in the course of a meeting or in writing.

Substantive meetings

13. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel. This list should be provided no later than 5.00 p.m. on the previous working day.

14. The first substantive meeting of the Panel with the parties shall be conducted as follows:

(a) The Panel shall invite the complainants to make opening statements to present their case first. Subsequently, the Panel shall invite the respondent to make its opening statement. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies to the interpreters through the Panel Secretary. Each party shall make available to the Panel and the other parties the final version of its statement, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

(b) After the conclusion of the statements, the Panel shall give each party the opportunity to ask questions or make comments, through the Panel. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party(ies) to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's questions within a deadline to be determined by the Panel.

(c) The Panel may subsequently pose questions to the parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

(d) Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the complainants presenting their statements first.

15. The second substantive meeting of the Panel with the parties shall be conducted as follows:

(a) The Panel shall ask the respondent if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite the respondent to present its opening statement, followed by the complainants. If the respondent chooses not to avail itself of that right, the Panel shall invite the complainants to present their opening statements first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies to the interpreters through the Panel Secretary. Each party shall make available to the Panel and the other parties the final version of its statement, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

(b) After the conclusion of the statements, the Panel shall give each party the opportunity to ask questions or make comments, through the Panel. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party(ies) to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's questions within a deadline to be determined by the Panel.

(c) The Panel may subsequently pose questions to the parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

(d) Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party(ies) that presented its opening statement first, presenting its closing statement first.

Third parties

16. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel. To maintain transparency between the proceedings in DS400 and DS401, the Panel shall also invite third parties in each dispute to make their written submissions to the Panel available to all parties and third parties in both disputes.

17. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. on the previous working day.

18. The third-party session shall be conducted as follows:

(a) To maintain transparency between the proceedings in DS400 and DS401, all third parties in both disputes may be present during the entirety of this session.

(b) The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, all parties and third-parties in both disputes with provisional written versions of their statements before they take the floor. In the event that interpretation is needed, third parties shall provide additional copies to the interpreters through the Panel Secretary. Third parties shall make available to the Panel, all parties and third parties in both disputes the

final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. on the first working day following the session.

(c) After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

(d) The Panel may subsequently pose questions to the third parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

19. Each party shall submit an integrated executive summary of its arguments as presented in its written submissions, statements and responses to questions in two parts. The total number of pages for the integrated executive summary, both parts combined, shall not exceed 30 pages. The parties shall submit the first part of the integrated executive summary at the latest 10 calendar days after the responses to questions following the first substantive meeting. The parties shall submit the second part of the integrated executive summary at the latest 10 calendar days after the comments on the responses to questions following the second substantive meeting.

20. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement at the latest 7 calendar days from the date of the third party session, or in the event that the Panel addresses questions to the third parties, at the latest 7 calendar days after the deadline for submission of responses to these questions. The integrated summary to be provided by each third party shall not exceed 5 pages.

21. The executive summaries referred to above shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case. The description of the arguments of the parties and third parties in the descriptive part of the Panel reports shall consist of these executive summaries, which shall be annexed as addenda to the reports.

Interim review

22. Following issuance of the interim reports, each party may submit a written request to review precise aspects of the interim reports and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

23. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

24. The interim reports as well as the final reports before translation shall be kept strictly confidential and shall not be disclosed.

Service of documents

25. The following procedures regarding service of documents shall apply:

(a) Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

(b) Each party and third party shall file 9 paper copies of all documents it submits to the Panel. However, when exhibits are provided on CD-ROMS/DVDs, 5 CD-ROMS/DVDs and 3 paper copies of those exhibits shall be filed. The DS

Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

(c) Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to *****@wto.org, with a copy to *****.*****@wto.org, *****.*****@wto.org, *****.*****@wto.org, *****.*****@wto.org and *****.******@wto.org. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

(d) Each party shall serve any document submitted to the Panel directly on the other parties. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

(e) Each party and third party shall file its documents with the DS Registry and serve copies on the other parties (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel.

(f) The Panel shall provide the parties with an electronic version of the descriptive part, the interim reports and the final reports, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

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ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

I. INTRODUCTION

1. This dispute concerns the regulatory framework of the European Union (EU) for trade in seal products, which is principally contained in two legal instruments: Regulation No. 1007/2009 (the Basic Regulation) and Regulation No. 737/2010 (the Implementing Regulation). These two instruments make up the EU Seal Regime. The Basic Regulation establishes strict conditions under which seal products may be placed on the EU market. The conditions apply to seal products that fall under the "Inuit Communities" (IC), "Marine Management" (MM) and "Consumer Choice" (CC) categories. The Implementing Regulation lays down rules that elaborate on the conditions under which seal products may be imported and placed on the market, and establishes a conformity assessment procedure (CAP) to ensure that only products that meet the conditions are being placed on the EU market. According to the European Union, the objectives of the EU Seal Regime are animal welfare with respect to seals and addressing the moral concerns of the EU public in this respect.

2. The effect of the EU Seal Regime is to exclude from the EU market all seal products derived from seals killed in commercial hunts, regardless of whether they were harvested humanely. In doing so, the EU Seal Regime has effectively shut out Canadian seal products from the EU market. The negative economic impacts of this measure have reverberated through coastal communities in the Canadian Maritimes, where economic opportunities are limited, and in Canada's Inuit communities, where the Inuit have historically relied on the income generated from seal skin sales to supplement their subsistence-oriented lives.

3. In contrast, the EU Seal Regime minimizes any negative commercial impact on seal products from Greenland and the European Union, as well as on the EU's economic actors with a commercial stake in seal products through processing of them for export and transit. Indeed, the EU Seal Regime was written in such a way that products from Greenland and the European Union would be able to access the EU market, regardless of whether the seals were killed humanely. It has not disrupted the access these products have to the EU market.

4. The EU Seal Regime imposes an import restriction on Canadian seal products, contrary to GATT Article XI:1. It also constitutes a *de facto* violation of the MFN and national treatment obligations in TBT Article 2.1 and GATT Articles I:1 and III:4. Further, it is more trade-restrictive than necessary to fulfill its objectives and thus constitutes an unnecessary obstacle to international trade, contrary to TBT Article 2.2. Finally, the CAP established by the Implementing Regulation violates TBT Articles 5.1.2 and 5.2.1.

II. FACTUAL BACKGROUND

A. Overview and history of the Canadian sealing industry

5. Seals have been harvested, first by the Inuit and other Aboriginal peoples, and, starting in the 16th century, by European settlers. Commercial sealing on Canada's east coast emerged in the 18th century.

6. For Inuit communities, the marketing of seal products continues to contribute to their economic development in the 21st century. The Inuit hunt mostly ringed seals. The Inuit hunt takes place throughout the year and is primarily for subsistence purposes although some skins are sold on the commercial market. Revenues generated from the sale of these products help finance Inuit hunting activities generally. Seal hunting is an intrinsic part of the Inuit way of life, and an integral part of Inuit culture and survival. Seal meat is a dietary staple and skins and bones are used to produce clothing for locals. It is not economically feasible for the Inuit to develop their own processing and distribution chains. Therefore, they have largely relied on commercial processing and marketing chains for east coast seal products. The decline in Canada-Europe trade in seal

products derived from the east coast commercial harvest has disrupted the functioning of such chains. Unless the Inuit develop their own processing and distribution networks, which would likely be prohibitively costly given the small volume of Inuit trade, they will be unable to access global markets.

7. The seal harvest has evolved from a subsistence activity into a commercial industry and an important economic driver for coastal communities. Sealing has played an integral role in the development and maintenance of Canada's eastern and northern coastal communities, and is at the heart of their culture and economy. Individual sealers are highly dependent on the income it generates, which allows them to pay for fishing-related expenses and earn an income from that activity.

8. There are two main areas of sealing on Canada's east coast: the Gulf and the Front. They both focus on the harp seal and, in accordance with the Marine Mammal Regulations (MMR) and depending on the ice conditions, run from mid-or late March to May (Gulf) or in April and May (Front). In both the Gulf and the Front, the harvest is conducted using a mix of small vessels and long-liners. The harvest in the Gulf generally takes place on pack ice or large ice floes, and the sealers use a mix of rifles and hakapiks. Smaller ice floes and more open water on the Front mean that the sealers tend to rely more on rifles to shoot before landing crewmen to confirm the kill or dispatch the seal with a hakapik, if necessary. Approximately 70 percent of the seal harvest occurs at the Front

9. Canada's east coast seal harvest is completely sustainable and is part of a larger marine resource management program. The Department of Fisheries and Oceans (DFO) has administered a total allowable catch (TAC) system since 1971 and the east coast harvest has been managed using a precautionary approach-based framework since 2003. TACs are set for three-years, with an annual TAC taking into account various considerations. Catch data must be recorded and reported daily. In addition, population estimates are revised annually. The Northwest Atlantic harp seal population is at just under eight million and scientists believe that it is at or near an historical high. This population has been rising steadily for the last two decades, despite increasing TACs and harvests in the last ten years.

10. Commercial sealing in Canada focuses on three main commodities, namely skins, oil and meat, from which a number of consumer goods are derived. In the last few years, seal oil has eclipsed fur to become Canada's primary seal-derived commodity. The available data demonstrates that the value of the seal harvest over the last two decades has fluctuated dramatically, with a sharp increase in value beginning in 2002 until 2006. Starting in 2007, the value of landed seals fell dramatically for a variety of reasons; including bans on seal products imposed by Belgium and the Netherlands that year and the introduction of the draft EU Seal Regime in 2008. Consistent with that trend and for similar reasons, Canada's export figures fluctuated dramatically over the 2000s, with a precipitous fall from 2006 to 2010. A key factor contributing to this was the EU and Member State seal product measures.

11. Canada's seal hunt is one of the most strictly regulated and closely monitored large-scale wild animal harvests in the world. At the federal level, DFO implements humane harvesting methods and animal welfare standards, administers licensing regimes, and conducts effective monitoring and enforcement. The Inuit hunt is subject to the MMR but, in some cases, land claims agreements complement them and may supersede them if there is a conflict.

12. The Canadian east coast seal hunt takes place in a regulatory environment characterized by clear and rigorous animal welfare standards that are based on the most current scientific research and independent expert advice. The MMR prescribe killing methods that oblige sealers to kill seals in a manner that avoids all unnecessary pain and suffering. The MMR and Canada's licensing conditions also require that every seal be harvested in accordance with the three-step process (striking, checking and bleeding), which mirrors processes used in commercial slaughterhouses around the world. This process has been recommended and endorsed by a number of veterinary and scientific panels, including the panel established by the European Food Safety Authority (EFSA). The three-step process clearly exceeds what is required for the vast majority of wild animal harvests. Recent statistics with respect to sealers' compliance with the three-step method, based on both on-site observations and post mortem skull checks, reveal a compliance rate that exceeds 95 percent.

13. Under the MMR, all sealers participating in the commercial seal harvest are required to have licenses. Canadian sealers are professionals who are experienced and knowledgeable about the animals they hunt, recognize the importance of adhering to the rules and requirements for harvesting seals, and are familiar with and comfortable in the physical environment in which they work.

14. The issuance of sealing licenses is governed by the MMR and guided by the Seal Licensing Policy. A voluntary training program developed through the cooperation of DFO and other agencies that covers many aspects of the MMR, such as the use of approved weapons and ammunition as well as humane harvesting (the three-step process), is offered each year in advance of the opening of the harvest. To date over 3000 sealers have participated. While this voluntary program has been successful, the training will be mandatory starting in 2014. This means that sealers will not be able to renew their licenses unless they have been formally trained.

15. In cooperation with other government agencies, DFO monitors the seal hunt closely and strictly enforces the Fisheries Act, the MMR and seal licencing conditions in an effort to ensure, among other things, that seals are killed in a way that inflicts as little pain and suffering as possible. To do so, a team of DFO Fishery Officers is deployed on a full-time basis on board a Canadian Coast Guard vessel (ice breaker) dedicated to monitoring sealing activities for the duration of the harvest in the Gulf and on the Front. In addition, the Royal Canadian Mounted Police and the provincial police have teams of officers aboard the icebreaker.

16. The Coast Guard vessel has been able to participate in all monitoring, control and surveillance activities. DFO has also employed the services of two or three Canadian Coast Guard helicopters. Other Fishery Officers are stationed near seal harvesting locations and they conduct activities such as: overhead monitoring by helicopters operating from land; patrolling areas of active harvesting with vehicles; accompanying and monitoring sealing crews, for a half or full day, directly onboard sealing vessels; conducting dockside verifications of catches; participating in daily aerial patrols in fixed wing aircraft to identify active harvesting sites; and coordinating the deployment of the icebreaker and helicopters. A number of advanced technological tools, including high-definition cameras, are at their disposal. DFO contracts with independent at-sea observers, who are randomly deployed on sealing vessels, and allows third parties to observe the harvest.

17. Sealers who fail to comply with the MMR or the conditions of their sealing licence are prosecuted. The consequences of illegal actions include fines, licence prohibitions, and the forfeiture of catches, fishing gear, vessels and vehicles.

18. In seeking to justify why it is necessary for products of the Canadian commercial seal harvest to be banned completely from its market, the European Union cites a number of studies, which it says demonstrate that: Canada has not prescribed an appropriate standard for humane killing; Canadian sealers fail to follow even the prescribed standards; and there are inherent obstacles to killing seals humanely. As confirmed by the EFSA 2007 Opinion and recent, peer-reviewed research by independent veterinary experts, there is nothing inherently inhumane about harvesting seals in Canada.

19. EFSA has also recognized that there is no perfect or ideal killing method that can guarantee the complete absence of pain, distress and other forms of suffering. Contrary to what the European Union is arguing in this dispute, EFSA did not conclude that Canada's east coast seal hunt is inherently inhumane; rather, it concluded that "[m]any seals can be, and are, killed rapidly and effectively without causing avoidable pain, distress, fear and other forms of suffering […]" According to EFSA, Canada's regulatory regime constituted an effective framework to ensure that seals are killed humanely, provided that the sealers use their tools properly and comply with the regulatory requirements prescribing the three-step method. To the extent that EFSA found evidence that some seals might experience pain or suffering, it provided a number of recommendations on how to minimize these events. These recommendations have been the basis for revisions to Canada's MMR. Canada's seal hunt compares well with other well-managed wildlife hunts and even approved slaughter methods used in abattoirs.

B. Greenland seal harvest

20. Historically, the seal harvest in Greenland has been one of the largest in the world. Since the adoption of the EU Seal Regime, it has become the largest. The harp seal hunt takes place all year round, but predominantly during the summer and autumn in open water. This method has been recognized to result in a significant percentage of struck seals sinking in the water before the sealer reaches them. Ringed seals are hunted primarily during the winter, using netting techniques, which were considered by the EFSA Panel to cause "considerable suffering".

21. Greenland's sealing community is almost exclusively made up of Inuit. The Inuit harvest seals for both subsistence and commercial purposes. It is estimated that over half of the seal skins from the Greenlandic hunt are sold to the Great Greenland A/S tannery, which processes them and either sells them in Denmark or through agents located there. Seal skins are sold during fashion fairs in Denmark or abroad, as well as at auctions.

22. The authorities in Greenland do not make a distinction between subsistence and commercial hunts when regulating these activities. Until recently, Greenland did not have any legislation specific to the seal harvest. The Executive Order that came into effect in December 2010 imposes requirements with respect to licenses, catch reporting and hunting methods, but there are no TACs for seals. There is no requirement for checking and bleeding or any other specific animal welfare requirements. In addition, there is no required testing or training of sealers and the monitoring of the hunt is very limited.

C. Sealing and animal welfare issues in the EU

23. There is very little sealing in the European Union with most of it concentrated in Sweden, Finland, and the United Kingdom (Scotland). In Sweden, and Finland, seals have generally been considered as pests due to the damage they cause to fisheries and thus are hunted primarily for marine resource management purposes and to protect the sustainability of fisheries. Swedish and Finnish sealers mainly consume what they catch or use seals to make commercial products on a small scale for sale locally or on the EU market. In the United Kingdom, grey seals are harvested as nuisance animals around fisheries and fish farms.

24. The numbers of seals that are subject to quotas or are actually killed in the EU Member States annually vary from 200 in Sweden to 3,500 in the United Kingdom. Hunters in Finland are largely self-regulated and it is unclear if there is any independent monitoring of that hunt. It is also unclear how well monitored the Swedish hunt is due to the relative scarcity of inspectors. The evidence shows that culls in Sweden and Finland do not require the application of the three-step method for killing seals.

25. The main legislation dealing with the killing and slaughter of animals in the European Union is Regulation 1099/2009 on the protection of animals at the time of killing, which applies to the killing of animals bred or kept for the production of food, wool, skin, fur or other products. This Regulation retained some of the stunning and killing methods prescribed under the previous legislation, including some that were associated with poor animal welfare outcomes. The slaughter methods accepted and used in the European Union do not "guarantee instantaneous death, without suffering" and, in fact, a number of the "best" or "recommended" methods may still cause pain, distress and suffering in animals.

26. Regulation 1099/2009 does not provide for independent monitoring of animal welfare protection. The European Union relies on a system where slaughterhouse operators appoint a certified animal welfare officer who is responsible for monitoring compliance with animal welfare rules. In smaller slaughterhouses, there is no requirement to monitor compliance. In addition, each kill of an animal is not monitored. Checks are carried out to verify that animals are stunned properly using only a representative sample at a frequency that takes account of previous checks. Moreover, the implementation of mandatory training for officers is, in practice, far from uniform and in most Member States there is no compulsory system of certification by the competent authorities to ensure that proper training is provided to staff.

27. Monitoring compliance with animal welfare regulations is also a challenge in all wildlife hunts. For instance, the deer hunt in the United Kingdom is not closely monitored. Hunters generally operate alone or in small groups and they are expected to police themselves.

D. EU legislative process

28. In 2006, the European Parliament passed a declaration requesting the European Commission (Commission) to draft a regulation to ban the import, export and sale of all harp and hooded seal products, which was aimed specifically at the Canadian east coast seal harvest. In response, the Commission undertook to make a full objective assessment of the animal welfare aspects of seal hunting. In 2008, it published a legislative proposal for a regulation on trade in seal products that imposed a prohibition on the placing on the market, import, transit or export of seal products, coupled with a derogation for seal products derived from seals harvested and skinned in a country where: (1) adequate legislative provisions or other requirements apply ensuring effectively that seals are harvested and skinned without causing avoidable pain and suffering; (2) the legislative provisions or other requirements are effectively enforced; and (3) a certification scheme is in place. The proposal also specified that the fundamental economic and social interests of Inuit communities traditionally engaged in seal hunting should not be adversely affected.

29. Following a series of amendments by the European Parliament, the proposal was transformed into the EU Seal Regime, which excludes seal products derived from any non-Inuit commercial harvests from the EU market while allowing seal products from non-commercial hunts, regardless of whether the seals are killed humanely.

30. Before and during the legislative process, Canada sought to engage with the European Union in discussions on a multilateral process that would lead to an international animal welfare standard to be applied to sealing. These efforts were ignored by the European Union.

III. LEGAL ARGUMENTS

A. The EU Seal Regime violates the GATT 1994

1. GATT Article XI:1

31. In this dispute, Canada's claim under GATT Article III:4 is an alternative to its claim under GATT Article XI:1.

32. Article XI:1 applies to any "measure" that prohibits or restricts imports from other Members, including laws, regulations and requirements. The EU Seal Regime is a "law" or "regulation" and thus clearly falls within the scope of a "measure". Panels and the Appellate Body have concluded that the term "restriction" is very broad and includes any "limitation on action, a limiting condition or regulation". It has also been confirmed that Article XI:1 applies to *de jure* and *de facto* prohibitions and restrictions, and that this provision protects competitive opportunities rather than actual trade flows. By limiting imports to products falling within the three categories, the EU Seal Regime imposes *de facto* quantitative restrictions on the importation of Canadian seal products in violation of Article XI:1.

33. The European Union has confirmed that seal products from Canada's east coast harvest do not fall within the scope of the IC or MM categories. As approximately 95 percent of Canada's total seal harvest placed into commerce in the last five years has come from this harvest, the vast majority of Canada's seal products are excluded from the EU market.

34. *Ad* Article III, which precludes the application of Article XI:1 for internal measures that are enforced at the time or point of importation, does not apply to the EU Seal Regime If a measure affects the competitive opportunities of imported products in different ways, its different aspects can fall within the scope of either Article III or XI. The three categories, which determine whether seal products have access to the EU market, can be assessed on their own for the purpose of determining which GATT Article to apply. The nature of the measure being a restriction in relation to importation is the key factor to consider in determining whether it may properly fall within the scope of Article XI:1.

35. The facts show that the EU Seal Regime does not meet the conditions set out in *Ad* Article III. The applicability of that provision turns on the application of the measure to both the imported and like domestic products. Under the CC category, the conditions only apply to the importation of seal products. By virtue of the fact that these seal products can only be imported for personal use, there is no "like" domestic product. Similarly, the conditions under the IC category effectively apply only to imported seal products as the European Union has acknowledged that there are no EU seal products that would qualify under that category. Therefore, Article III:4 would never apply because there are no "like" domestic products.

36. For its part, the MM category is also effectively a restriction on importation. Its conditions do not restrict EU domestic seal products as they were crafted to specifically reflect sealing practices in the relevant EU Member States (i.e., Sweden). The conditions under that category effectively operate as a border measure because their actual impact (i.e., restriction) would only be felt by imported products. Indeed, Canadian seal products not derived from seals killed as part of a marine resource management cull can never fulfil the conditions to enter the EU market. Even if some Canadian seal products were derived from such a cull, the non-systematic and non-profit conditions would prevent their entry into, and placement on, the EU market. In contrast, all of the EU's domestic seal products derive from marine management hunts and will therefore satisfy the conditions. No domestic seal products are effectively prevented from being placed on the EU market.

2. GATT Article I:1

37. Article I:1 prohibits discrimination between "like" products originating in, or destined for, different countries. The primary objective of the MFN obligation is to ensure "equality of opportunity to import from, or to export to, all WTO Members." As found by the Appellate Body in *EC – Bananas III*, it requires that all "like" products be treated equally regardless of their origin. The MFN obligation covers both *de jure* and *de facto* discrimination.

38. The term "advantage" in Article I:1 is broad and, by reference to Article III:4, it includes "laws, regulations and requirements" affecting the "internal sale, offering for sale, purchase, transportation, distribution or use" of products. The EU Seal Regime is a law or regulation that "affects" the "internal sale", "offering for sale", "purchase" and "distribution" of seal products. The EU Seal Regime confers an advantage to Greenlandic seal products by allowing them to be imported and placed on the EU market and to circulate freely between EU Member States given that they meet all of the conditions under the IC category.

39. In *EC – Asbestos*, the Appellate Body noted that a determination of likeness is "fundamentally, a determination about the nature and extent of a competitive relationship between and among products". Pursuant to the criteria set out by the Appellate Body, seal products from Canada's non-Inuit east coast commercial seal harvest and seal products from Inuit hunts in Greenland, whether they are inputs or finished products, are physically similar, have the same or similar end-uses, consumers considered them to be highly substitutable before the introduction of the EU Seal Regime and they are classified under the same tariff lines. In addition, the parties to the dispute agree that all seal products, whether or not they conform to the EU Seal Regime, are like products that compete and are substitutable between each other in the EU market. Thus, Canadian and Greenlandic seal products are "like" products.

40. The trade advantage granted to Greenlandic seal products is not granted "immediately and unconditionally" to "like" Canadian seal products. Indeed, the conditions under the IC category effectively permit all Greenlandic seals products to be placed on the EU market, while excluding the vast majority of Canadian seal products from the same market. This is due to the fact that Canada's east coast commercial seal harvests are not "hunts traditionally conducted by Inuit or other indigenous communities" as required under the IC category.

3. GATT Article III:4

41. The EU Seal Regime violates the national treatment obligation under Article III:4 because it treats Canadian seal products less favourably than EU seal products. The EU Seal Regime changes the conditions of competition to the detriment of Canadian seal products. In particular, the MM category effectively allows all domestic seal products from the EU to continue to be placed on the

EU market, but excludes Canadian seal products from the same market, thus constituting a *de facto* violation of Article III:4.

42. The parties to this dispute agree that all seal products are like products that compete and are substitutable between each other in the EU market. The like products to be compared are all domestic (EU) products that both conform and do not conform to the conditions allowing them to be placed on the market and all conforming for non-conforming seal products from Canada.

43. The EU Seal Regime is a law, regulation or requirement affecting the internal sale, offering for sale, purchase and distribution of seal products in the EU. In particular, the MM category imposes conditions for seal products to be placed on the market and restrictions on the manner in which such products must be marketed in order to qualify under this category. Thus, the operation of the category limits the internal sale, offering for sale, distribution, and ultimately, the purchase of seal products.

44. In *Korea – Various Measures on Beef*, the Appellate Body determined that "treatment no less favourable" under Article III:4 means "according conditions of competition no less favourable to the imported product than to the like domestic product." Ultimately, this inquiry turns on whether the EU Seal Regime modifies the conditions of competition to the detriment of Canadian seal products. In this case, the design, structure and operation of the category indicate that EU seal products (i.e., those originating in Sweden, Finland and the United Kingdom), were expected to, and, in the case of Sweden, will meet all the conditions under the category, including the "non-systematic", "non-profit basis" and "ecosystem-based approach" conditions, while Canadian seal products do not. Canadian seal products are effectively excluded from qualifying under the MM category. The recent approval of Swedish authorities to issue accreditation documents confirms that such conditions were set to accommodate the existing practices of EU Member States. Thus, the EU Seal Regime modifies the conditions of competition to the detriment of Canadian seal products and accords those products less favourable treatment.

4. Incorrect legal standards proposed by the EU under GATT Articles I:1 and III:4

45. Despite the European Union's concessions regarding the elements under Articles I:1 and III:4, it defends the discrimination of the EU Seal Regime, not on the basis of facts, but on the application of erroneous legal standards. The European Union does this by attempting to incorporate the legitimate regulatory distinction test into the less favourable treatment analysis under Articles I:1 and III:4. However, the legitimate regulatory distinction test was developed for the sole purpose of addressing claims regarding measures falling under TBT Article 2.1. In *US – Clove Cigarettes*, the Appellate Body concluded that the preamble in the TBT Agreement sets out a balance not unlike the balance found between GATT Articles III and XX, and it suggested that the absence in the TBT Agreement of a general exceptions clause like Article XX necessitates a different reading of Article 2.1. That reading resulted in the incorporation of the legitimate regulatory distinction element in the legal standard for Article 2.1 aiming to preserve the balance, as found by the Appellate Body in *US – Clove Cigarettes*, between the objective of trade liberalization and a WTO Member's right to regulate. In contrast, the text and context of Articles I:1 and III:4 neither allow for, nor do they require, an inquiry into the legitimacy of policy-based distinctions drawn between products that have been found to be like. As the Appellate Body intimated in *US – Clove Cigarettes*, Article XX is the appropriate GATT provision for this. The European Union's attempts to insert a legitimate regulatory distinction element into Articles I:1 and III:4 are not supported by the jurisprudence, or the text and context of those provisions. Further, its argument regarding the possible incongruence between the TBT Agreement and the GATT 1994 is mere conjecture, as it is based on an assumption that the ranges of the policy objectives covered under the TBT Agreement is greater than what is found under Article XX. The European Union is incorrect as a matter of law when it asserts that the legal standard for determining less favourable treatment under GATT Articles I:1 and III:4 is the same as for TBT Article 2.1.

46. The European Union applies another incorrect legal standard with respect to Canada's *de facto* discrimination claims when it tries to distinguish between like products on the basis that they are in different situations. To be able to justify differences in treatment on such a basis between like products would eliminate the possibility of *de facto* discrimination being found under Articles I:1 and III:4, and thus overturn more than three decades of GATT and WTO jurisprudence.

In *US – Clove Cigarettes*, the Appellate Body has ruled that a panel is to assess objectively the universe of domestic products that are "like" the products that are imported from the complainant, on the basis of the nature and extent of the competitive relationship between the products in the market of the regulating WTO Member.

47. The universe of products that the Panel must consider is all domestic seal products that are "like" the products from Canada and products that originate from other countries, whether they conform to the conditions imposed by the EU Seal Regime or not. Any grouping of products based on differences in how the products are treated under the EU Seal Regime does not alter the fact that they are in a competitive relationship. In this case, all seal products are in a competitive relationship despite any differentiation between the seal products based on who produces them, where they originate from or the purpose for which they are produced. The different situations that may exist in the production of seal products do not affect which seal products are to be compared for the purpose of determining discrimination under the GATT 1994 or the TBT Agreement.

48. Product grouping does not have any role in a determination of a violation under Article I:1. The test for a violation under Article I:1 is not whether there has been less favourable treatment accorded to a like product from one country but whether an advantage has been provided to a like product from a WTO Member that is not accorded immediately and unconditionally to an individual like product from any other country. The fact that some like products, which are placed into a category or group of products under a measure, are accorded an advantage does not negate the failure to accord the same advantage to a like product that is not part of that group.

49. In addition, the division of products into groups is not relevant in proving less favourable treatment. Generally, different treatment between like products is not dispositive of less favourable treatment. The inverse is also true in that treatment under a measure that results in the same treatment being accorded to domestic and some imported products does not prove that there is no less favourable treatment. A violation is established when there has been a change in the conditions of competition to the detriment of imported products as a whole. It is not necessary to show a detriment to every single imported product. Where almost all of the imported products are accorded less favourable treatment, which is the case for Canadian seal products, this is sufficient to demonstrate a violation of the non-discrimination obligations in Articles I:1 and III:4.

50. Even if the groupings of like products based on different situations should be assessed, *quod non*, the result in this case would still be that the overwhelming majority of Canadian seal products are discriminated against. By comparison, virtually all EU and Greenlandic seal products conform to the EU Seal Regime conditions and thus receive more favourable treatment by being able to compete in the EU market. The fact that there may be equal treatment amongst a sub-category of products, or that the conditions under such sub-categories are origin-neutral on their face, does not dismiss the discrimination against nearly all Canadian seal products.

5. GATT Article XX

51. In *US – Gasoline*, the Appellate Body found that the burden of proof rests on the party invoking a GATT XX exception. The European Union has conceded that point. Accordingly, it must demonstrate that its measure falls within the scope of either Article XX(a) or (b), and that it is necessary for the protection of public morals or the protection of animal life or health. In particular, the European Union must demonstrate that the less favourable treatment accorded to Canadian seal products (Article III:4) and the failure to grant to those products the same advantage granted to Greenlandic seal products (Article I:1) are necessary to protect public morals or animal life or health. It is also for the European Union to demonstrate that its measure, in its application, does not constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.

52. According to the European Union, its measure pursues two closely related objectives: addressing the moral concerns of the EU population with regard to the welfare of seals, and contributing to the welfare of seals by reducing the number killed in an inhumane way. The first objective is stated to be the "overarching" objective of the EU Seal Regime. As explained by the European Union, by reducing the global demand for seal products and thus the number of seals not killed in a humane way, this improves the welfare of seals and partially addresses the alleged moral concerns of the EU population. The alleged moral concerns are also addressed because EU

citizens would not be an "accomplice" to an immoral act being the killing of seals in an inhumane way and they would not be confronted with seal products that result from such activity.

53. In addition, the European Union asserts that both moral concerns stem from a basic rule of morality according to which it is wrong for humans to inflict suffering on animals without sufficient justification. This rule attempts to bring the objectives of protecting the economic and social interests of the Inuit and marine resources management under the "umbrella" objective of public morals. Canada also observes that this so-called basic rule of morality is not articulated anywhere else in official EU documents dealing with animal welfare issues, despite the fact that there is a considerable body of both policy and legislative documents that deal with animal welfare in the European Union. The complete absence of such references suggests that its articulation here is largely an *ex post facto* attempt to justify the EU Seal Regime.

54. As recognized by the Appellate Body in *US – COOL* and *US – Gambling,* a Member's characterization of its own measure is not binding on a panel, which may also look to the structure and operation of the measure along with contrary evidence adduced by the complainant. The evidence shows that the EU Seal Regime has a number of objectives, with the primary goal being to address animal welfare. The Basic Regulation refers to the animal welfare aspects of harvesting seals and the concerns of citizens about those animal welfare aspects. In contrast, the EU Seal Regime does not refer either to the public morals of EU citizens or to the need to protect them. Concerns about seal welfare as such can be based on a broad range of factors not connected to a judgement as to the rightness or wrongness of specific conduct, including pragmatic or utilitarian considerations, or a desire to minimize pain and suffering. In this dispute, the public concerns relating to the animal welfare of seals are just that – a public concern.

a) Article XX(a) (protection of public morals)

55. Under this provision, the European Union must establish that (1) the purpose of the measure falls within the scope of protecting public morals, and (2) the measure is necessary to accomplish that objective. The EU Seal Regime does not fall within the type of measures under Article XX(a) as the alleged public moral upon which it is based is not a clearly discernible and unambiguous rule of right and wrong conduct. The content of the moral norm is not precise enough to allow individuals to understand what is required to adhere to it. In addition, the alleged moral norm is not applied consistently in the EU Seal Regime, undermining its coherence and precluding the alleged norm from rising to the level of a moral imperative. The EU Seal Regime also does not protect the public morals of its citizens. In any event, even if the EU Seal Regime is measure that falls under Article XX(a), it would not be necessary to achieve the protection of public morals.

56. The panel in *US – Gambling* defined "public morals" as "standards of right and wrong conduct maintained by or on behalf of a community or nation". This phrase discloses several elements that must be present for a measure to be said to concern itself with the protection of public morals. First, the policy being pursued must include a clearly discernible standard with a normative dimension that discloses whether conduct is right or wrong. Second, it must be clear what conduct is at issue and whose conduct is being targeted by the measure. Third, the phrase "maintained by or on behalf of a community or nation" suggests that a high level of consensus must exist with respect to whether the conduct in question is right or wrong. In addition, Article XX(a) refers to the "protection" of public morals, which entails that the purpose of a measure sought to be justified under that provision is to forestall or prevent some type of harm.

57. In *US – Gambling* and *China – Publications and Audiovisual Products*, there was ample evidence that the measure aimed to prevent societal harm from the particular service or product being regulated. In both cases, the evidence that allowing the importation of the products or service would give rise to a risk of harm to the society of the Member whose measure was at issue was inherent in the measure. Further, the complainants in these disputes did not argue that the measures at issue were not measures to protect public morals. This is not the case in the present dispute.

58. The European Union has failed to meet its burden to establish the existence of a clearly discernible and unambiguous rule of moral conduct, and that the conduct gives rise to a risk of harm within its territory. Its articulation of the alleged public morality objective has changed over

the course of this dispute, which demonstrates the risk of accepting an ill-defined public morality objective. The European Union sometimes uses the term "excessive" when it refers to "pain, distress, fear and other forms of suffering" but it does not do so in all cases. While the European Union does not define that term, its ordinary meaning implies that some level of pain is acceptable. This also undermines the European Union's argument that the hunt is inherently inhumane as a concern regarding "excessive suffering" acknowledges that there is a degree of suffering that is acceptable to the EU public. On that point, the Commission's proposal and Regulation 1099/2009 both refer to "avoidable" pain, distress and other forms of suffering. Later in the course of these proceedings, the European Union indicated that it is seeking to, "uphold a standard of conduct according to which it is morally wrong for humans to inflict suffering upon animals without sufficient justification." This last phrase is inherently subjective and it offers little guidance as to what would constitute acceptable conduct and under what circumstances. The European Union has not explained how these apparently different characterizations of the alleged moral norm relate to each other, or if they are meant to articulate the same standard.

59. It is not enough for the European Union to assert that its measure reflects a public norm in the sense of a standard of right and wrong conduct. As the party alleging the affirmative of this factual claim, it must demonstrate the existence of that standard with affirmative evidence. The European Union claims that these moral concerns are evidenced by a series of opinion polls conducted between 2006 and 2008 (prior to the entry into force if the EU Seal Regime) in several EU Member States and a multi-country survey conducted after the measure was adopted. The evidence advanced by the European Union suffers from a number of critical shortcomings. First, many of the surveys cited by the European Union do not provide sufficient information (e.g., margins of error, confidence intervals, response rates and sampling methodology) to determine whether they are methodologically sound from the standpoint of proper survey techniques. Thus, it is impossible to extrapolate the findings of the surveys to the broader population. In addition, most of the surveys are quite old. Second, the polls disclose that the views of EU citizens are not rooted in any knowledge about the hunt. In some cases, the views are even expressed by respondents who profess not to be aware of the hunt. Even for those respondents who characterized themselves as knowledgeable, perceptions regarding the humaneness of Canada's commercial seal hunt are contradicted by the most recently available peer-reviewed scientific evidence. Third, several of the surveys filed by the EU as exhibits contain questions that do not comport with proper question design, and are framed in a leading or biased manner, undermining the accuracy of the data generated from the answers. In sum, the public survey evidence advanced by the European Union does not support its assertion that the EU public is deeply concerned, in moral terms, about the presence of seal products on the EU market. However, it does show that, in general, EU citizens do not know very much at all about the seal industry. More generally, public opinion cannot itself be equated with public morals.

60. The idea that the EU Seal Regime addresses public moral concerns rests on a false premise that the commercial seal hunt is inherently inhumane. This is not the case. Therefore, any public concerns, be they moral in nature or reflecting some other value, are based on misinformation about the seal hunt. Hence, the European Union's claim that the concerns of EU citizens will be addressed by the expectation that fewer seals will be killed inhumanely is rooted in the misperception that a significant number of seals are not killed humanely as part of the Canadian seal hunt.

61. The European Union's alleged moral norm does not apply universally. According to the European Union, the concerns of the public relate only to seals that are killed in commercial hunts. The European Union claims that it is consistent with its public morals objective to allow seal products to be placed on its market despite the risk that the seals from which they were derived were killed in a manner that gave rise to the "moral concerns" in the first place, provided that they satisfy the conditions in the IC or MM categories. The European Union alleges that the hunts covered by the IC and MM categories justify or require toleration of a higher level of risk to the welfare of seals.

62. The European Union thus seeks to distinguish between seal products on the basis that they derive from "commercial" or "non-commercial" seal hunts, but this distinction is illusory for a number of reasons. First, the polls cited by the European Union did not elicit views on the trade-offs between seal welfare and the economic and social interests of the Inuit or marine resource management. Moreover, nowhere does the European Union adequately explain why allowing products to be placed under the IC and MM categories could not be conditioned on a requirement

that animal welfare standards be respected. Second, to the extent that seals experience pain and suffering when they are killed, this is not increased or decreased depending on the purpose of the hunt. What matters is the harvesting method used and whether it is applied effectively. Hence, if there is a standard of conduct with respect to the killing of seals based on the degree of suffering, that standard must apply consistently and coherently, regardless of the purpose of the hunt. Third, hunts that qualify under the IC and MM categories have significant commercial dimensions. For instance, over one-half of the total annual seal harvest in Greenland is sold commercially. Marine management hunts also have a commercial element as they are used to minimize damage to commercial fisheries and the seal by-products are traded commercially, even if the fisher/sealer is prevented from making a profit. In addition, the EU Seal Regime allows for commercial activities within the EU such as sales at auction houses, inward processing for export and production of final products for export.

63. The European Union's articulation of the alleged public morality objective was transformed from a single objective based on concerns about animal welfare and the possible presence on the market of products derived from animals killed in a way that causes pain and suffering, to a rule of public morality in which it is acceptable, even required, to inflict suffering upon seals provided that there is a sufficient justification. The European Union has not been able to provide any objective criteria to determine whether there is a sufficient justification. The European Union has not provided a consistent and coherent articulation of the public morality objective; rather, it has used the "umbrella" of public morals to cover various competing and contradictory objectives depending on which aspect of the EU Seal Regime it is trying to defend.

64. This is arbitrary and it fatally undermines the normative character of the standard of conduct that is allegedly the basis for the public moral concerns of EU citizens. The so-called standard is not applied consistently and coherently, and this is particularly problematic where the "exceptional" treatment essentially eviscerates the norm relating to the conduct. Indeed, the effect of the IC category is that seal products from Greenland can be imported into the European Union at numbers which would fully satisfy the historical demand for seal products, despite sealing practices that have been characterized by EFSA as falling below humane animal welfare standards.

65. The European Union is also required to demonstrate how the EU Seal Regime protects public morality in order for it to constitute a measure that falls within the scope of Article XX(a). It alleges that the moral concerns of its citizens would be "addressed" if the placement on the market of seal products is prohibited given that the population would then not be an "accomplice" to seals being killed in a manner that causes them excessive pain, fear, distress or other forms of suffering, and would not have to be confronted with such products on the EU market. Both of these claims presuppose that a failure to achieve these objectives would result in actual injury or harm to an EU citizen. None of the evidence provided by the European Union (including the polls) pertains specifically to any moral concerns about the hunt or discloses any specific injury or harm to EU citizens that would arise as a result of the continued trade in seal products. In addition, it is difficult to reconcile the alleged wrong conduct of buying and selling seal products in the European Union while allowing the marketing of seal products under the IC and MM categories. This is compounded by the Regime's toleration of the importation, use and consumption of seal products by EU citizens pursuant to the CC category, and the processing of such products for the purposes of exporting them from the EU. Therefore, the European Union has not established a public moral concern that is in need of protection in the sense of Article XX(a).

66. The European Union has also failed to discharge its burden that the EU Seal Regime is necessary to protect public morals. Establishing the necessity of a measure entails determining whether its discriminatory elements were necessary to achieve its objectives. According to the Appellate Body in *Brazil – Retreaded Tyres*, this is a weighing and balancing test between three elements: the importance of the common interests or values being sought; the extent of the contribution the measure makes to achieve the objective; and the degree of trade-restrictiveness of the measure. If this assessment leads to a finding of provisional necessity, a further assessment must be made of possible alternative measures advanced by the complainant that may be reasonably available to the WTO Member. The onus is then on the respondent to demonstrate that such alternative measures are not reasonably available and that they would not make an equivalent contribution to the achievement of the objective.

67. While the protection of public morals is, in principle, a highly important interest or value, an assessment of the relative importance of the interest or value at stake must take into account the

specific measure at issue and, in particular, the nature or quality of the harm that might be expected to arise, having regard to the specific circumstances of the matter before the Panel. The European Union has not fully explained whether the EU Seal Regime intended to "protect" public morals in the European Union; rather, it has stated that its measure is meant to "address" public moral concerns. However, there are reasons to doubt the seriousness of the harm that might be expected to arise from the presence of seal products on the EU market. First, the European Union only proscribes certain classes of seal products, which it characterizes as "commercial". Second, seal products that qualify under the three categories are permitted access to the EU market, regardless of whether they have been derived from seals killed in a manner that causes them excessive pain, fear, distress or other forms of suffering. It is thus entirely possible that EU citizens will continue to be confronted with the very products about which the EU alleges they harbour serious moral concerns. Further, because of the absence of labelling requirements, these citizens will have no way of knowing whether the seal products with which they are being confronted will have been derived from seals killed in such manner. Third, under the CC category, EU citizens remain free to purchase seal products that do not qualify to be placed on the EU market and other citizens will continue to be confronted with them in their daily lives.

68. In *Brazil – Retreaded Tyres*, the Appellate Body determined that a measure must make a material contribution to the achievement of the objective. A measure that makes a marginal or insignificant contribution to the achievement of the objective cannot be considered necessary especially where it is very trade-restrictive. A panel is required to assess the "actual contribution" made by the measure to the objective pursued. To demonstrate that such contribution has been made, there must be a genuine relationship of ends and means between the objective pursued and the measure at issue.

69. The EU Seal Regime does not make a material contribution to the objective of protecting the public morals of EU citizens relating to the welfare of seals. The categories of seal products that can be placed on the market regardless of animal welfare concerns highlights the marginal contribution the EU Seal Regime makes towards protecting animal welfare and the moral concerns surrounding the alleged inhumaneness of the seal hunt. The EU Seal Regime does not prevent EU citizens from being complicit in seal hunts that conflict with positive animal welfare outcomes, which is at the root of their alleged moral concerns. This is because seal products can still enter the EU under the categories without any requirement that the seals be killed humanely. The measure thus fails to address the alleged moral concerns of EU citizens and does not make a material contribution to the objective of protecting public morality.

70. In addition, the European Union has failed to explain the public morality dimension of the seal product categories that would justify, under its rationale, accepting the alleged wrongful conduct, that is, inflicting pain and suffering on seals when they are killed. The European Union has not offered any evidence how the categories contribute to protecting public morals of EU citizens other than relying on its own bare assertions.

71. According to the Appellate Body, the more trade-restrictive a measure is, the more difficult it becomes to demonstrate that it is necessary to achieve the policy objective. In this case, the proper comparison to determine if the EU Seal Regime is trade-restrictive is to compare the measure as a whole, that is, the categories of seal products that can enter the European Union and the consequential prohibition of all other seal products, to the situation prior to the enactment of the measure when market access was not prohibited for commercial seal products. As the IC and MM categories impose conditions that limit which seal products may be imported and placed on the market, and that these categories exclude virtually all Canadian seal products, it is clear that the EU Seal Regime as a whole is severely trade-restrictive.

72. Weighing and balancing the relative low importance of the value or interest being pursued, the marginal contribution the measure makes to the protection of public morals and its severe trade-restrictiveness, leads to the conclusion that the measure is not provisionally necessary to protect public morals under Article XX(a). In any event, a less trade-restrictive alternative exists – that is a regime that conditions market access on compliance with animal welfare criteria for seal harvesting methods, combined with a certification and compulsory labelling scheme – and it is reasonably available to the European Union while offering at least an equivalent level of protection. Canada has identified the alternative measure in the context of TBT Article 2.2, which is equally applicable for the necessity test under Article XX in this case.

b) Article XX(b) (protection of animal life or health)

73. According to the European Union, its measure contributes to protecting the health of seals because it limits global demand for seal products, thereby reducing the number of seals that are killed in a manner that causes them excessive suffering. Canada considers that the animal welfare objective (i.e., the protection of seals from avoidable pain, distress and other forms of suffering) falls within the scope of the protection of animal health.

74. However, in this case, there is an insufficient "nexus" between the European Union and the seals whose welfare is allegedly protected under the EU Seal Regime. Those seals occur entirely outside EU territory. If a jurisdictional limitation to Article XX(b) exists, as found by the panel in *EC – Tariff Preferences,* the EU Seal Regime does not fall within the scope of Article XX(b).

75. If the EU Seal Regime falls within the scope of measures covered by Article XX(b), the EU Seal Regime is not necessary to protect the health of seals and a less trade-restrictive, reasonably available alternative exists that makes an equivalent or greater contribution to the protection of the welfare of seals.

76. The European Union claims that the Seal Regime contributes to protecting the health of seals because it has the effect of "limiting global demand for seal products, thereby reducing the number of seals which are killed every year in a manner that causes them excessive suffering". Its assertion that the Seal Regime will result in lowering the number of seals killed and thus the incidence of inhumane killings is not based on any specific evidence and is thus nothing more than speculation. In addition, the Seal Regime, due to the fact that seal products that derive from seals killed in an inhumane manner are permitted to be placed on the market while seal products that derive from seals killed in an inhumane manner are not, defeats the objective of protecting the welfare of seals. Finally, the Seal Regime allows several types of commercial activities within the European Union involving seal products without regard for whether the seals were killed humanely such as the importation for the purposes of processing and re-exportation.

c) Article XX – chapeau (arbitrary or unjustifiable discrimination)

77. If a measure is provisionally justified under Article XX(a) or (b), it still must meet the requirements of the chapeau. A measure must not be applied in a manner that would constitute "arbitrary or justifiable discrimination" between countries where the same conditions prevail or "a disguised restriction on international trade".

78. The focus of the analysis under the chapeau is on the application of the measure already found to be inconsistent with an obligation under the GATT 1994. The design, structure and expected operation of a measure can provide information about how a measure will be applied, including how it discriminates against imported products. The relevance of the measure's design, structure and expected operation is more readily apparent when there is no or little discretion available to authorities in the implementation of the measure. The parts of the measure that are to be assessed will consist of those that govern its application and that result in a violation of certain GATT provisions. In this case, it is the conditions under the EU Seal Regime, which determine whether a seal product can be either placed on the market or imported for that purpose, that govern its application.

79. As held by the Appellate Body in *US – Gasoline,* the type of discrimination examined under the chapeau differs from the discrimination giving rise to a violation under GATT Article I:1 or III:4. Analyzing whether the discrimination is arbitrary or unjustifiable will normally involve an analysis that relates primarily to the cause of the discrimination in the light of the policy objective. An important factor is whether the measure operates to exclude products from the market whose presence on that market would be consistent with the objective of the measure. If so, as found by the Appellate Body in *Brazil – Retreaded Tyres*, the restriction on trade is not rationally connected to the objective being pursued. For example, in *US – Shrimp*, the Appellate Body found that, in certain circumstances, shrimp caught abroad using methods identical to those employed in the United States would be excluded from that market. This result was judged to be at odds with the objective of the measure to protect and conserve sea turtles.

80. In this case, the regulatory distinctions between prohibited and permitted seal products under the IC and MM categories are not rationally connected to the policy objectives under Article XX(a) and (b). Permitting seal products to be placed on the EU market under the IC and MM categories, while disregarding animal welfare considerations, indicates that the discrimination does not relate to the pursuit of the objective of protecting seal welfare and even goes against it, as admitted by the European Union. Any public moral concerns that depend on such protection would also be undermined. Therefore, there is an absence of a genuine connection between the discrimination in the measure, as applied, and the objectives of the EU Seal Regime.

81. In addition, the rigidity with which the EU Seal Regime is applied and its disregard for the differing regulatory conditions amount to arbitrary and unjustifiable discrimination. Seal products are either permitted to, or prohibited from, being placed on the EU market because of the nature of the hunt but without any consideration as to how the hunt is regulated. Further, the European Union has failed to engage in multilateral negotiations on animal welfare standards in relation to seal hunting.

82. These factors strongly demonstrate that the EU Seal Regime, as applied, constitutes arbitrary and unjustifiable discrimination between countries where the same conditions prevail.

B. The EU Seal Regime violates the TBT Agreement

1. TBT Annex 1.1 (definition of "technical regulation")

83. Following the approach of the Appellate Body in *EC – Asbestos*, the EU Seal Regime should be viewed as an "integrated whole", taking into consideration both its prohibitive and permissive elements. In any event, whether these elements are viewed individually or together as an integrated whole, it is clear that the definition of "technical regulation" under TBT Annex 1.1 is met.

84. The EU Seal Regime applies to an identifiable group of products, namely all products. The EU Seal Regime lays down a product characteristic in the definition of "seal product": "all products […] deriving or obtained from seals". This is an intrinsic characteristic to the products covered by the measure. The product characteristic is prescribed in a negative manner: products placed on the EU market cannot contain seal unless they satisfy the conditions under the IC or MM categories. The conditions include applicable administrative provisions that must be met for products to have the product characteristic of containing seal. The same is true for products qualifying under the CC category.

85. The identity of a producer may also be a relevant factor in the identification of related processes and production methods. In this case, certain elements of the IC category can be characterized as such. Compliance with the product characteristics and administrative requirements is mandatory, as evidenced in the text of the Basic Regulation and the Implementing Regulation, as well as the imposition of penalties under the Implementing Regulation. Therefore, the EU Seal Regime is a technical regulation.

86. The European Union does not dispute that the EU Seal Regime applies to an identifiable group of products and that it is mandatory but it contends that the requirements under the IC and MM categories, considered separately, do not lay down product characteristics because they do not relate to the product itself. However, the issue is whether the EU Seal Regime, as a whole, establishes a regulatory scheme that conditions market access on whether a product exhibits a certain characteristic. In *EC – Asbestos*, the exceptions to the prohibition permitted certain products to contain chrysotile asbestos, which was the product characteristic, provided that certain conditions, unrelated to the products themselves, existed and that certain administrative requirements were met. The parallel in this case is that the three categories set out requirements that themselves are not product characteristics but are applicable to products with certain characteristics, that is, products containing seal. Thus, it is not necessary for the IC and MM categories to lay down product characteristics themselves, given that the measure as a whole does.

2. TBT Article 2.1 (national treatment)

87. The national treatment obligations in Article 2.1 and GATT III:4 contain the same core terms, namely like products and less favourable treatment. Canada has demonstrated that Canadian and EU seal products are "like" and that Canadian seal products are treated less favourably than domestic seal products under the MM category. However, unlike under Article III:4, a finding that a measure has resulted in a detrimental impact on competitive opportunities for the group of imported products *vis-à-vis* the group of domestic like products may not be inconsistent with Article 2.1 if the impact stems exclusively from a legitimate regulatory distinction.

88. There are two steps in the legitimate regulatory distinction test. First, the Panel must identify the regulatory distinction that causes the detrimental impact on the imported product as explained by the Appellate Body in *US – Tuna II (Mexico)*. This requires the Panel to determine the objective being pursued and how the distinction manifests itself, which can be discerned from the design, architecture, revealing structure, operation and application of the measure. Second, the legitimacy of the distinction is assessed. This is done by examining whether the regulatory distinction is even-handed. In *US – COOL*, the Appellate Body found that evidence of "arbitrary and unjustifiable discrimination" towards imported products would tend to show that the measure is not "even-handed", and that a measure that is not designed or implemented in an even-handed manner cannot be considered to have a legitimate regulatory distinction. To determine whether it is legitimate, the regulatory distinction must be assessed against the backdrop of its objectives. However, the legitimacy of the objective cannot be equated with the legitimacy of the regulatory distinction.

89. The EU Seal Regime distinguishes between seal products that can be imported into the European Union or placed on the EU market and those that cannot. For seal products to qualify for importation and placement on the market, they must meet the conditions under the three categories in the EU Seal Regime. The regulatory distinction arises from the operation of the conditions.

90. With respect to the national treatment claim under Article 2.1, the distinction is between seal products from commercial seal hunts and from those marine management hunts. The regulatory distinction reflected in the conditions under the MM category is unrelated to the central objective of the EU Seal Regime to address animal welfare concerns or even the alleged public moral concerns. There is no requirement that the seals be harvested in a way that avoids pain, distress and other forms of suffering. The design, structure and expected operation of the conditions leave open the possibility that products derived from seals that suffered pain and distress when killed will be available on the EU market. The European Union assumes that marine management hunts are conducted in a way that positive animal welfare outcomes can be achieved due to the incentive of sealers to be able to recoup the costs of seal hunts, rather than imposing any specific requirements to that effect. However, under the EU Seal Regime, the Canadian east coast seal hunt does not benefit from the same assumption. Therefore, the distinction between hunts is arbitrary given that the same logic would apply to commercial sealers. The European Union also disregards the fact that marine management hunts have commercial elements because they are conducted to protect fisheries and because the MM category only eliminates profit-making from the seal products at the hunt level but allows it at the downstream level through processing, manufacturing and retailing.

91. Distinguishing between seal products based on whether the seals are harvested on a profit or non-profit basis is not relevant to the efficacy of the objective relating to sustainable marine management and it bears no rational connection to it. Also, there is no rational connection between the objective of promoting the sustainable management of seal populations and restricting commerce in seal products. The regulatory distinction also arbitrarily favours marine management programs involving small seal populations such as those in Sweden, Finland and the United Kingdom. The conditions are arbitrary and unjustifiable in that they reflect the characteristics of the hunts taking place in those countries.

92. The distinction between commercial and non-commercial hunts that the European Union claims to be legitimate is more apparent than real given the commercial elements of non-commercial hunts. Seal products qualifying under the MM category have tangible commercial elements that are not just the "'incidental' or 'ancillary' results" of such hunts. Further, such a

distinction is not legitimate as it is not applied consistently under the EU Seal Regime and it is therefore arbitrary. It is also unjustifiable in that it ignores animal welfare considerations. Non-commercial seal products can still be placed on the market without any requirement that the seals from which those products are derived be killed without experiencing excessive pain, fear, distress or other forms of suffering. The distinction is administered in an arbitrary and unjustifiable manner and is therefore not even-handed.

93. It is clear that the detrimental impact on virtually all Canadian seal products arising from the conditions under the MM category cannot be explained exclusively by a legitimate regulatory distinction. Rather, it reflects discrimination and results in a violation of the national treatment obligation found in Article 2.1.

3. TBT Article 2.1 (most-favoured-nation treatment)

94. The MFN obligation under Article 2.1 requires that the imported products be "like" the products originating in other countries that have access to the market of the regulating WTO Member, and that the treatment accorded by the measure to products originating in the complainant be no "less favourable" than that accorded to like products of other countries. The Appellate Body in *US – Tuna II (Mexico)* suggests that the legitimate regulatory distinction element is also part of the MFN test.

95. The EU Seal Regime violates the MFN obligation under Article 2.1 because it accords less favourable treatment to seal products from Canada as compared to like products originating in Denmark (Greenland). Greenlandic and Canadian seal products are like products, as confirmed by the European Union. The EU Seal Regime creates inequality of competitive opportunities for Canadian seal products as the EU market is closed to virtually all of them while effectively being open to all seal products from Greenland. Thus, the EU Seal Regime modifies the conditions of competition to the detriment of Canadian seal products resulting in inequality of competitive opportunities.

96. The detrimental impact from the loss of competitive opportunities is not based exclusively on a legitimate regulatory distinction. The distinction between commercial seal products and IC seal products is not even-handed because it is administered in an arbitrary and unjustifiable manner. First, the regulatory distinction is unjustifiable in that it does not contribute to the advancement of the EU's animal welfare objective. This is because the EU Seal Regime allows the marketing of seal products derived or manufactured from large-scale seal harvests in Greenland on the grounds that those are Inuit hunts, but it does not impose any requirements that the seals be killed humanely. A significant number of seals killed as part of that hunt are harvested in a manner that is likely to lead to avoidable pain or suffering. Second, the IC category is arbitrary in that it restricts the harvesting of seals to a narrow population of hunters based only on their ethnic origin while disregarding the significant commercial aspects of the Greenlandic seal hunt. In addition, the distinction ignores the similarities between the historical and socio-economic context of the Greenlandic and Canadian seal harvests. Canadian east coast seal products meet all of the conditions under the IC category except for the indigenous status of the harvester.

97. The regulatory distinction under the EU Seal Regime is not even-handed and therefore not legitimate. Consequently, the detrimental impact from the changes in the conditions of competition reflects discrimination and therefore the EU Seal Regime violates the MFN obligation found in Article 2.1.

4. Incorrect legal standard proposed by the EU under Article 2.1

98. Contrary to the test set out by the Appellate Body in *US – Clove Cigarettes*, the European Union conflates the detrimental impact and legitimate regulatory distinction elements of the less favourable treatment test by making regulatory objectives a factor in determining whether the measure has caused a detrimental impact on the competitive opportunities for imported seal products. According to the European Union, the regulatory objectives of the measure create different situations that justify the creation of sub-categories of like products within which there is no differential treatment. This does not mitigate, nor justify, the detrimental impact on the competitive opportunities for seal products that fall under one of the sub-categories. The European

Union's claim that different circumstances are relevant in addressing whether there has been a detrimental impact on imported products has no jurisprudential support.

5. TBT Article 2.2

a) Objectives of the EU Seal Regime

99. The EU Seal Regime pursues different and often contradictory objectives. The overarching objectives, based on the legislative history and the preamble of the measure, are to protect the animal welfare of seals and to address public concerns in that regard. In addition, the EU Seal Regime appears to pursue other objectives: prevention of consumer confusion; protection of the economic and social interests of Inuit and other indigenous communities engaged in sealing; sustainable management of marine resources; consumer choice; and the harmonization of the EU internal market.

100. These objectives can be discerned from the design, architecture and structure of the EU Seal Regime and the legislative history of the Basic Regulation. Notably, the objective of ensuring animal welfare, which is in the preamble, is absent from the operative text of the EU Seal Regime. Also, the alleged public morality objective of the EU Seal Regime is not articulated anywhere in the measure. The preamble of Basic Regulation refers to concerns about the animal welfare of seals but these concerns are qualitatively different from moral concerns about seal welfare. In other words, the concerns to which the EU Seal Regime refers do not arise from a standard of right or wrong conduct regarding the killing of seals; rather, they relate to a desire to minimize or prevent pain, distress, fear and other forms of suffering when seals are killed. The evidence submitted by the European Union fails to establish that any concerns expressed by EU citizens are moral in nature.

b) Legitimacy of the objectives

101. Animal welfare appears to fall within the scope of the objective relating to the protection of animal life or health listed in Article 2.2. It is therefore legitimate for the purposes of that provision. Providing consumers with product information is likely to be a legitimate objective. The panel in *US – COOL* concluded – a finding that was upheld by the Appellate Body – that providing consumer information is related to the prevention of deceptive practices which is a legitimate objective under Article 2.2. Protecting the economic and social interests of Inuit and other indigenous communities engaged in seal hunting does not fall within the list of objectives contained in Article 2.2. Nevertheless, it is a policy matter that has received international attention and is of considerable importance for Canada, and it also falls within the types of policies for which governments are generally acknowledged to carry responsibility. It is therefore a legitimate objective for the purposes of Article 2.2. The sustainable management of marine resources is an aspect of protecting the environment, as found by the Appellate Body in *US – Shrimp.* The protection of the environment is listed in Article 2.2. Consequently, it is also a legitimate objective. Preserving the personal choice of consumers is not one of the enumerated objectives; however, it is consistent with the overall objectives of the WTO regime. Finally, the harmonization of the EU internal market does not fall within the enumerated objectives in Article 2.2, nor can it be found elsewhere in the TBT Agreement or the WTO Agreement. As conceded by the European Union, in this case, it is not a legitimate objective for the purposes of Article 2.2.

c) Necessity of the EU Seal Regime

102. Determining whether a technical regulation is more trade-restrictive than necessary involves a weighing and balancing of three factors (trade-restrictiveness, degree of contribution to the objective, and risks arising from non-fulfilment), as well as the consideration of possible alternative measures. It is not disputed that the EU Seal Regime is trade-restrictive. However, the European Union misinterprets and misapplies the jurisprudence when it suggests that only the prohibitive aspect of the measure and not the permissive aspects need to be examined under Article 2.2 because the operations of the categories allow trade that would otherwise be prohibited. Both aspects of the EU Seal Regime must be examined, and the comparison to determine whether the measure is trade-restrictive is between the measure as a whole and the situation prior to the EU Seal Regime, that is, the absence of restrictions on the import and placing on the market of seal products.

103. The EU Seal Regime either does not contribute or partially contributes to its objectives. In some cases, the Seal Regime, based on its design, structure and expected operation, undermines its objectives. As determined by the Appellate Body in *US – COOL*, a panel is not required to identify the level at which the respondent aims to achieve or fulfil the objective but only to "assess the degree to which a Member's technical regulation, as adopted, written and applied, contributes to the legitimate objective pursued by that Member". Thus, it is the actual contribution of the measure to the objective that is relevant.

104. The EU Seal Regime prohibits the importation and placing on the market of seal products unless they meet the conditions of the EU Seal Regime. At the same time, the trade in the categories of seal products undermine the achievement of the purported objective of public morality by allowing for the possibility that an unlimited number of seal products derived from seals killed inhumanely will have access to the EU market. The result is that EU citizens will be confronted by the very products that the European Union claims they abhor. Any indirect and minor contribution to the animal welfare objective and alleged public moral objective is offset by granting market access to seal products that do not meet animal welfare standards.

105. The EU Seal Regime partially contributes to the protection of the economic and social interests of Inuit Communities engaged in seal harvesting but, as conceded by the European Union, also undermines it. In particular, the replacement of Canadian east coast seal products with those of the Canadian Inuit is unlikely to occur, as recognized in COWI's 2010 report, due to factors such as remoteness of the communities and limited access to the supply chains needed to increase production

106. The EU Seal Regime partially contributes to the sustainable marine management objective but, in some cases, it undermines it. The MM category allows the by-products of this type of harvest to be placed on the market and some of its conditions support this objective. However, some of its other conditions (i.e., "sole purpose", "non-profit basis", "non-systematic way" and "not of a commercial nature") result in the exclusion of seal products that derive from sustainable marine management hunts.

107. The EU Seal Regime makes no contribution towards the objective of preventing consumer confusion. The Implementing Regulation does not provide any information to retail consumers with respect to the presence of seal in the product, compliance with animal welfare criteria, or whether the conditions under the EU Seal Regime have been met.

108. The EU Seal Regime only partly contributes to the objective of protecting consumer choice but it also undermines it as consumers who do not want to purchase seal products may still inadvertently do so because they lack the information necessary to make an informed choice. Further, consumers who want to purchase seal products but do not have the option of travelling abroad can only purchase from a limited supply of seal products, namely those that meet the IC and MM categories.

109. The nature of the risks of non-fulfilment of the objectives of the measure and the gravity of the consequences arising from such non-fulfilment must be examined for each legitimate objective. Under the EU Seal Regime, the objective of animal welfare is important and the consequences of non-fulfilment are serious. However, the EU Seal Regime makes little to no contribution to the objective and thus the consequences of non-fulfilment have already been accepted through the placement on the market of seal products that derive from seals killed in a way that causes pain and suffering. In that regard, the risks non-fulfillment would create in relation to the alleged public moral objective are that EU citizens would be morally offended about the continuous inhumane killing of seals and the products from those hunts being placed on the EU market. An additional risk is that EU consumers would continue participating or being complicit in supporting the market for products from inhumanely killed seals. In fact, the EU Seal Regime already exposes the EU public to these risks by allowing Greenlandic and EU seal products to be placed on the market under the IC and MM categories.

110. The risk that the consumers may be confused as to whether products contain seal harvested in a manner consistent with animal welfare principles and may inadvertently purchase such products that are not already accepted under the EU Seal Regime. Thus, the European Union's rejection of a labelling system that would inform consumers demonstrates that the risks of

confusion are not significant and the consequences of non-fulfilment of the objective are not particularly serious.

111. The EU Seal Regime restricts the fulfillment of the objective regarding consumer choice to those able to travel abroad. Therefore, the consequences that many EU consumers will be unable to purchase seal products within the European Union are accepted under the EU Seal Regime.

112. Some of the conditions under the MM category (i.e., non-profit, non-systematic) prevent trade in seal products derived from sustainably managed hunts. In addition, these conditions provide no incentive for sustainable marine management in commercial harvests. Thus, the risks that the objective of sustainable marine management will not be fulfilled are tolerated because of the conditions.

113. Canada has put forward a measure that has three main features: (1) it sets out animal welfare requirements that must be met; (2) it requires certification of, and compliance with those requirements; and, (3) it includes product labelling. As found by the Appellate Body *in US – Tuna II (Mexico)*, the alternative measure must make an equivalent or greater contribution to the fulfillment of the objective than the measure at issue. There is no requirement for the alternative measure to fully achieve the objective at the level of fulfilment chosen by the Member if the measure at issue does not fully achieve the objective at that level.

114. At best, the EU Seal Regime makes a minor and indirect contribution to the objectives of protecting animal welfare and addressing alleged public moral concerns related to this issue. On the other hand, conditioning compliance on animal welfare standards would make a substantial and thus greater contribution to those objectives directly addressing the methods of killing seals. The European Union concedes that fulfilling the animal welfare objective would also address any related public moral concerns, which means that conditioning market access on compliance with animal welfare requirements would fulfil both objectives. In addition, EU consumers would not be confronted with seal products that derive from inhumanely killed seals nor be accomplice to such killing.

115. The alternative measure would provide market access for all seal products, as long as those products were derived from seals harvested in a manner that meets animal welfare standards. This would keep the commercial supply chains of the market intact and restore the demand and higher prices for seal products. The alternative measure would thus advance the objective of protecting the economic and social interests of the Inuit by allowing them to market their products in a global market driven by demand and therefore provide much-needed income for other subsistence activities. Thus, the alternative measure would make a greater contribution to protecting the economic and social interests of the Inuit than the EU Seal Regime.

116. The alternative measure, by requiring the use of a label on the final product when sold to the retail consumer, would make a greater contribution to the objective of preventing consumer confusion by enabling consumers to make informed purchases. It also would facilitate greater consumer choice as consumers would have the option of purchasing any seal products harvested in accordance with animal welfare requirements, and thus have a wider variety of products from which to select.

117. The alternative measure would encourage sustainable marine management by allowing market access for all seal products that meet the requirements relating to conservation and sustainable marine management, many of which are currently excluded under the EU Seal Regime.

118. The alternative measure proposed by Canada is reasonably available. Scientifically-based animal welfare criteria are available and applied at the international, regional and national levels. The general principle is that methods of animal harvest should not cause avoidable pain, distress or other forms of suffering. There are also accepted, general rules or steps in methods of harvest that can be and are applied to animals taking into account, *inter alia*, their physiology, behaviours and mental states. These rules or steps are expressed in different ways, but common to them are requirements to strike, check and bleed the animal. The field studies of Canada's seal harvest found its protection of animal welfare comparable to, or better than that found in other types of hunts and some domestic slaughters. This demonstrates that meaningful and measurable animal welfare criteria for the harvesting of seals is currently available and being applied. It is also

possible to monitor and enforce compliance with these criteria, as found in the study conducted by Professors Daoust and Caraguel.

119. The second element of the alternative measure, certification of compliance with animal welfare requirements, is reasonably available. The Implementing Regulation requires that a seal product be accompanied by an "attesting document" at the time of placing on the market, which is issued by a "recognized body". Therefore, the structure for certification already exists, and the functions of that body could be modified to require that it have the capacity to ascertain if the animal welfare criteria are met and to monitor compliance. In addition, the regulation proposed by the Commission in 2008 also provided for a certification scheme for seal products meeting animal welfare criteria. The EU also has a process in place to certify individuals and slaughterhouses with respect to animal welfare criteria under Regulation 1099/2009. Given that the EU Seal Regime significantly affects non-EU countries, the *Agreement on International Humane Trapping Standards* provides another possible model for certification under which the animal welfare criteria are certified based on certification in the exporting country. The European Union could then establish conformity assessment requirements for the recognition of these products. In the context of a wild game hunt, the certification of the hunter can be done through the licencing process. Thus, contrary to the European Union's argument, certification does not need to be done on a seal-by-seal basis. In fact, the European Union does not require animal-by-animal certification in the killing of any other animals.

120. The third element of the alternative measure, product labelling, is reasonably available. A labelling scheme was considered by the Commission and proposed by the European Parliament's Committee on the Internal Market and Consumer Protection.

121. In *Korea – Various Measures on Beef*, the Appellate Body recognized that measures addressing similar risks and objectives in "related product areas" or with respect to "like, or at least similar, products" can provide guidance on possible alternatives that are reasonably available. For instance, the EU set up a system under Regulation 1099/2009, composed of animal welfare criteria, competence certification, supervision and monitoring, and penalties and enforcement provisions. This is in stark contrast to the approach applied to the Canadian seal hunt. Given that one of the underlying issues and overarching objectives of both the Regulation 1099/2009 and the EU Seal Regime are protecting animal welfare, there is no logical reason why a similar regime could not be applied to seals and seal products.

122. The reasonable availability of the alternative measure is also confirmed by looking at similar schemes for other animals (e.g., labelling and certification scheme for the commercial harvest of kangaroos and international trade in the resulting skins and meat, Origin Assured certification and labelling scheme for fur products, France's Label Rouge) and the regulatory approach taken by EU Member States with respect to wild deer hunts, an activity that presents many characteristics that are very similar to Canada's east coast seal hunt.

123. The alternative proposed by Canada is less trade-restrictive than the EU Seal Regime. Currently, all non-Inuit commercial seal products are effectively excluded from the EU market as they cannot meet either the IC or MM requirements. The alternative regime would exclude products that do not meet the animal welfare requirements. However, it would allow all seal products to be placed on the EU market provided they meet those requirements. In its initial proposal, the Commission concluded that such a measure constituted the "least burdensome measure" that can effectively achieve the objectives of the EU Seal Regime.

6. TBT Article 5

124. The certification regime created by the Implementing Regulation (recognized bodies, attesting documents and competent authorities) constitutes a CAP as defined in TBT Annex 1.3. It is thus subject to Article 5. However, that regime has not been fully operationalized and seal products that satisfy the conditions of the IC and MM categories are therefore unable to be placed on the EU market. This is due to the fact that the European Union has failed to establish a body that is authorized to assess conformity and to issue attesting documents.

a) Article 5.1.2

125. The failure by the European Union to ensure the existence of a recognized body means that the CAP cannot function, which prevents trade in seal products even if they meet the applicable conditions. This amounts to an unnecessary obstacle to international trade. The European Union elected to set up a regime whereby it will consider applications for third party entities requesting that they be listed as "recognized bodies" instead of creating one under the Implementing Regulation. Conditioning market access on the prospect that a third party entity will apply for, and be recognized as such by the EU, creates uncertainty. Further, even if a recognized body is established, it may decide at any time to cease its operations or it could have its authority revoked by the Commission. Thus, the failure by the European Union to ensure that a recognized body exists amounts to a violation of Article 5.1.2.

126. The similarities between TBT Articles 5.1.2 and 2.2 suggest that the test under both provisions is very similar. Textually, the first sentence of Article 2.2 and that of Article 5.1.2 are virtually identical, and the second sentence of Article 5.1.2 contains further close textual similarities as compared to the second sentence of Article 2.2. The fifth preambular recital of the TBT Agreement was explicitly referred to by the Appellate Body in *US – Clove Cigarettes*, as being relevant to an interpretation of Article 2.2. Given the reference to CAPs in the fifth recital, its terms are equally applicable to them. Conceptually, the requirement under Article 2.2 that links trade-restrictiveness to the achievement of a specific objective is very similar to the requirement in Article 5.1.2 that links the strictness of the CAP to the objective of ensuring conformity with the substantive requirement set out in the relevant technical regulation. In both cases, the concept invites the application of what the Appellate Body, in *US – Tuna II (Mexico)*, has referred to as a relational analysis to determine whether the CAP is necessary. This would include consideration of reasonably available, less trade-restrictive alternative measures, such as supplier declaration of conformity, rather than a third party CAP.

b) Article 5.2.1

127. Given the similarities with Annex C.1(a) to the SPS Agreement, the approach of the panel in *EC – Biotech* provides relevant guidance to the interpretation of Article 5.2.1. The panel in that case found that Annex C.(1)(a) requires that "approval procedures be undertaken and completed with no unjustifiable loss of time". The Implementing Regulation does not provide for the creation of a recognized body, but merely creates a process whereby an entity can apply to become such a body. As a result, the CAP cannot be undertaken and completed "as expeditiously as possible" and the European Union's failure to create a recognized body gives rise to a violation of Article 5.2.1.

128. The chapeau of Article 5.2 signifies that the specific obligations set out in Article 5.2.1, while being autonomous obligations that are in addition to the general obligation in Article 5.1.2, are also relevant to a determination of whether a CAP, in its development or implementation, meets the requirements set out in the more general obligation in Article 5.1.2. Thus, a WTO Member may violate both Article 5.1.2 (e.g., because its CAP is applied more strictly than necessary to give the Member concerned adequate confidence that a product conforms to its technical regulation) and Article 5.2.1 (e.g., because the CAP was not undertaken and completed as expeditiously as possible). At the same time, Article 5.2.1 is not exhaustive of the considerations that may go into an analysis of whether a given CAP meets the requirements set out in Article 5.1.2.

C. The EU Seal Regime nullifies or impairs benefits accruing to Canada in the sense of Article XXIII:1(b) of the GATT 1994

129. If the Panel were to find that the EU Seal Regime does not violate the TBT Agreement or the GATT 1994, its application nevertheless nullifies or impairs benefits that would otherwise accrue to Canada in a manner that is inconsistent with GATT Article XXIII:I(b). The adoption of the EU Seal Regime has essentially nullified and impaired the value of these concessions since 20 August 2010. Canada's claim is in respect of all the products covered by the indicative list published by the Commission. The European Union granted market access concessions to Canada for these products in the Tokyo and Uruguay Rounds.

130. The three elements that must be satisfied to prove this claim are present in this case. First, the European Union has applied the EU Seal Regime. Second, Canada had a "legitimate

expectation" of improved market access as a result of the relevant tariff concessions granted to it by the EU. At the time these concessions were made, Canada could not have anticipated the implementation of the EU Seal Regime and, therefore, Canada benefits from the presumption found by the panel in *Japan – Film*. The European Union has failed to rebut this presumption. While it relies on a description of anti-sealing activities and a series of trade measures that took place or were adopted over the last few decades, the European Union fails to acknowledge that, over the years, Canada has improved its sealing regulations and policies to address the concerns raised about its seal hunt. As a result of these efforts, Canada could not have reasonably anticipated the adoption of the EU Seal Regime. Third, the application of the EU Seal Regime has resulted in Canada's benefits under the GATT Article II:1(a) being nullified or impaired. The EU Seal Regime has resulted in an almost complete loss of access to the EU market for Canadian seal products and its adoption has almost completely nullified the value of the EU's tariff concessions. The relative conditions of competition between domestic and foreign products, or between foreign products of different origins, have been upset.

131. In response, the European Union argues that its measure does not discriminate in the sense of Articles I:1 and III:4 and that, as a result, it does not upset the competitive relationship between them. This argument should be rejected not only because the EU Seal Regime violates Articles I:1 and III:4 but also because, if upheld, it would make it impossible for a complainant to succeed in a non-violation claim pertaining to a measure that has been found to be in compliance with those provisions. The European Union's reasoning does not find support in the text of the WTO Agreement or the jurisprudence. As for the European Union's argument that the Panel should extend the application of the panel's approach in *EC – Asbestos* to situations where a measure pursuing one of the objectives in Article XX is found to be WTO-consistent rather than justified under that provision, the reasoning of the panel in that case contains a number of errors and should therefore not be followed by the Panel.

132. Pursuant to Article XXIII:1(b) and Article 26.1 of the DSU, Canada is entitled to have the balance of concessions restored through a mutually satisfactory adjustment.

IV. CONCLUSION AND REQUEST FOR RELIEF

133. Canada requests that the Panel find that the EU Seal Regime:

- is a technical regulation in the sense of TBT Annex 1.1;
- is inconsistent with the European Union's obligations under the TBT Agreement, in particular Articles 2.1, 2.2, 5.1.2 and 5.2.1;
- is inconsistent with the European Union's obligations under the GATT 1994, in particular Articles I:1, III:4 and XI:1; and,
- is not justified by Article XX(a) or XX(b) of the GATT 1994.

134. Accordingly, Canada requests, pursuant to Article 19.1 of the DSU, that the Panel recommend to the Dispute Settlement Body that it request the EU to bring its measures into conformity with its obligations under the TBT Agreement and the GATT 1994.

135. In the event that the Panel finds that the EU Seal Regime does not violate the European Union's obligations under the TBT Agreement or the GATT 1994, Canada requests that the Panel nevertheless find that the EU Seal Regime has nullified and impaired benefits accruing to Canada in the sense of Article XXIII:1(b), and recommend to the Dispute Settlement Body that it request the EU to make a mutually satisfactory adjustment as required by Article 26.1 of the DSU.

ANNEX B-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF NORWAY

I. THE MEASURE AT ISSUE

1. This dispute concerns the European Union's legislation that imposes restrictive conditions on the import and sale of products obtained from, or containing, seal ("seal products"), namely *Regulation (EC) No. 1007/2009 of 16 September 2009 on Trade in Seal Products* (the "Basic Seal Regulation") and *Regulation (EU) No. 737/2010 of 10 August 2010 Laying Down Detailed Rules for the Implementation of Regulation (EC) No. 1007/2009 of the European Parliament and of the Council on Trade in Seal Products* (the "Implementing Regulation"). These regulations are collectively referred to as the "EU Seal Regime".

2. The measure at issue consists of three sets of trade-restrictive conditions, which present both prohibitive and permissive elements. The *prohibitive* elements serve to limit the placing on the market of seal products from some sources, and effectively ban Norwegian seal products from the EU market. The *permissive* elements, by contrast, open the EU market to products that conform with the relevant conditions.

3. Under the Indigenous Communities ("IC") requirements, which are the first set of restrictive conditions, seal products may be placed on the EU market if they derive "from hunts traditionally conducted by the Inuit and other indigenous communities and contribute to their subsistence". "Inuit" for purposes of these requirements are defined as "indigenous members of the Inuit homeland, namely those arctic and subarctic areas where, presently or traditionally, Inuit have aboriginal rights and interests, [including] Inupiat, Yupik (Alaska), Inuit, Inuvialuit (Canada), Kalaallit (Greenland) and Yupik (Russia)". "Other indigenous communities" are, in turn, defined as "communities in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country … at the time of conquest or colonisation or the establishment of present State boundaries and who … retain some or all of their own social, economic, cultural and political institutions". Products deriving from IC hunts qualify under the IC requirements if: (i) the IC in question has a tradition of seal hunting in the community and in the geographical region; (ii) the products in question are at least partly used, consumed or processed within the communities according to their traditions; *and* (iii) the seal hunts in question contribute to the subsistence of the community.

4. Under the Sustainable Resource Management ("SRM") requirements, which are the second set of restrictive conditions, seal products may be placed on the EU market if they are "by-products of hunting that is regulated by national law and conducted for the sole purpose of the sustainable management of marine resources", provided that those products are placed on the market on a "non-profit basis", in a "non-systematic way", and are not of a "nature and quantity" that indicates they are placed on the market for commercial reasons.

5. Finally, the third set of restrictive conditions, the Personal Use ("PU") requirements, permit the occasional importation of seal products "for the personal use of travellers or their families", namely where those products: (i) are either worn by the travellers, or carried or contained in their personal luggage; (ii) are contained in the personal property of a natural person transferring his normal place of residence from a third country to the Union; or (iii) are acquired on site in a third country by travellers and imported by those travellers at a later date.

II. THE EU SEAL REGIME DISCRIMINATES INCONSISTENTLY WITH ARTICLE I:1 AND III:4 OF THE GATT 1994

6. The EU Seal Regime violates Articles I:1 and III:4 of the GATT 1994. The structure, design and expected operation of the EU Seal Regime effectively bars all seal products of Norwegian origin from the EU market. At the same time, because all or virtually all seal products from Denmark (Greenland) are expected to qualify under the IC requirements, the EU Seal Regime discriminates in favour of seal products originating in Denmark (Greenland) and against "like"

products from Norway, contrary to Article I:1. Further, all or virtually all seal products originating in Sweden and Finland are expected to qualify under the SRM requirements. In this way, the EU Seal Regime provides treatment that is less favourable for seal products from Norway than for "like" products originating in the European Union, contrary to Article III:4.

7. For purposes of both these claims, the parties agree that seal products conforming to the requirements of the EU Seal Regime are "like" those that do not, including because all such products share "identical product characteristics".

A. The structure, design and expected operation of the IC requirements result in discrimination inconsistent with Article I:1 of the GATT 1994

1. The IC requirements are *de jure* discriminatory

8. The Basic Seal Regulation expressly names certain beneficiary Members (or territories within Members) as qualifying under those requirements, namely: "Canada", Denmark ("Greenland"), "Russia", and the United States ("Alaska"). Thus, *according to the words used in the measure*, goods originating in these Members *expressly* qualify for market access opportunities under the requirements.

9. Moreover, for "other indigenous communities", the words used in the Implementing Regulation define, by *necessary implication*, a limited, additional group of WTO Members whose goods also qualify for market access opportunities under the IC requirements. This group is defined and closed because a qualifying indigenous community is one descended from people that have "inhabited" a particular territory "*at the time of conquest or colonisation or the establishment of present State boundaries*"; they must have retained "political institutions"; and the community must have a "*tradition*" of seal hunting "*in the geographical region*". Based on these criteria, the additional qualifying Members under this aspect of the IC requirements constitute a closed group: the European Union (Sweden and, possibly, Finland) and Norway. Irrespective of the facts examined in a *de facto* analysis, products from other countries where seal products are produced, such as Iceland or Namibia, can *never* qualify under the IC requirements.

2. The IC requirements result in *de facto* discrimination in favour of products originating in Denmark (Greenland)

10. For the qualifying countries listed above, the *extent* of the benefit differs *de facto* from country-to-country. Under the IC requirements, the factors that determine the *extent* to which a Member may benefit from market access are (i) the size of the indigenous community with a seal hunting tradition; (ii) the volume of seals harvested by that community; and (iii) whether the products of the seal hunt contribute to the subsistence of the community and are partly used, consumed, or processed within the community in question according to tradition.

11. Based on these criteria, Denmark (Greenland) is, overwhelmingly, the primary beneficiary of the IC requirements. In fact, almost the entirety of Greenland's population is Inuit with a strong seal hunting tradition, and the products derived from the Inuit seal hunt are partly consumed within the community and contribute to its subsistence. Further, the Greenlandic hunt represents a very important proportion (between 20 and 25 per cent) of the world's seal hunt, with 189,000 seals hunted in 2006 and an average annual catch of circa 162,000 seals between 2006 and 2009. It is not contested that all, or virtually all of the Greenland harvest is likely to qualify under the IC requirements.

12. By contrast, the benefits afforded to seal products from other WTO Members that, by the structure and design of the EU Seal Regime, may benefit from the IC requirements, are different from those of Denmark (Greenland). In particular, virtually no Norwegian seal products will benefit under those requirements, either in absolute terms or as a proportion of total Norwegian production. Indigenous communities take part, at times, in the coastal hunt in Norway. However, the Norwegian coastal hunt accounted for just 810 seals in total in 2006, which is about 4.5% of the total Norwegian hunt during the same year. The indigenous portion of the seals taken in the coastal hunt is a further fraction of the total. Similarly, the evidence on the record shows that the vast majority – around 97 per cent – of seal products originating in Canada will not qualify under the IC requirements.

13. As a result, through its design, structure, and expected operation, the IC requirements confer a significant advantage on seal products that originate in Denmark (Greenland). The competitive opportunity conferred on seal products from this origin is, as a matter of fact, not extended immediately and unconditionally to seal products (finished or intermediate) originating in other countries, including Norway.

B. The SRM requirements result in *de facto* discrimination inconsistent with Article III:4 of the GATT 1994

14. Norway does not allege discrimination in respect of the first set of conditions attached to the SRM requirements, namely that products derive from hunts "regulated by national law", subject to a total allowable catch ("TAC") quota established in accordance with a natural resources management plan. Indeed, Norway expects the products of its seal hunt to meet this condition, because Norwegian regulations establish a TAC aimed at stabilizing (or reducing, if need be) the future population of adult seals on the basis of ecosystem-based population models taking into account, *inter alia*, the role of seals as apex predators in the ecosystem, as well as their reproductive rates and mortality.

15. However, the three *additional* conditions attached to the SRM requirements – namely, the "non-systematic", "non-profit" and "sole purpose" conditions – are expected to operate to the preponderant advantage of EU seal products and to the preponderant disadvantage of "like" products from Norway.

1. The "non-systematic" condition

16. As shown by the evidence on the record, the "non-systematic" condition reflects the characteristics of seal hunting as it is carried out in the European Union and, therefore, does *not* restrict any seal products originating in the European Union from being placed on the EU market. In fact, during the legislative process, both Finland and Sweden requested to be allowed to continue placing their seal products on the market, indicating that the size of their respective hunts was small and sporadic. The scientific literature on the interaction between seals and fisheries in EU countries confirms these characteristics. Further, Sweden has 11 recognized bodies that can approve the marketing of local seal products under the EU Seal Regime. It is not contested that seal products from Sweden and Finland would meet the "non-systematic" condition.

17. Conversely, the condition *excludes* the products of the sustainable management hunts conducted in non-EU countries, including Norway, from access to the EU market. As a result of the size of the seal populations involved in the Norwegian seal hunt, which are also reflected in the TACs recommended on the basis of scientific population models, the Norwegian seal hunt *necessarily* involves larger numbers than the occasional, incidental hunting carried out in the European Union.

18. In fact, the size of the harp seals stocks subject to Norwegian hunting is approximately 2.01 million. One estimate showed that the total consumption by harp seals in the East Ice (one of Norway's sealing areas) was about 4 million tons of fish stocks such as cod, herring and capelin utilized in wild capture fisheries – that is, almost twice the size of the catch by the Norwegian fishing fleet. Further, at times, key fish stocks in the marine food chain do not spawn in sufficient numbers, leading to harp seals migrating to the coast in Northern Norway to feed, creating significant problems. The seals damaged fish catches and many drowned after becoming entangled in fishing gear. For instance, in 1987, up to 60,000 seal carcasses were found. The government had to support the fishermen and find ways to dispose of seal carcasses.

19. In light of the ecosystem-based needs outlined above, which result in larger TACs, Norwegian seal products would not fulfil the SRM requirements, because they are placed on the market "systematically".

20. In these ways, the design, structure, and expected operation of this aspect of the SRM requirements allow marketing of seal products originating in the European Union, while denying non-EU products an opportunity to compete, thereby according imported products treatment less favourable than that accorded to "like" domestic products inconsistent with Article III:4 of the GATT 1994. In addition, as discussed in paragraphs 0-0 below, the "non-systematic" condition

results in arbitrary and unjustifiable discrimination between countries where the same sustainable resource management conditions prevail.

2. The "non-profit" and "sole purpose" conditions

21. The "non-profit" and "sole purpose" conditions, too, are tailored to the reality of the EU seal hunt and, therefore, do *not* restrict seal products originating in the European Union from being placed on the EU market. At the same time, those conditions effectively exclude from the EU market seal products originating in Norway.

22. In the European Union, the seal hunt is an occasional activity conducted by fishermen, incidental to their fishing activities. The economic benefit derived to fishermen from seal hunting consists of the elimination of seals causing problems to fisheries by damaging gears and catches, thereby avoiding costs and losses and securing an improved fishing activity. EU fishermen do not need to earn a profit from sealing, because sealing improves the return on their fishing activities. By contrast, Norway's exploitation of living marine resources includes harvesting on all levels of the ecosystem and makes an important contribution to the Norwegian economy. In this way, in implementing an effective SRM plan, Norway seeks to make use of its marine resources in a manner that is both environmentally and economically sustainable. As a result of the different approach to seal hunting in Norway, no products from Norway would qualify under the "non-profit" and "sole purpose" conditions of the SRM requirements.

23. In sum, the result of the "non-profit" and "sole purpose" conditions is that, while seal products from the European Union have access to the EU market, seal products from Norway do not. In this way, the conditions in question modify the competitive opportunities for seal products to the detriment of products imported from non-EU countries such as Norway, resulting in "less favourable treatment" inconsistent with Article III:4 of the GATT 1994. In addition, as discussed in paragraphs 0-0 below, the "non-profit" and "sole purpose" conditions result in arbitrary and unjustifiable discrimination between countries where the same sustainable resource management conditions prevail.

C. The European Union posits the wrong legal standard for Articles I:1 and III:4 of the GATT 1994

24. The European Union posits the wrong legal standards for Articles I:1 and III:4 of the GATT 1994 in several ways. With respect to *de facto* discrimination, the European Union wrongly equates the legal standard for "less favourable treatment" under Articles I:1 and III:4 of the GATT 1994 and Article 2.1 of the *TBT Agreement*. It argues that, under each of these three provisions, a panel determines whether any detrimental impact on imports results from a legitimate regulatory distinction. However, the Appellate Body has already said that the "scope and content of these provisions is not the same".[1] Under Articles I:1 and III:4, a panel determines whether a regulatory distinction has a detrimental impact on imports. If so, the legitimacy of that distinction may then be examined under a separate GATT exception, such as Article XX. Under Article 2.1, if a regulatory distinction has a detrimental impact on imports, a panel may assess its legitimacy under Article 2.1 itself.

25. Further, the European Union wrongly argues that the legal standard for "less favourable treatment" involves a "quantitative" assessment of detrimental impact and a "qualitative" assessment of the legitimacy of the regulatory distinctions. In Norway's view, whilst there is often a quantitative aspect in analysing whether a regulatory distinction alters competitive opportunities to the detriment of imports, that analysis also has important *qualitative* aspects relating to the design, structure and expected operation of the measure. Indeed, it is hard to conceive of the analysis being conducted *without* qualitative aspects.

III. THE EU SEAL REGIME IS INCONSISTENT WITH ARTICLE XI:1 OF THE GATT 1994 AND ARTICLE 4.2 OF THE *AGREEMENT ON AGRICULTURE*

26. The PU requirements constitute quantitative import restrictions on seal products that are inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the *Agreement on Agriculture*.

[1] Appellate Body Report, *US – Tuna II (Mexico)*, para. 405.

27. These requirements restrict *imports* of seal products by laying down conditions as to the use and the nature and quantity of those imports. By their very terms, these conditions apply only at the point of importation in respect of products originating outside the EU territory. By definition, these conditions do not apply "to the like domestic product" in the sense of the *Ad* Note to Article III. Accordingly, the core features of the PU requirements constitute *de jure* a border measure, which should be analysed under Article XI:1 of the GATT 1994. The PU requirements constitute limiting conditions on importation, expressed in terms of "quantity". For the same reasons, the PU requirements constitute a "quantitative import restriction" on agricultural products that is prohibited by Article 4.2 of the *Agreement on Agriculture*.

28. In addition, as an alternative to its claim under Article III:4 of the GATT 1994 that the SRM requirements result in *de facto* discrimination in favour of seal products originating in the European Union, Norway submits that the EU Seal Regime as a whole operates *de facto* as a border measure which restricts imports of seal products from Norway, but, by virtue of the permissive elements of the SRM requirements, does not apply to "like" domestic products. Indeed, evidence of the design, structure, and expected operation of the EU Seal Regime suggests that all seal products produced in the European Union will meet the conditions of the SRM requirements, because three of the conditions comprised in the SRM requirements – namely, the "non-systematic", "non-profit" and "sole purpose" conditions – are tailored to meet the characteristics of seal hunting as it is carried out in Sweden and Finland. Conversely, as discussed in paragraphs 12, 17 and 22 above, the requirements of the EU Seal Regime deny market access to all seal products from Norway.

29. Viewed in this way, the EU Seal Regime as a whole constitutes a quantitative restriction on imports inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the *Agreement on Agriculture*, because the "centre of gravity"[2] of the EU Seal Regime is one that imposes a restriction – indeed, a complete ban – in relation to imports of seal products from Norway, whereas it effectively does not restrict the internal sale of domestic seal products by virtue of the permissive scope of the SRM requirements.

IV. THE EUROPEAN UNION'S VIOLATIONS OF THE GATT 1994 ARE NOT JUSTIFIED UNDER ARTICLE XX

30. In responding to Norway's claim that the EU Seal Regime gives rise to violations of the GATT 1994, the European Union invokes the exceptions provided by Articles XX(a) and XX(b) to justify the measure at issue. The European Union bears the burden of proving the elements required to make out an Article XX defence. It has, however, failed to meet this burden.

31. In relation to subparagraph (a), the European Union has failed to prove the existence of the complex public morals that it asserts exist. We discuss this further below.[3] In particular, it has failed to prove the existence of the alleged public morals that compel discriminatory treatment of seal products. The European Union says that its morals regarding seals include norms regarding indigenous communities and resource management. Absent proof of the alleged public morals, however, the European Union has no basis for asserting that preferring seal products from some origins, over others, is "necessary to protect public morals".

32. Just as the European Union has not proven the existence of relevant "public morals", so too has it failed to demonstrate that the discriminatory treatment of seal products from IC and SRM hunts is necessary to *protect the welfare of seals*, whether welfare is considered as "animal ... life or health" in the sense of subparagraph (b) or as part of "public morals" under subparagraph (a). The European Union argues that its measure is "necessary" because it limits global demand for seal products, thereby reducing the number of seals killed inhumanely every year. However, in this way, the European Union defends only the *prohibitive* elements of the EU Seal Regime, effectively ignoring that the GATT violations arise from the *differential* impact of the measure on seal products from Norway, Denmark (Greenland) and the European Union itself. This argument does not explain why the *differential treatment* of products from these sources is necessary on animal welfare grounds.

[2] Appellate Body Report, *China – Auto Parts*, para. 171.
[3] See below, paras. 45-47.

33. Further, even leaving to one side the European Union's failure to prove that its animal welfare objective (whether as part of a public morals or as such) compel *discrimination*, the EU Seal Regime makes no "material" contribution[4] to animal welfare for another reason. Specifically, even if the *prohibitive* aspects of the measure were to reduce the number of seals killed in *unfavoured* sources (*quod non*), this contribution would be undermined by the *permissive* aspects of the measure under the IC and SRM requirements, which permit seals to be killed, without regard to animal welfare, in the *favoured* sources, which could readily meet all EU demand with seal products derived from seals suffering poorer animal welfare outcomes than seals in the Norwegian hunt.

34. Norway has put forward three alternatives that would be less restrictive, but which would contribute to all of the European Union's legitimate objectives to an equal or greater extent than the EU Seal Regime. These alternatives would also contribute to the policy objectives invoked by the EU under Article XX of the GATT 1994 to an equal or greater extent than the EU Seal Regime.[5]

35. As to the requirements of the chapeau to Article XX, Norway contends that the EU Seal Regime introduces several aspects of arbitrary or unjustifiable discrimination between countries where the same conditions prevail and a disguised restriction on international trade.[6] Thus, even if the European Union were to show that its measure were provisionally justified under one of the subparagraphs of Article XX (*quod non*), the European Union's defence under Article XX would still fail because the measure is applied in a manner contrary to the requirements of the chapeau.

V. THE EU SEAL REGIME IS A TECHNICAL REGULATION WITHIN THE MEANING OF ANNEX 1.1 OF THE *TBT AGREEMENT*

A. It is uncontested that the EU Seal Regime applies to identifiable products and compliance with it is mandatory

36. The EU Seal Regime is a technical regulation within the meaning of Annex 1.1 of the *TBT Agreement*, because (i) it applies to identifiable products; (ii) it lays down product characteristics, or alternatively, their related processes and production methods, including applicable administrative provisions; and (iii) compliance with its requirements is mandatory. It is not contested that the EU Seal Regime applies to identifiable products; namely, all products. No product can be derived from seals unless it satisfies the requirements set out in the measure. Nor is it contested that compliance with the EU Seal Regime is mandatory.

B. The EU Seal Regime lays down product characteristics or their related processes, including applicable administrative provisions

37. In *EC – Asbestos*, the Appellate Body explained that "product characteristics" could include "any objectively definable 'features', 'qualities', 'attributes', or other 'distinguishing mark' of a product", as well as related "characteristics" that are not "intrinsic" to a product, such as "means of identification, the presentation and the appearance of a product".[7] The Appellate Body also stated that whether a measure comprising both prohibitive and permissive elements "lays down product characteristics" cannot be determined unless the measure is examined as a whole. The permissive elements in a measure have no autonomous legal significance in the absence of the prohibitions. Therefore, permissive elements of a measure must be considered together with, and not in isolation from, the prohibitive elements.[8]

38. The EU Seal Regime sets out in a negative and positive manner – that is, through the prohibitive and permissive aspects of the measure – whether products may and may not possess certain physical characteristics, i.e., that they contain seal. Indeed, the three sets of requirements under the EU Seal Regime *in and of themselves* prescribe the conditions that must be fulfilled for seal products to gain access to the EU market, formally and substantively combining the permissive and prohibitive elements of the measure. Failing fulfilment of the conditions, a seal

[4] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 210.
[5] For further discussion of these alternatives, see below, paras. 45-53 and 61-64 below.
[6] Norway's arguments on arbitrary and unjustifiable discrimination are summarized in paras. 74-80 below.
[7] Appellate Body Report, *EC – Asbestos*, para. 67.
[8] Appellate Body Report, *EC – Asbestos*, para. 64.

product may *not* be marketed in the European Union. The legal situation is therefore the same as the one confronting the Appellate Body in *EC – Asbestos*, in which the measure established when and under what conditions products marketed in the European Union could, and could not, contain asbestos.

39. The European Union suggests that the measure in *EC – Asbestos* was different because "the exceptions [in that dispute] permitted certain products which were identified according to their intrinsic characteristics". By contrast, it argues, the permissive elements of the three sets of marketing requirements – which it calls "exceptions" – make reference to characteristics, such as the type of hunters and the traditions of communities and the purpose of the hunt, which do not relate to the intrinsic features of, the product. This argument is misplaced, because it is incorrect to analyse the three requirements in isolation from the totality of the measure, considering all components of the measure in combination. Moreover, the presence of these other "conditions" does not affect the characterization of the measure as a technical regulation.

40. Alternatively, the EU Seal Regime also lays down "related processes". The panel in *EC – GIs* said that a "process" is "a systematic series of actions or operations directed to some end, as in manufacturing…".[9] The IC and SRM requirements lay down "processes" that "relate" to defined product characteristics, that is, when a product containing seal can be marketed. The IC requirements prescribe a "process" involving a particular course of action (a traditional seal hunt by specified persons) with a defined end (the production of seal products for community subsistence). For the SRM requirements, the course of action concerns the purpose of the hunt (sustainable management of marine resources); the way in which the hunt is conducted (it must be regulated at national level pursuant to an SRM plan); and the way in which the seal products are marketed (not-for-profit, non-commercial nature and quantity); and the action also has a defined end (the sale of SRM by-products).

41. Finally, the EU Seal Regime prescribes the "applicable administrative provisions" that must be satisfied for products to contain seal. For instance, parties wishing to market seal products under the IC and SRM Requirements must obtain a certificate to prove that the requirements set out in either exception are met. EU residents wishing to take advantage of the PU requirements must, "upon arrival" in the European Union, present to customs authorities "a written notification of import", details of the product characteristics, and "a document giving evidence that the products were acquired in the third country concerned".

VI. THE EU SEAL REGIME VIOLATES ARTICLE 2.2 OF THE *TBT AGREEMENT*

42. The EU Seal Regime violates Article 2.2 of the *TBT Agreement* because it is more trade-restrictive than necessary to fulfil legitimate objectives. Under Article 2.2 of the *TBT Agreement*, a panel must: (i) ascertain the objectives of the EU Seal Regime; (ii) assess whether those objectives are legitimate; and (iii) assess whether the EU Seal Regime is "necessary" to pursue its legitimate objectives, which, as explained below involves, a relational analysis.

A. Identification of the objectives of the EU Seal Regime

1. Objectives revealed by the measure, the legislative history and other evidence

43. The Appellate Body has stated that "the importance of a panel identifying with sufficient clarity and consistency the objective or objectives pursued by a Member through a technical regulation cannot be overemphasized".[10] The Appellate Body has also cautioned that panels must objectively assess the objectives pursued by a measure, having regard to "the texts of statutes, legislative history, and other evidence regarding the structure and operation" of the measure.[11]

44. On the basis of "the texts of statutes, legislative history, and other evidence regarding the structure and operation of the measure", Norway identifies that the measure pursues six objectives: (i) the protection of animal welfare, including responding to consumer concerns regarding animal welfare; (ii) the protection of the economic and social interests of indigenous

[9] Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.510.
[10] Appellate Body Report, *US – COOL*, para. 387.
[11] Appellate Body Report, *US – COOL*, para. 371.

communities; (iii) the encouragement of the sustainable management of marine resources; (iv) allowing consumer choice; and (v) preventing consumer confusion; and (vi) harmonizing the internal market. The parties agree that the Panel need not address the objective of harmonizing the internal market, since any measure adopted at the EU level would achieve that objective.

2. The European Union argues, but fails to prove, that the EU Seal Regime aims to protect public morals

a. The European Union's description of the measure reveals internal inconsistencies

45. In response to Norway's argument that the EU Seal Regime pursues several separate objectives, the European Union argues that it is *not* pursuing *two* of the objectives identified by Norway, namely, consumer choice and the prevention of consumer confusion. However, this position is contradicted by the preamble and provisions of the Basic Seal Regulation, as well as a recent judgment of the EU General Court.[12]

46. In respect of the other identified objectives, the European Union says that they all are elements of a single umbrella objective consisting of the protection of public morals. The European Union argues it is morally wrong to kill seals inhumanely except when justified by benefits to humans or other animals, such as those reflected in the IC and SRM requirements. EU consumers aid or abet an immoral act when they are confronted with seal products in EU shops, except where the seal products comply with marketing requirements under the EU Seal Regime. Further, it is not immoral to commercially exploit seal products in the European Union, provided the products are not placed on the EU market.

47. The moral norms purportedly protected by the EU Seal Regime are thus replete with contradictions and inconsistencies.

b. The European Union fails to prove the existence of its alleged public morals

48. The parties agree that "public morals" refers to a "standard[] of right and wrong conduct maintained by or on behalf of a community or nation".[13] A standard is distinguished from a mere public concern because it connotes the existence of a *societal rule or norm* with precise and specific content that unambiguously delineates right and wrong conduct, and which is *generally applied within the community*.

49. The European Union bears the burden of proving the existence of the different moral norms alleged. However, the evidence submitted by the European Union to substantiate its position that the EU Seal Regime responds to the "public morals" held in the European Union – (i) the measure at issue; (ii) surveys of the EU public opinion; and (iii) scientific evidence – does not substantiate the existence of the specific norms alleges with all their precise and conflicting features.

50. First, the measure at issue reflects no "standard of right and wrong conduct" to be consistently applied; but rather a variety of different and inconsistent standards applying to the treatment of seals and the commercial exploitation of seal products. Although institutions, including democratic institutions, can take action in pursuit of a vast variety of objectives, the mere fact that the institutions in question, or the decision-making process, are "democratic and open", does not in itself demonstrate that the measure pursues the protection of "public morals".

51. Second, the surveys do not evidence the existence of the "public morals" invoked by the European Union. To the contrary, the surveys (1) highlight an extremely low level of knowledge about seal hunting; (2) did not use techniques that would provide information on the moral views

[12] General Court of the European Union (Seventh Chamber), Judgment, *Inuit Tapiriit Kanatami v. European Commission*, Case T-526/10 (25 April 2013), available at http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130d5708fecd272ff44e2ba90b6184274b9b4.e34KaxiLc3eQc40LaxqMbN4OaheOe0?text=&docid=136881&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=233545 (last checked 11 May 2013).

[13] Panel Report, *US – Gambling*, para. 6.465; see also Panel Report, *China – Publications and Audiovisual Products*, para. 7.759.

respondents; and (3) do not even elicit information on the different normative aspects of the umbrella public moral that the European Union invokes.

52. Third, although the EU invokes scientific evidence as grounds for the umbrella public moral, the evidence that was before the European Union during the legislative process does not support the existence of the purported public moral norms, in particular the elements pertaining to IC and SRM hunts, and the allowance of commercial exploitation other than placing seal products on the market. Indeed, the scientific evidence shows that the hunts to whose products the EU Seal Regime grants market access pose greater animal welfare problems than those whose products are denied market access.

53. Thus, the evidence provided by the European Union does not support its assertion that the EU Seal Regime responds to the "public morals" held in the European Union, with all its peculiar nuances and contours. Instead, the legislative history shows that the peculiar choices made by the EU legislator were motivated by political expediency and policy choices, and not public morals. Hence, Norway contends, therefore, that the different elements of the EU Seal Regime cannot be understood as pursuing a single, coherent "public morals" objective, but rather must be understood as pursuing separate, competing objectives; namely, animal welfare; protecting the economic and social interests of indigenous communities; promoting the sustainable management of marine resources; promoting the personal choice of travelling EU consumers; and preventing consumer confusion.

B. The objective of discriminating in favour of particular communities is not "legitimate" within the meaning of Article 2.2

54. Norway accepts that the protection of animal welfare, the sustainable management of marine resources, the encouragement of consumer choice, and the prevention of consumer confusion are "legitimate" objectives for purposes of an Article 2.2 analysis. With respect to the European Union's alleged public morals, if the Panel agrees this as an "objective", Norway considers this "legitimate" for purposes of an analysis under Article 2.2, but only to the extent that such public moral relates to "animal welfare".

55. However, Norway does *not* consider that the objective of protecting the economic and social interests of indigenous communities is "legitimate" in the sense that term is used in Article 2.2 of the *TBT Agreement*. This is because the European Union's pursuit of this objective necessarily involves the introduction of a regulatory trade preference for products of certain origins, to the detriment of products from other sources, such as Norway. The granting of such selective special and differential treatment cannot be "legitimate" under Article 2.2 because it runs counter to the cornerstone non-discrimination principle, which is reflected in the *TBT Agreement* itself. If a Member wishes to infringe that principle by granting special and differential treatment to products from some sources because of economic or social considerations, it must obtain express authorization *within* the WTO legal system, in the form of a WTO waiver or in line with specific provisions of the covered agreements enabling special and differential treatment.

56. In support of its position, the European Union refers to certain instruments of international law addressing the rights of indigenous peoples. However, none of the cited instruments compel the granting of discriminatory trade preferences. Moreover, if other sources of international law could serve as a basis for justifying discriminatory trade restrictions under Article 2.2 of the *TBT Agreement*, the lack of harmony between the *TBT Agreement* and the other covered agreements would prejudice one of the cornerstone principles of WTO law, namely, the non-discrimination principle that is reflected, *inter alia*, in Articles I:1 and III:4 of the GATT 1994 as well as the *TBT Agreement* itself. Thus, the mere fact that instruments of international law call for the favourable consideration of certain producers does not, and cannot, result in unfettered authority for a WTO Member to grant discriminatory trade preferences through technical regulations.

C. The EU Seal Regime is more trade-restrictive than necessary to fulfil its legitimate objectives

57. Having considered, *first*, the objectives of the EU Seal Regime and, *second*, the legitimacy of these objectives (concluding that certain of the European Union's objectives are not legitimate),

Norway demonstrates that the EU Seal Regime is "more trade-restrictive than necessary" to fulfil its legitimate objectives.

58. The assessment of the necessity of trade restrictiveness in a technical regulation, requires a weighing and balancing of: (i) the trade-restrictiveness of the technical regulation; (ii) the degree to which it contributes to its legitimate objectives; and (iii) the risks non-fulfilment would create. In weighing and balancing these different elements, the panel is typically aided by a comparison with less trade-restrictive alternatives put forward by the complainant. If a less trade-restrictive alternative is reasonably available, and makes a contribution to the measure's objectives that is at least equivalent to that of the challenged measure, the challenged measure is more trade restrictive than necessary for purposes of Article 2.2 and Article XX.

1. The EU Seal Regime is "trade-restrictive"

59. The EU Seal Regime is trade restrictive. The legal conditions that must be satisfied in order to comply with the IC, SRM, and PU requirements have "a limiting effect"[14] on the ability of a trader to place seal products on the market. Seal products cannot be lawfully marketed without complying with one set of restrictive conditions, which constitutes a restriction on international trade. Moreover, the IC and SRM requirements introduce discrimination between different sources of supply, which is also trade restrictive.

2. Contribution

60. Under Article 2.2 of the *TBT Agreement*, a panel must establish the "*degree* of contribution"[15] made by the measure towards achievement of its objective. If there is no contribution, then consideration of an alternative is not required because, absent a contribution, the measure is not "necessary" under Article 2.2.[16] If a technical regulation makes an overall positive contribution to achieving the objective, the level of that contribution will be compared with the level of contribution that would be achieved by a reasonably available and less-restrictive alternative measure.

a. The EU Seal Regime fails to contribute to animal welfare or the alleged public morals relating to animal welfare

61. Beyond the general, hortatory wording in the Basic Regulation, there is *nothing* explicit in the EU Seal Regime apt to affect the animal welfare of seals that are killed to produce seal products, in particular, those that may be sold in the European Union. In particular, the EU Seal Regime does not condition market access on compliance with animal welfare requirements. At the moment, it is possible to place on the EU market seal products from seals killed by drowning, seals shot in the water, and seals killed in a hunt with extremely high struck and lost rates, like those from favoured sources under the measure.

62. Nor is the EU Seal Regime apt to reduce the number of seals killed inhumanely, since the volume of products able to be placed on the EU market from sources with poor animal welfare regulation matches or exceeds the total size of the EU market prior to the Regime. Conversely, animal welfare-compliant products, among others from Norway, are unable to access the EU market.

63. Further, contrary to the European Union's arguments, the EU Seal Regime does not shield the EU public from being confronted with seal products, including seal products derived from "an immoral act (the killing of seals in an inhumane way)". Seal products may be placed on the EU market or imported under the EU Seal Regime and consumers are not even informed of the fact that the products in question contain seal, let alone of whether the seals were caught humanely.

64. Finally, also contrary to the EU arguments, the EU Seal Regime does not prohibit the "commercial exploitation" of seal products "within the EU territory": seal products may be placed on the EU market, or imported regardless of compliance with animal welfare requirements. The EU

[14] See Appellate Body Report, *US – Tuna II (Mexico)*, para. 319 (quoting Appellate Body Report, *China – Raw Materials*, para. 319); *US – COOL*, para. 375.

[15] Appellate Body Reports, *US – Tuna II (Mexico)*, para. 315 (emphasis added); *US – COOL*, para. 373.

[16] Appellate Body Report, *US – COOL*, para. 376 and fn 748 thereto.

Seal Regime also does not restrict transit across the European Union, processing for export in the European Union under an inward processing procedure, production for export, or sale at auction houses for export, for *any* seal product irrespective of the type of hunt. Thus, EU citizens are allowed to participate in the commercial exploitation of seal resources in a variety of ways.

b. Contribution to sustainable resource management

65. As noted above, the SRM requirements provide: first, that seal hunts must be conducted on the basis of a natural resources management plan using scientific population models and applying the ecosystem-based approach; second, that the seal hunt must not exceed the TAC; and third, that the SRM hunt must be for the "sole purpose" of marine resource management, and that the by-products on these hunts must be marketed on a "not-for profit" and "non-systematic" basis.

66. It is not contested that the first two above-mentioned conditions *promote* the objective of sustainable resource management or that the Norwegian hunt complies with both these requirements.

67. However, the "sole purpose", "not-for profit" and "non-systematic" conditions do not contribute to the objective of resource management, and indeed, undermine it. They provide a legal basis for the European Union to cherry pick and favour seal products derived from "small-scale" SRM hunts in the European Union, like Sweden and Finland.

68. The "non-systematic" requirement discriminates in favour of EU Member States and to the detriment of third countries, including Norway, inconsistently with Article III:4 of the GATT 1994. It serves as a quantity-based distinction that is irrational and arbitrary because the size of the seal quota is based on rational scientific principles that ensure the achievement of the objective of managing marine resources in a sustainable manner. The size of the quota – and therefore the "scale" of the hunt – may, therefore, be larger in some countries than others, *precisely* to ensure that the SRM objective is achieved.

69. The "sole purpose" and "non-profit" requirements are equally irrelevant for, and also undermine, the sustainable management of resources. The European Union suggests that "exploitation of natural resources" and commercial seal hunting are inherently at odds with efficient marine resource management. However, as Norway explained above, this is flawed. Indeed, from a sustainable management resource perspective, allowing the hunter to make a profit creates a favourable economic incentive that contributes positively to achieving the SRM goals. The European Union's suggestion that the hunts conducted in Sweden are somehow non-commercial, as explained above, is also incorrect, as Swedish fishermen derive a commercial advantage from killing seals that endanger fish stocks and gear.

70. In its arguments about these conditions, the EU has sought to draw a distinction between commercial and non-commercial seal hunting. Norway considers this distinction to be an illusory one, since all seal hunts that result in seal products have commercial dimensions. The Greenland Government itself notes that its seal hunting is both subsistence oriented and a *commercial activity*. In other words, it is conducted for profitable financial returns. The SRM requirements allow fishermen to kill seals as pests that endanger fish stocks and that cause problems to fisheries by damaging gears and catches. Fishermen who kill seals for these purposes have commercial motives: they are killing seals to benefit commercial fishing activities by protecting "fish stocks" and "gear and catches". The legislative history also suggests that the fisherman is entitled to earn "income" compensating for the cost of his time. Further, other commercial parties in the supply chain, such as processors, distributors, and retailers, can earn profits from the sale of the seal products.

c. Contribution to consumer choice and to the prevention of consumer confusion

71. The EU Seal Regime does not prevent consumer confusion and undermines consumer choice. To recall, seal products allowed onto the EU market under the IC or SRM requirements *do not even have to bear a label indicating that they contain seal*, let alone provide information on compliance with animal welfare. The EU Seal Regime has in fact made the situation worse for many consumers, because those consumers will now believe that trade in seal products is banned.

As a result, those EU consumers that care whether they purchase seal products may unwittingly purchase unlabelled seal products.

72. Further, in respect of consumer choice, the EU Seal Regime allows consumers to exercise their personal choice provided they travel abroad, by purchasing seal products for their "personal use" or that of "their families".[17] However, it denies that same choice to consumers within the European Union.

d. Arbitrary or unjustifiable discrimination

73. In its Article 2.2 case law, the Appellate Body has reasoned that the sixth recital of the preamble reflects an important aspect of the balance between the *TBT Agreement's* trade liberalizing objective and its objective to allow Members to retain regulatory freedom.[18] Just as the trade liberalizing provisions of the GATT 1994 are counterbalanced by the general exceptions found in Article XX, which allows Members to pursue the objectives reflected in the subparagraphs to that provision, so long as the measures taken are "not [] applied as a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail", so too is this same balance reflected in the provisions of the *TBT Agreement*. Specifically, Article 2.2 *permits* Members to adopt trade-restrictive technical regulations in order to contribute to the legitimate objectives of the regulation at a certain level of protection. However, this authority is not unfettered, since, in taking measures to achieve its legitimate objectives, a Member is "subject to the requirement that such measures are not applied in a manner that would constituted a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail".

74. The EU Seal Regime draws arbitrary distinctions between countries where the same conditions prevail, and thereby constitutes a means of arbitrary and unjustifiable discrimination and a disguised restriction on international trade.

75. *First*, as regards animal welfare, the *same* animal welfare conditions prevail in all countries where seals are hunted: seals in Denmark (Greenland) are *not* less susceptible to unnecessary pain, distress and suffering than seals hunted elsewhere, such as in Norway. This same "condition" relating to the vulnerability of seals is common to the situation of *all* countries. However, the European Union *disregards* animal welfare risks with respect to countries whose seal products comply with the IC or SRM requirements, by allowing the marketing of products originating from those countries despite poor animal welfare outcomes in their hunts.[19] At the same time, the European Union gives *decisive significance* to these same risks in connection with seal hunting in other countries, where hunting predominantly does not meet these requirements, such as Norway, despite good animal welfare outcomes in those hunts.[20]

76. *Second*, as regards encouraging sustainable resource management, the "not for profit", "sole purpose" and "non-systematic" conditions attached to the SRM requirements are rationally disconnected from the objective of allowing the sustainable management of marine resources, and thereby introduce arbitrary or unjustifiable discrimination between countries that have sound, science-based management plans that establish quotas for seal hunting.

77. For purposes of the sustainable management of marine resources, *all* countries having sound, science-based marine resource management plans that establish a quota for seal hunting are countries "where the same [SRM] conditions prevail". In all countries, the size of the seal quota is based on rational scientific principles that ensure achievement of the objective of managing marine resources in a sustainable manner.

78. Under the "non-systematic" condition, a country may be able to place all of its seal products on the EU market only if the permissible seal catch under an SRM plan is sufficiently small that

[17] Basic Seal Regulation, Article 3(2)(a).
[18] Appellate Body Report, *US – Clove Cigarettes*, para. 95.
[19] See paras. 61-62 above.
[20] For instance, Norway's regulations prohibit the shooting of seals in the water and catching of seals in nets, *Regulation Relating to the Conduct of the Seal Hunt in the West Ice and East Ice*, adopted by the Norwegian Ministry of Fisheries and Coastal Affairs as Regulation of 11 February 2003 No. 151, amended by the Regulation of 11 March 2011 No. 272 (original and unofficial translation) ("Conduct Regulation"), Exhibit NOR-15, Sections 6 and 11. Furthermore, Norwegian authorities require the presence of an inspector.

sales are "non-systematic" (e.g. Sweden or Finland). Conversely, another country may not do so, because the seal catch is too large to allow for the disposal of all of its seal products in a "non-systematic" manner (e.g. Norway). Discriminating between such countries on the basis of the number of seals that the respective country may take, and put on the market each year, without regard to the quota size determined in order to maintain a balance in the ecosystem, is "arbitrary or unjustifiable discrimination" in terms of the regulatory objective, in violation of Article 2.2 of the *TBT Agreement*. Further, the "sole purpose" and "not for profit" conditions remove an important economic incentive for commercial actors to participate in the efficient implementation of SRM plans. This frustrates the successful implementation of such plans, making implementation likely depend on government funding, and not harnessing the efficiencies of the market. The limitations also frustrates the efficient use of seals, as a natural resource, once they have been harvested, which is contrary to basic principles of sustainable resource management. This introduces a further element of arbitrary and unjustifiable discrimination between countries where the same conditions prevail.

79. *Third*, as regards consumer confusion, the EU Seal Regime involves conditions that not only make no contribution to preventing consumer confusion, those conditions also fail to deal even-handedly with the products of countries where the same conditions prevail in respect of this regulatory objective also. This introduces another element of arbitrary and unjustifiable discrimination, since unlabelled seal products from *all* countries are *equally* capable of deceiving EU consumers who are unaware of the seal-content of products placed on the EU market. Thus, products originating from Denmark (Greenland), marketed under the IC requirements, and products from the European Union, marketed under the SRM requirements, pose the same risks of consumer confusion as products from other countries. Yet, the EU Seal Regime permits seal products from Denmark (Greenland) and the European Union, while banning them from other countries.

80. *Finally*, just as in *US – Shrimp*, the primary targets of the "unilateral and non-consensual"[21] EU Seal Regime are third countries. Although Norway emphasized the importance of the sustainable use of marine resources, and offered to negotiate international standards for seal hunting, the European Union has not engaged "in serious, across-the-board negotiations"[22] with Norway on seal hunting. By contrast, the European Union was prepared to accommodate the interests of Denmark (Greenland) and of certain EU Member States. As in *US – Shrimp*, the willingness of the European Union to accommodate the interests of some, but not other, countries is "plainly discriminatory" and "unjustifiable".[23]

3. Risks non-fulfilment would create

81. The EU Seal Regime accepts significant risks of non-fulfilment for all of its legitimate objectives. In particular, the European Union concedes that it has chosen to accept non-fulfilment of the animal welfare objective. The EU legislators chose to grant privileged market access to seal products from indigenous communities and EU fishermen because, in those cases, the benefits to humans or other animals *outweighs* the risk of suffering being inflicted upon seals. Moreover, because the EU Seal Regime provides *no information* to consumers on whether products on the EU market contain seal, the measure contributes to consumer confusion and prevents consumers from being able to act upon any personal convictions they may have about seal products.

4. Less trade restrictive alternatives

82. As Norway has shown that the EU Seal Regime does not contribute to the four objectives, and is therefore not "necessary", the Panel could end its analysis under both Articles 2.2 and Article XX here. In any event, however, Norway offers three less trade-restrictive alternatives that are reasonably available that would make an equivalent or *greater* contribution to all of the legitimate objectives of the EU Seal Regime.

- The first alternative consists of the removal of the three sets of marketing requirements;

[21] Appellate Body Report, *US – Shrimp*, para. 171.
[22] Appellate Body Report, *US – Shrimp*, para. 166.
[23] Appellate Body Report, *US – Shrimp*, para. 172.

- A second alternative consists of restricting access to the EU market to those seal products that are demonstrated to comply with animal welfare requirements through (i) the adoption by the European Union of animal welfare (and related enforcement) requirements for the killing of seals; (ii) conditioning market access on certification of conformity with those animal welfare requirements; and (iii) labelling to inform consumers that a product contains seal and is derived from a seal hunted in accordance with the prescribed animal welfare requirements;

- With respect to the SRM requirements, a third alternative would allow market access for seal products derived from sustainable resource management hunts, without requiring that the hunt be for the "sole purpose" of sustainable resource management; and that sales by the hunter be "non-systematic" and "not for profit". If it were necessary to contribute further to animal welfare, a modified version could couple removal of the contested conditions with the *addition* of explicit animal welfare requirements.

83. With respect to the first and third alternatives, there is no question that these options are "reasonably available" to the European Union as they would simply involve the removal of requirements that currently exist under the EU Seal Regime.

84. The second alternative, which involves the adoption of added requirements by the European Union, is also reasonably available to the European Union. During the course of the proceedings, the European Union attempted to cast doubt on the feasibility of laying down and enforcing appropriate animal welfare standards in the killing of seals. It argued that seal hunting is "inherently inhumane", because insurmountable obstacles make it *impossible* to hunt seals in a manner that avoids pain, stress or other forms of suffering. In the European Union's view, these "obstacles" include: various environmental factors, such as wind and cold, which affect accuracy in shooting; the significance of delays between shooting seals and administration of the further fail-safe killing steps (i.e., hakapik and bleeding out); and the allegedly frenetic pace of the Norwegian seal hunt.

85. Norway has offered ample evidence showing that it is *not impossible* to hunt seals humanely, or to lay down and enforce standards that result in the humane killing of seals. This is also confirmed by documents from the legislative history. In relation to the Norwegian hunt, Norway has shown that: (i) the Norwegian seal hunt is not characterized by competitive pressure on sealers; (ii) factors such as low visibility, wind, swells and waves, and cold do not adversely affect hunters or the accuracy of shooting, and in practice steps are taken on the Norwegian hunt to ensure they do not; (iii) the presence of veterinary inspectors on board every sealing vessel ensures a high level of compliance with relevant regulations and animal welfare standards.

86. The European Union has also argued that no alternative measure could achieve the level of protection desired by the EU legislator. However, Norway has shown that the level of animal welfare protection *actually* achieved by the EU Seal Regime (i.e., its contribution) is lower than what would be achieved under Norway's alternative measure.

87. As for the certification and labelling components, Norway refers to various schemes that have already been adopted that illustrate the practical feasibility of certifying compliance with animal welfare or other standards, and reliably labelling conforming products.

VII. THE EUROPEAN UNION'S CONFORMITY ASSESSMENT PROCEDURE IS INCONSISTENT WITH ARTICLE 5 OF THE *TBT AGREEMENT*

A. The European Union's conformity assessment procedure is inconsistent with Article 5.1.2 of the *TBT Agreement*

88. The European Union's conformity assessment procedure, aimed at ensuring compliance with the IC and SRM requirements and based on the Commission's appointment of recognized certification bodies, creates an unnecessary obstacle to international trade in seal products and is, therefore, inconsistent with Article 5.1.2 of the *TBT Agreement*.

89. Such procedure does not include the designation of a "default" recognized body able to issue conformity certificates in the absence of third-party recognized bodies. This institutional lacuna makes the effectiveness of its conformity assessment procedures depend entirely on the extent of the willingness of third parties to act as recognized bodies – an element over which traders in conforming seal products have no control.

90. The conformity assessment procedure entered into force on 20 August 2010, that is, on the same day of the entry into force of the prohibitive elements of the EU Seal Regime. As a consequence, when the three restrictive requirements established under the EU Seal Regime entered into force, trade in *conforming* seal products was *necessarily and inevitably* prohibited, because the European Union failed to establish a designated recognized body, or procedures for the establishment of such a body, in due time. Moreover, following the entry into force of the EU Seal Regime, it took the European Union more than two years to establish recognized bodies which, at the time of the filing of this summary, cover *only* conforming products from Sweden and Denmark (Greenland). Therefore, for a period of 28 months following entry into force, the European Union's conformity assessment procedures created a *ban* on trade in seal products that *conform* to the IC and SRM requirements and that, in principle, enjoy access to the EU market.

91. The European Union could have easily *avoided* this highly trade-restrictive situation by designating a recognized body able to issue conformity certificates pending the approval or in the absence of third-party recognized bodies. Such a system would ensure that the conformity assessment procedures *always* function to enable traders to secure approval for conforming seal products, whether or not a third party is willing and approved to serve as a recognized body. If the European Union did not wish to establish a recognized body capable of functioning from 20 August 2010, it should – by way of alternative – have given interested third parties an adequate opportunity to apply sufficiently far in advance of the entry into force of the EU Seal Regime, so as to allow recognized bodies to be established *before* the Regime entered into force on 20 August 2010.

92. The European Union lays the blame for the failings of its procedures on the lack of successful applications by third parties. However, a WTO Member cannot contract out of its WTO obligations, by making third parties responsible for the performance of those obligations. Further, "the intervention of some element of private choice does not relieve [a WTO Member] of responsibility under the [covered agreements]".[24] In light of the above, the European Union's conformity assessment procedure results in an unnecessary barrier to trade, inconsistent with Article 5.1.2 of the *TBT Agreement*.

B. The European Union's conformity assessment procedure is inconsistent with Article 5.2.1 of the *TBT Agreement*

93. The conformity assessment procedure fails to ensure that the procedures concerned are undertaken and completed as expeditiously as possible, inconsistently with Article 5.2.1 of the *TBT Agreement*. Article 5.2.1 suggests that a violation of this provision is established only if the more rapid conduct of conformity assessment procedures is "possible". Again, it would be perfectly "possible" for the European Union to conduct its procedures more rapidly than by imposing infinite delay, namely, by designating a body that could act in timely fashion, without making its procedures depend on the desire of third party entity to seek, and secure, approval as a recognized body; or by giving interested third parties adequate time to become recognized in advance of the entry into force of the EU Seal Regime.

94. Instead, the above-mentioned institutional lacuna results in a situation where procedures can *never be commenced* with respect to seal products originating in countries other than Sweden, and therefore do not meet the basic requirement that they be undertaken and completed, as "*expeditiously as possible*". In short, infinite delay does not meet a requirement of timeliness. The European Union has therefore violated its obligation, under Article 5.2.1 of the *TBT Agreement*, to ensure that conformity assessment procedures are undertaken and completed as expeditiously as possible.

[24] Appellate Body Report, *Korea – Various Measures on Beef*, para. 146; see also Appellate Body Report, *US – Tuna II (Mexico)*, paras. 236-240.

VIII. THE APPLICATION BY THE EUROPEAN UNION OF THE EU SEAL REGIME NULLIFIES AND IMPAIRS BENEFITS ACCRUING TO NORWAY UNDER THE GATT 1994

95. The European Union's adoption of the EU Seal Regime nullifies and impairs benefits accruing to Norway under the GATT 1994 within the meaning of Article XXIII:1(b) thereof. The measure at issue does so by: (i) effectively barring Norway's seal products from accessing the EU market; and (ii) modifying the competitive position of Norwegian seal products vis-à-vis "like" seal products that are permitted to be marketed under the IC or SRM requirements, as well as non-seal products that compete with seal products. In this way, the European Union has upset the negotiated balance reflected in the Tokyo Round and Uruguay Round outcomes. Because Article XXIII:1(b) applies "whether or not the measure conflicts" with other GATT provisions, Norway's claim under this provision stands irrespective of whether or not the Panel finds the EU Seal Regime to be inconsistent with the GATT 1994.

96. There is no contest between the parties that the tariff concessions negotiated between Norway and the European Union during the Tokyo and Uruguay Rounds constitute "benefits" protected under Article XXIII:1(b). However, with respect to the nullification and impairment of those benefits, the European Union contends that Norway has failed to show that: (i) the EU Seal Regime could not have been reasonably anticipated by Norway; and (ii) the EU Seal Regime upsets the competitive relationship between Norwegian seal products and other products.

97. As well settled in WTO case law shows, there is a rebuttable presumption that a measure could *not* reasonably have been anticipated in cases where it was adopted *subsequent* to the making of the relevant tariff concessions.[25] The EU Seal Regime came into effect in August 2010, 16 years after the conclusion of the Uruguay Round and 30 after the conclusion of the Tokyo Round. These facts raise a presumption that Norway did not reasonably anticipate the adoption of the EU Seal Regime.

98. In attempting to rebut such presumption, the European Union provides a short history of what it labels "public morals concerns" with regard to the killing of seals, and refers to a series of measures, not all of which are measures of European countries, of which four precede the conclusion of the Tokyo Round and five precede the conclusion of the Uruguay Round. However, the policy objective of such measures was generally to protect seals from unsustainable exploitation. Accordingly, Norway could, at most, have anticipated a measure of a type that pursued conservation ends. Since Norway carefully manages its TACs for seals based on scientific evidence, Norway could not reasonably have envisaged that the "market access guarantees" secured from the European Union would be nullified for other reasons. Further, even assuming *arguendo* that at the time of the Tokyo and Uruguay rounds some of the current EU Member States had adopted measures regulating trade in seal products for reasons of "public morals concerns", there was no reason for Norway to expect that the *same* moral values exhibited by a small number of Member States would become shared by the community of the dramatically enlarged EU-27 as a whole.[26]

99. Moreover, the European Union fails to demonstrate that the imposition of a measure *of the same type as the measure at issue*[27] could have been reasonably anticipated by Norway. To recall, the EU Seal Regime is *not* structured, designed or expected to operate as a ban on the marketing seal products. Rather, the placing on the market is allowed for products: (i) falling within the IC requirements, which are expected to operate to allow virtually all products of Greenland to be sold; and (ii) complying with the SRM and PU requirements, under which virtually all EU products are eligible to be sold. Nor does the EU Seal Regime contain *any provisions whatsoever* addressing animal welfare. To the contrary, as explained in paragraphs 0-0 above, the measure *allows* the marketing of products deriving from hunts that present the poorest animal welfare outcomes and *excludes* products deriving from hunts ensuring higher animal welfare standards.

[25] Panel Report, *Japan – Film*, para. 10.71.

[26] When the Tokyo Round was concluded in April 1979, the European Communities comprised just 9 member states, and when the Uruguay Round was concluded in December 1993 it comprised just 12 member states.

[27] Any expectation of a measure must be of the same time as that actually adopted: Panel Report, *Japan – Film*, paras. 10.79, 10.124 and 10.125; Panel Report, *EC – Asbestos*, para. 8.291(a).

ANNEX B-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

1. INTRODUCTION

1. The measure at issue in this dispute (the "EU Seal Regime") provides for a general prohibition of the placing on the market of all seal products. That prohibition is subject to three exceptions: the Indigenous Communities ("IC") exception, the Marine Resources Management ("MRM") exception and the Travellers exception. The EU disagrees with the Complainants' characterization of the EU Seal Regime as containing three self-standing "requirements". Besides, this characterization is at odds with the characterization included in the Complainants' panel requests. Consequently, in the event that the Panel were to decide that, as alleged by the Complainants, the EU Seal Regime cannot be characterized as a General Ban subject to three exceptions, the European Union hereby requests the Panel to find that Norway's and Canada's panels requests do not meet the requirements of Article 6.2 of the DSU and reject all the claims submitted by them.

2. The EU Seal Regime seeks to address deep and longstanding moral concerns of the EU public with regard to the presence in the EU market of seal products. Those concerns arise from the fact that seal products may have been obtained from animals killed in a way that causes them excessive pain, distress, fear or other forms of suffering.

3. The EU public's moral concerns find adequate support in qualified scientific opinions, according to which: Canada's and Norway's sealing regulations fail to prescribe a humane killing method; there are inherent obstacles which render it impossible to effectively employ humane killing methods on a consistent basis; and there is evidence that, largely as a result of those inherent obstacles, even the inadequate killing methods prescribed by Canada's and Norway's regulations are not effectively and consistently applied in practice.

4. The IC exception and the MRM exception are based on moral grounds connected to the objective of the EU Seal regime. When assessing the moral implications of seal hunting it is essential to take into account, together with the welfare of seals, the purpose of each type of hunt. It would be morally wrong to endanger the subsistence of the Inuit and other indigenous communities by prohibiting the placing on the market of seal products resulting from hunts traditionally conducted by those communities. In turn, prohibiting the placing on the market, on a non-profit basis, of seal products resulting from small-scale hunts conducted for the exclusive purpose of ensuring a sustainable management of marine resources would be unnecessary and counterproductive in light of the objective pursued by the EU Seal Regime.

5. The EU Seal Regime is neither protectionist nor discriminatory. Both the General Ban and the IC and MRM exceptions apply indistinctly with regard to all seal products, whether domestic or imported, and irrespective of the country of origin. Nor does the EU Seal Regime create unnecessary obstacles to trade. The General Ban is necessary in order to achieve the high level of fulfilment of the intended policy objective which was desired by the EU legislators and the EU citizens. None of the alternative measures identified by the complaining parties would make an equivalent contribution to that objective.

2. BACKGROUND

6. <u>IDENTIFICATION OF THE POLICY OBJECTIVE OF THE MEASURE</u>

7. The immediate objective of the EU Seal Regime is to harmonise the requirements applied by the EU Member States with regard to the marketing of seal products, so as to prevent obstacles to intra-EU trade in those or other products. It is obvious, however, that, if this were the only objective, it could have been achieved through the adoption of measures with a very different content, ranging from the full liberalization of trade in seal products to a complete ban.

8. The General Ban of the Basic Regulation responds to the moral concerns of the EU public in two different manners. First, because of the way in which seals are killed, the EU public regards seal products from commercial hunts as morally objectionable and is repelled by their availability in the EU market. The General Ban addresses directly this concern by prohibiting the placing on the EU market of seal products, so that the members of the EU public do not have to confront those products. Second, the EU public does not wish to be accomplice to the killing of seals in a manner which causes them excessive suffering. By prohibiting the placing on the EU market of seal products, the General Ban reduces the global demand for those products.

9. By enacting a general prohibition of the placing on the market of seals products, the European Parliament and the EU Council have chosen a high level of fulfilment of the intended policy objective.

10. The IC exception and the MRM exception are not "rationally disconnected" from the objective sought by the EU Seal Regime. In assessing the moral implications of seal hunting it is essential to take into account, together with the welfare of the seals, the purpose of each type of hunt.

11. Some hunts are conducted primarily for commercial purposes, such as obtaining skins for manufacturing inessential clothing items. According to the moral assessment of the EU legislators and the EU public, in the case of these hunts it is warranted to adopt a high level of protection against the risk that seals will experience excessive suffering when they are killed. In contrast, other seal hunts have a non-commercial purpose, such as the subsistence of indigenous communities or the sustainable management of natural resources. In such cases, it may be justified, or even required, *from a moral point of view* to tolerate a higher level of risk to the welfare of seals.

12. The IC exception and the MRM exception are based on moral grounds rationally connected to the objective of the EU Seal Regime. If the EU Seals Regime allows the placing on the market of seal products under those two exceptions it is because products qualifying for those exceptions do not raise the same moral concerns as products from commercial seal hunts. In view of this, the EU legislators concluded that it was unnecessary to prescribe, in addition to the conditions attached to each exception, some form of labelling requirement.

2.1. LEGITIMACY OF THE POLICY OBJECTIVE

13. According to the prevailing view in the European Union, the way in which humans treat animals is a matter of public morals: humans are not free to treat and use animals as they wish, but ought instead to conform to certain moral standards of right and wrong. Furthermore, such standards must be defined and enforced by the public authorities. These views have led to the adoption of laws aimed specifically at protecting animals against human behaviour.

14. Currently all EU Member States have in place animal protection laws based on public moral considerations. Animal welfare is also recognised as a value of concern to the European Union and has been enshrined by the Treaty of Lisbon in Article 13 of the TFEU.

15. Like the European Union, other WTO Members restrict the importation and/or marketing of certain animal products on public moral grounds which are often related, at least in part, to the way in which the animals are killed.

2.2. SCIENTIFIC GROUNDS FOR THE MEASURES

16. The European Union showed that, according to some qualified scientific opinions, Canada's and Norway's sealing regulations fail to prescribe a humane killing method; there are inherent obstacles which render impossible the effective and consistent implementation of any humane killing method; and there is evidence that, largely as a result of those inherent obstacles, even the inadequate killing methods prescribed by Canada's and Norway's regulations are not effectively and consistently applied in practice.

17. It is not the Panel's task to choose one among the various expert opinions available or to substitute its own scientific judgement. Rather, the Panel's task should be limited to examine whether, in so far as the policy choices which are reflected in the measure at issue purport to be based on science, such choices can find adequate support on qualified scientific opinions, irrespective of whether they represent the majority view.[1]

18. The measure at issue takes into account the opinion issued by the European Food Safety Authority (EFSA) on 6 December 2007 at the request of the European Commission. Having considered EFSA's opinion and the scientific evidence reviewed by EFSA, the EU legislators concluded that the risks to the welfare of seals which result from the inherent obstacles to the effective and consistent application of humane killing methods in commercial seal hunts documented by such evidence are excessive and morally unacceptable. While in selecting a level of protection of public morals it is appropriate to take into account available relevant scientific evidence, as the EU legislators did in this case, the choice of a level of protection of public morals is not a scientific judgement. It is a policy decision involving a moral judgement which, in the present case, was the exclusive prerogative of the EU legislators.

19. In addition to the EFSA opinion, reference should be made to two recent reports, which have reviewed the available scientific evidence pertaining to the Canadian commercial hunt. These are, first, the Richardson (2007) report, and second, the Butterworth (2012) report. The Richardson (2007) report concludes that, while it might be possible to prescribe a killing technique that would fit within accepted guidelines of humane slaughter, Canada's commercial seal hunt can never be made acceptably humane because of the conditions in which the hunt takes place. The Butterworth (2007) report concludes that Canada's commercial seal hunt adopts procedures, and has measurable outcomes that do not meet internationally recognized standards of humane slaughter. There are unacceptable (and unlawful) things being done to animals for profit in this hunt. The evidence clearly shows that the actions of governments in prohibiting seal product trade are, and will continue to be, justified.

2.2.1. Recommended killing methods

20. Various veterinary reports, including Burdon and Smith, have recommended a killing method involving a "three-step" process: First, the seal must be effectively *stunned* by a blow to the head or by shooting the animal in the head. Second, the stunned seal must be *checked for irreversible unconsciousness.* Seals which are not irreversibly unconscious must be immediately re-stunned. Third, the seal must be *bled out* to confirm or achieve death by terminating blood flow to the brainstem. Each of the three steps must be carried out *effectively* and in rapid succession. Any undue delay in completing the second or third steps may result in a situation in which the animal experiences severe suffering. Moreover, seals should not be shot in the water or in any circumstance when it is possible that the carcass cannot be recovered.

21. Drawing on the above opinions, EFSA recommended that: The time between shooting and monitoring of the state of the shot animal should be short, and seals should be bled out as soon as possible and, preferably immediately, after the effectiveness of the stunning process has been verified (which in turn should be as soon as possible after stunning). Moreover, unless they are in the water, animals should not be moved, i.e. gaffed, hauled or moved from the position they have come to rest, until it has been confirmed that they are dead or irreversibly unconscious, or have been bled-out. Furthermore, if animals are in water or located where they cannot be bled-out immediately, they should be monitored as soon as possible for consciousness and, if not dead or irreversibly unconscious, they should be re-stunned or killed. Last, shooting animals where the likelihood of reaching them quickly is reduced or questionable (e.g. on thin and loose pack ice, open deep water) poses an unknown risk of causing avoidable pain, distress and suffering.

22. When considering the above recommendations it must be recalled that EFSA deliberately omitted to take into account the "ethical aspects" of killing seals and that its

[1] Cfr. Appellate Body Report, *EC – Asbestos*, para. 178.

recommendations only sought to minimise the suffering experienced by seals by addressing the avoidable risks.

23. Butterworth (2012) stresses that the different versions of the three-step method recommended by previous veterinary experts involve an unacceptable compromise with commercial interests and do not ensure a humane killing. In order to qualify as humane, a method for killing seals would have to comply with the following generally accepted principles of humane slaughter: Minimizing distress experienced by the animal prior to and during stunning; rendering the animal unconscious (and therefore insensitive to pain) without the need to repeat the application of the stunning method; confirming unconsciousness by monitoring for multiple indicators of consciousness; delivering death without delay through an accepted euthanasia method; and, ensuring that unconsciousness persists until death occurs. He concludes, nevertheless, that the review of available data indicates that the above generally accepted principles of humane slaughter cannot be carried out effectively and consistently in the commercial seal hunt.

2.2.2. Canada's commercial hunt

24. Although the Canadian regulations purport to prescribe a humane killing method based on the 'three-step' process, they fail to do so. Instead*, gaps, loopholes and imprecise wording in the regulations* allow for sealers to engage in behaviours that cause excessive pain and distress. The deficiencies observed in Canada's hunting regulations affect each of the three 'steps': the method of stunning, the confirmation of unconsciousness and the bleeding.

25. Even if Canada's regulations were amended in order to address the deficiencies regarding the three-step process, there are, according to qualified scientific opinions, a number of *inherent obstacles* that would still make impossible, in practice, the application of a humane killing method in an effective and consistent manner. Indeed, it is presumably in recognition of such inherent obstacles that no commercial sealing regulations in existence today prescribe a humane killing method. These obstacles are, essentially, of three types: obstacles resulting from the unique *physical environment* in which commercial seal hunting occurs; obstacles resulting from the *intense competitive pressure and other time constraints* that characterise the commercial seal hunt; and obstacles relating to the *inability of the responsible authorities to effectively monitor* the killing and enforce the hunting regulations.

26. The ice conditions and extreme weather that make up the physical environment of the seal hunt make it impossible, in practice, for sealers to apply effectively and consistently the different steps of the prescribed killing method, let alone a genuinely humane method. Accurate and effective clubbing of seals becomes even more difficult while sealers scramble across broken, unsteady and slippery ice floes and attempt to maintain their balance without falling into the ocean, and the same is the case for shooting. In practice, extreme weather conditions, including strong winds, high ocean swells and waves, extreme cold and low visibility (snow, freezing rain, fog) make accurate shooting even more difficult. The Royal Commission on Seals and Sealing recognised in its 1986 report that many Canadian hunts take place, or have taken place, under conditions which make it impossible to obtain an acceptably high proportion of kills with head shots. Moreover, Butterworth (2007) concluded that, since it is impossible to ensure a high level of accuracy when shooting from a boat, even when using telescopic sights, hunting seals with rifles should be viewed as inherently inhumane and it is highly improbable that any improvements would lead to internationally acceptable standards of welfare. Furthermore, EFSA concluded that there is a risk of a targeted animal being hit with insufficient force and accuracy to cause instantaneous death or unconsciousness, and possibly escaping wounded.

27. Because of deteriorating ice conditions, the sealers are often unable to disembark to retrieve the seals. According to EFSA, considering the safety issues associated with the difficult working conditions often encountered during certain seal hunts and that animals may be shot from a distance, a regulation requiring the animal to be bled immediately after stunning may not always be practicable, depending on the hunt. Moreover, Smith recognised that the ice, sea and weather conditions present greater challenges for hunters to carry out all three steps of stunning, checking by palpation of the skull, and bleeding.

The European Union agrees of course that the sealers' personal safety should not be put at risk. However, if the three-step process cannot be properly conducted due to concerns about the safety of the sealers, the conclusion to be drawn is that seals should not be shot or clubbed in the first place, and not that sealers should be allowed to dispense with that process. What is more, ice conditions enhance the risk of wounded seals slipping into the water and diving beneath the surface ("struck and lost").

28. Canada's commercial hunt is a highly competitive industry, with staggering numbers of seals killed in a very short period of time by a large number of sealers. Every year Canada's DFO sets a quota for harp seals and allocates it according to region and vessel size. As a result, the hunt effectively turns into a race between sealers to collect as many skins as possible, as quickly as possible, until the quota assigned to each region is reached. In addition to the quota system, a number of other factors contribute to make Canada's commercial hunt a frenetic affair: the high risk of damages to the vessels and crew and the corresponding insurance costs; the high costs of operating a vessel (such as fuel or maintenance items); and the fact that most vessels are licensed for other, more lucrative fisheries, with overlapping seasons. Under considerable pressure to work quickly, for long hours and in extreme weather conditions, sealers are very susceptible to fatigue. This, as noted above, compounds the risk of inaccurate clubbing and shooting.

29. Another inherent obstacle to the effective implementation of humane killing methods is the inability of the authorities to monitor the hunt and enforce the regulations. In 1986 the Royal Commission on Seals and the Sealing Industry reported on the inability of the fisheries officers to adequately monitor the seal hunt. They noted that the area that they must patrol is very extensive, the number of sealers is large, and sealing operations are multifaceted. For these reasons, it is impossible to keep all parts of the seal hunt under close supervision at all times. Moreover, Smith observed that the physical realities of the Canadian harp seal hunt present a significant set of challenges for observation, supervision, monitoring and enforcement, and he also drew attention to the limitations of aerial surveillance. Furthermore, he identified conflicts of interest, which could affect the willingness of the authorities to effectively monitor and enforce compliance with the sealing regulations.

30. The inherent obstacles described in the preceding section have the consequence that, in many cases, the killing methods prescribed by the existing hunting regulations are either disregarded or ineffectively applied. EFSA reported that it has been observed by several independent groups that sealers in the Canadian hunt, on many occasions do not comply with the regulations. Burdon reached a similar conclusion, while Butterworth (2007) stated that a maximum of only 15% of seals they observed on the videos were killed in a manner that conformed to the Marine Mammal Regulations. EFSA also found that there is strong evidence that in practice, effective killing does not always occur. The veterinary reports examined by EFSA include evidence showing that clubbing is not always performed effectively, and they also provide clear evidence of inaccurate and ineffective shooting. Moreover, all the reports examined by EFSA agree that in many cases the second and third steps (monitoring for consciousness and bleeding) are either omitted or not performed rapidly enough.

2.2.3. Norway's commercial hunt

31. Norway's regulations are in some respects stricter than Canada's. In particular, Norway's regulations, unlike Canada's, prohibit shooting seals in the water. But they are deficient in other respects.

32. Some of the deficiencies have been openly admitted by Norway's own regulators. In November 2010 Norway's Fisheries Directorate issued for consultation a proposal to amend the hunting regulations. That proposal provided *inter alia* for the repeal of those provisions that permit hooking and hoisting the seals on board before bleeding them. The proposal was strongly opposed by both sealers and ship owners. As a result, the provisions allowing the bleeding of seals on board were left unmodified by the amending regulation eventually adopted by the Fisheries Directorate on 23 March 2011.

33. There is very little scientific evidence on the effectiveness of the prescribed killing methods in the conditions in which the Norwegian commercial hunt takes place. The VKM report acknowledges that scientific, peer-reviewed studies and scientific data on the actual performance of the Norwegian seal data are very limited. More specifically, VKM recognised that: the scientific data on the efficiency of the Norwegian hakapik are limited; only a limited number of studies is available from Norwegian seal hunts which investigate how effective rifles are; and there are no official statistics on numbers of percentages of seals struck and lost, either alive or dead during Norwegian hunts. To some extent the lack of evidence can be filled by examining the reports drawn by the inspectors on board of the sealing vessels. Those reports though cannot be regarded as independent evidence, since the inspectors are government employees. Moreover, the inspection reports are often very brief and uninformative.

34. Norway's commercial hunt takes place in the Greenland Sea ("West Ice") and in the Barents Sea/White Sea ("East Ice"), under very similar environmental conditions as Canada's commercial hunt. For that reason, the observations made above in section 2.4 with regard to the inherent obstacles to the effective implementation of a humane killing method resulting from environmental factors are equally relevant with regard to Norway's commercial hunt.

35. Unlike Canada's regulations, Norway's regulations prescribe the presence of an inspector on board of each vessel. Nevertheless, in practice it is very difficult for the inspector to keep an adequate overview over all the activities of the hunt at all times. Moreover, inspectors live closely together with the sealers over extended periods of time. As a result, they are exposed to intense social pressure. They may easily compromise and tolerate practices which are against the regulations because, like the sealers, they come to perceive such practices as 'usual' and 'unavoidable' for the commercial success of the hunt.

36. Inspection reports provide further evidence that, in practice, seals are not always effectively killed in a humane manner. The Norwegian sealers have repeatedly voiced discontent with the existing regulations. The inspection reports provide evidence that those regulations are often disregarded, even if formal charges are very rarely brought against the offenders. Mention should be made, in particular, of a recent and exceptionally detailed report of 2009 by Inspector Liv Greve-Isdahl concerning a sealing expedition by the vessel Kvitungen, which provides ample evidence, *inter alia*, of careless and very inaccurate shooting; a high rate of 'struck and lost' animals; hooking of animals, despite good ice conditions and when animals where not obviously dead; excessive delays in bleeding the animals; and use of semi-automatic weapons (Kalashnikov).

2.2.4. Reliability of the evidence submitted by the European Union

37. The Complainants assert that Burdon (2001) and Butterworth (2007) are not peer reviewed and thus are less credible studies. However, Burdon (2001) and Butterworth (2007) were produced for reasons other than publication and both were reviewed by peers far more exhaustively than would have occurred in a formal peer review for publication. Moreover, the attempts by the Complainants to challenge the scientific credentials of the experts who authored the studies relied by the European Union, are baseless. The qualifications of all these experts go well beyond their experiences observing seal hunting. Many of them are internationally renowned, distinguished scientists in the field of humane slaughter, and with their expertise have evaluated commercial sealing in comparison with other large-scale commercial slaughter operations.

38. With regard to the facilitation of some studies by NGOs, the European Union does not believe that scientific research becomes unreliable merely because it has been commissioned or facilitated by NGOs with a non-commercial interest. The key point is whether the scientists involved produce unbiased scientific information. Besides, Canada's own evidence is questionable in view of Dr P.Y. Daoust's close links to the Canadian fur industry. Moreover, the allegation that the evidence submitted by the EU is "dated" is spurious. Not only were the changes made to Canada's regulations in 2009 very minimal and inconsequential, but also the studies relied upon by the European Union focus on the inherent obstacles to humane killing. Furthermore, more than two thirds of the video

evidence submitted by the EU was produced after the most recent regulatory changes occurred in Canada.

39. The EU has also demonstrated that video evidence is reliable and credible, in that it is 1) more accurate than first hand observation/memory; and 2) obtained in a random fashion. That EFSA regarded video evidence as reliable is confirmed by the fact that the EFSA opinion is largely based on studies which made extensive use of video evidence. Moreover, Canada's position that video evidence is unreliable is difficult to reconcile with the fact that Canada claims to rely on video evidence for monitoring the hunt or with the fact that the Canadians authorities have sometimes laid charges against sealers based on video evidence of commercial sealing supplied by NGOs.

2.3. EVIDENCE OF THE PUBLIC MORAL CONCERNS

40. The European Union has identified various types of evidence that may be relevant in order to establish the existence of "public morals". The starting point of the enquiry should be the measure itself, including its preamble and the legislative history. The structure and design of the EU Seal Regime is fully consistent with the public morals objective invoked by the European Union. To begin with, the preamble to the Basic Regulation confirms that it was enacted in response to the "serious concerns" expressed by the public with regard to the way in which seals are killed. Moreover, the Impact Assessment accompanying the European Commission proposal confirms that, by improving the welfare of seals, the proposal aimed at addressing the public's moral concerns. Furthermore, the amendments to the European Commission proposal made by the EU legislators were aimed at responding to the public morals concerns of the EU citizens, which the EU legislators considered had not been sufficiently addressed by the proposal. Last, the Basic Regulation was enacted in order to replace and pre-empt the measures already taken, or about to be taken, by some EU Member States.

41. The EU Seal Regime seeks to uphold a standard of conduct according to which it is morally wrong for humans to inflict suffering upon animals without sufficient justification. This basic rule reflects a long-established tradition of moral thought, which in its modern form is usually designated as "animal welfarism"."Animal welfare" and morality, albeit different, are inseparable.

42. The moral standard which the EU Seal Regime seeks to uphold appears to be shared by the Complainants themselves, and in particular by Norway. The same standard also inspires other measures and policies of the European Union, pursuant to Article 13 of the TFEU, while all EU Member States have in place animal protection laws based on public moral considerations. Moreover, opinion polls conducted in various EU Member States show a strong public demand for a ban on the marketing of seal products. This demand indicates the unacceptability of seal hunting. What is more, all these actions are aligned with actions taken by international organizations. Among others, the OIE has considered to develop a standard with regard to the commercial killing of seals. Nevertheless, the discussions soon revealed that the humane killing standards developed by OIE for the commercial slaughtering of animals for food cannot be transposed to the commercial seal hunts due to the environmental conditions in which the latter take place.

43. The European Union has referred to various measures restricting trade in animal products applied by other Members on public moral grounds related to animal welfare, including measures restricting trade in seal products, as evidence of the fact that the objective pursued by the EU Seal Regime is a legitimate objective and, more specifically, that it falls within the scope of Article XX(a) of the GATT.

44. Last, the European Union considers that, once it is established that the basic standard of conduct which the EU Seal Regime seeks to uphold is part of the European Union's "public morals", it is not necessary to prove that each of the individual outcomes from the application of that rule in specific situations is regarded by the EU public as a separate rule of public morality on its own. Governments are not required to test the populace´s support for each and every element of an envisaged piece of legislation based on public morals before enacting it. Indeed, as illustrated by the measures at issue in both *U.S. - Gambling*

or *China – Publications and Audio-visual Products,* regulations on public morals can be very complex and do not lend themselves easily to that kind of testing. Instead, all that may be necessary is to show that the subject matter of the measure at issue (e.g. the protection of animals) is regarded as an issue of public morals in the responding Member.

3. THE TBT AGREEMENT

3.1. APPLICABILITY OF THE TBT AGREEMENT

45. The complainants' claims under Articles 2.1, 2.2, 5.1.2 and 5.2.1 of the TBT Agreement require that the EU seals regime is a "technical regulation", according to Annex 1.1 of the *TBT Agreement.* Pursuant to the interpretation which the Appellate Body developed in *EC – Asbestos* and summarised in *EC – Sardines*, a document must meet three criteria to fall within this definition: *first*, it must apply to an identifiable product or group of products. *Second*, it must lay down one or more characteristics of the product. These product characteristics may be intrinsic, or they may be related to the product. They may be prescribed or imposed in either a positive or a negative form. *Third*, compliance with the product characteristics must be mandatory. These three criteria apply cumulatively. Contrary to the allegations of Canada and Norway, the EU seals regime is not a technical regulation since it does not meet the second criterion, i.e. it does not lay down product characteristics

46. According to WTO jurisprudence,[2] a document fulfilling the second criterion for a technical regulation needs to "lay down", in positive or negative form, one of three types of subject matter: (1) "product characteristics" which encompass (a) intrinsic features and qualities to the product, and (b) related "characteristics" (2) "processes and production methods" which are "related" to such product characteristics; or (3) "administrative provisions" which are "applicable" to such product characteristics or their related processes and production methods. The analysis of whether a document prescribes such subject matter needs to examine the measure as an integrated whole, taking into account, as appropriate, the prohibitive and the permissive elements. Furthermore, the determination of whether the measure constitutes a technical regulation must be made in the light of the characteristics of the measure at issue and the circumstances of the case.

47. The EU seals regime does not prescribe any of the subject matter covered by the second criterion of a "technical regulation" within the meaning of Annex 1.1 of the TBT Agreement. The regime does not lay down "product characteristics"; be it intrinsic or related characteristics in either positive or negative form. More specifically, it is not a technical regulation to the extent that it prohibits products which exclusively consist of seal. With regard to products not only containing seal but also other ingredients ("mixed" products) the EU seals regime does not constitute a simple ban of seal ingredients in their natural state. Canada and Norway primarily argue that the EU seals regime lays down intrinsic product characteristics in negative form by providing that all products may not contain seal. However, their argument ignores that the EU seals regime is not limited to prohibiting the placing on the market of products containing seal, but that it also provides for three exceptions under which products containing seal may be placed on the EU market.

48. As the Appellate Body held in *EC-Asbestos*, "the proper legal character of the measure at issue cannot be determined unless the measure is examined … as an integrated whole, taking into account, as appropriate, the prohibitive and the permissive elements". The Appellate Body also explicitly stated that "the scope and generality of those prohibitions *can only be understood in the light of the exceptions* to it". The characterization of the EU seals regime under Annex 1.1 of the TBT Agreement in the light of its exceptions is particularly important since most claims of the complainants under the TBT Agreement actually focus on the exceptions. Therefore, the EU Seal Regime must be examined *as an integrated whole taking into account the three exceptions.* None of the three exceptions lays down product characteristics within the meaning of Annex 1.1 of the TBT Agreement. To the extent that the EU Seal Regime provides for exceptions from the ban, it does so not by relying on product characteristics or their related processes or production methods as

[2] Appellate Body Report, *EC-Asbestos*, and Appellate Body Report *US-Tuna II (Mexico)*

conditions, but by relying on conditions that are *not related* to product characteristics. The EU seals regime *as an integrated whole*, therefore, does not lay down "product characteristics" within the meaning of Annex 1.1 of the TBT Agreement.

49. Canada and Norway further submit that the EU Seal Regime establishes process or production methods within the meaning of Annex 1.1 of the TBT Agreement. The EU does not agree with Canada and Norway, and submits that the EU Seals Regime does not regulate any processes and production methods. The ban read together with the exceptions allows the placing on the market of seals products depending on the identity of the hunter (for the IC exception) and the purpose of the hunt (for the IC and the MRM exception), which have nothing to do with methods for the production of seals products.

50. Canada and Norway also argue that certain procedural provisions in the Implementing Regulation relating to the operation of the three exceptions constitute "applicable administrative provisions" within the meaning of Annex 1.1 of the TBT Agreement. The EU argues that whereas the procedural requirements set out in the Implementing Regulation may be considered as administrative provisions, they do not constitute "applicable administrative provisions" within the meaning of Annex 1.1 of the TBT Agreement. Annex 1.1 of the TBT Agreement *only* addresses those administrative provisions *which apply to product characteristics or their related processes and production methods*. Already the term "applicable" in the *wording* of Annex 1.1 of the TBT Agreement indicates that only administrative provisions which apply to the subject matters mentioned in the first part of the definition may qualify a document as a technical regulation. This is further supported by the *context*. The reference to "applicable administrative provisions" immediately follows the mention of "product characteristics or their related processes and production methods". The linkage to these two categories of subject matter is expressed by the conjunctive term "including".

3.2. ARTICLE 2.1 OF THE TBT AGREEMENT

51. Canada argues that the EU Seal Regime, through the IC exception, *de facto* violates the MFN obligation under Article 2.1 of the TBT Agreement, because it accords less favourable treatment to Canadian products as compared to like products from Greenland. Further, Canada submits that the EU Seal Regime, through the MRM exception, *de facto* violates the national treatment obligation under Article 2.1 of the TBT Agreement, because it treats Canadian seal products less favourably than domestic seal products.

52. As argued above, the European Union considers that the TBT Agreement does not apply in the present case since the EU Seal Regime, including any of its exceptions, does not amount to a "technical regulation" in accordance with Annex 1 of the TBT Agreement. In any event, assuming that the TBT Agreement is applicable in the present case, the European Union considers that Canada's claim that the EU Seal Regime violates Article 2.1 of the TBT Agreement must fail. In particular, the EU Seal Regime, through any of the exceptions challenged by Canada, does not *discriminate* between the group of imported products and the group of domestic/other origin like products. Any difference in treatment between certain sub-categories of like products within those groups stems from a *legitimate regulatory distinction* that is designed and applied in an *even-handed* manner. As the EU explained in its reply to *Question 29 of the First Set of Questions from the Panel*, this regulatory distinction made by the EU Seal Regime between conforming and non-conforming seal products is primarily based on the "purpose" of the hunt. In this sense, the EU Seal Regime distinguishes among seal hunts i) for commercial purposes; ii) for subsistence purposes (of the Inuit and other indigenous communities); and iii) for the purpose of the sustainable management of marine resources.

3.2.1. Legal standard

53. According to WTO case-law,[3] in order for a complaining Member to prevail in a *de facto* claim under Article 2.1 of the TBT Agreement, like the one brought by Canada in the present case, the following elements must be proven: (i) that the measure at issue

[3] Appellate Body Report, *US-Tuna II (Mexico),* Appellate Body Report, *US-Clove Cigarettes*, Appellate Body Report, *US-COOL*

constitutes a "technical regulation" within the meaning of Annex 1.1; (ii) that the group of imported products must be "like" the group of domestic/other origin products; and (iii) that the treatment accorded to the group of imported products must be less favourable than that accorded to the group of "like" domestic/other countries products. With respect to the last element, in cases where no *de jure* discrimination is claimed (i.e., when the measure is origin-neutral on its face), it is not sufficient for the complaining Member to show that the technical regulation at issue *modifies the conditions of competition in the relevant market to the detriment of the group of imported* products *vis-à-vis* the group of like domestic/other origin products. Rather, it needs to be examined *whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination* against the group of imported products. It is against this legal standard that the European Union examined the merits of Canada's claim against the IC and MRM exceptions.

3.2.2. Likeness

54. The European Union submits that Canada's identification of "like" products is partial and skewed towards finding discrimination in the present case. The Panel is not bound to limit its analysis to those products identified by Canada in its first written submission, but is required to determine the *group* of domestic and/or other origin products that are "like" the *group* of products imported from the complaining Member. The European Union considers that the relevant group of products with respect to Canada's claim under Article 2.1 of the TBT Agreement are those conforming and non-conforming with the EU Seal Regime. The European Union also considers that all seal products, *regardless of the type and purpose of hunt* they were obtained from, *compete and are substitutable* between each other in the EU market.

3.2.3. Less Favourable Treatment - IC exception

55. Canada argues that the Indigenous Communities exception *de facto* violates Article 2.1 of the TBT Agreement since such exception effectively permits 100% of Greenlandic seal products to be placed on the EU market, but excludes virtually all Canadian seal products from the same market, thereby modifying the conditions of competition to the detriment of Canadian seal products and resulting in inequality of competitive opportunities. The European Union has shown that the IC exception does not provide for less favourable treatment to the group of Canadian imported products, because any detrimental impact on Canadian imports derived from the IC exception *stems exclusively from a legitimate regulatory distinction* rather than reflecting discrimination against the group of imported products. More specifically, the European Union has, first, demonstrated that the objective pursued by the IC exception is "legitimate". *A fortiori*, the regulatory distinction should also be considered "legitimate". Second, the European Union has established that the IC exception does not *de jure* discriminate by reasons of origin. Third, the European Union has shown that the IC exception does not *de facto* discriminate against the group of Canadian imported products.

3.2.3.1 Legitimate objective behind the IC exception

56. Contrary to what Canada suggests, the IC exception is "rationally connected" to the main objective of the EU Seal Regime, i.e., addressing the moral concerns of the EU public with respect to seal hunting. The IC exception takes into account that the Inuit and other indigenous communities have a long tradition of seal hunting, which continues to make an essential contribution to their subsistence. As stressed by Canada, seal hunting is an intrinsic part of the Inuit way of life, and an integral part of Inuit culture and survival. The same could be said of other indigenous communities in similar circumstances. Consequently, the situation of the Inuit and other indigenous communities is rather unique. In view of this, the EU legislator came to the conclusion that it would be "morally wrong" to prohibit the placing on the market of seal products resulting from hunts traditionally conducted by those communities and which contribute to their subsistence. Indeed, the moral perception of products from seals hunted by Inuit and other indigenous communities is the result of a practice whose inherent legitimacy (subsistence of indigenous people) overrides the general concerns over the killing methods for purely

commercial motives. Besides, as the European Union observes, the protection of the Inuit and indigenous communities has been widely recognised in the international fora.

3.2.3.2 The IC exception – no *de jure* discrimination

57. The European Union observes that Canada challenges the IC exception as a *de facto* discrimination. In other words, Canada does not dispute that the IC exception is origin-neutral on its face. In any event, for the avoidance of any doubt, the European Union has shown that the IC exception is origin-neutral on its face and, thus, there is no *de jure* discrimination. More specifically, the terms employed in either the Basic Regulation or the Implementing Regulation with respect to the IC exception are origin-neutral.

58. First, Article 3.1 of the Basic Regulation, referring to the Indigenous Communities exception, covers the placing on the market of seal products that result from "hunts traditionally conducted by Inuit and other Indigenous Communities and contributing to their subsistence". In this respect, the wording of Article 3.1 of the Basic Regulation does not list countries by name or specify a particular origin of seal products. Rather, it refers to (i) the type of the hunt, i.e. traditional hunts carried out by Inuit and other indigenous communities, and (ii) the purpose of the hunt (i.e., contributing to the subsistence of the hunter). Second, the Basic Regulation does not define the term "Inuit" as being indicative of a particular origin. In fact, those communities are widely spread around the world. Third, the conditions for qualifying for the IC exception are further specified in Article 3 of the Implementing Regulation. Like the Basic Regulation, the Implementing Regulation refers to seal products originating from seal hunts (not from specific countries) where certain conditions are met. None of these conditions explicitly relate to a country or limited group of countries, but rather to the characteristics (i.e., type and purpose) of the seal hunts. Fourth, as evidenced by the legislative history, there is no indication that the European Union intended to design the IC exception to privilege certain WTO Members among others. Fifth, the European Union observes that other countries have likewise introduced the same exception to the imports of seal products. Finally, the European Union considers that the fact that some countries happen to have –at a given moment– indigenous population and others do not may create an incidental disparate impact, but the EU Seal Regime is not structured or designed to benefit a limited group of countries based on the nationality or origin of seal products. In sum, the European Union considers that there is no *de jure* discrimination in the present case, because the EU Seal Regime is origin-neutral on its face.

3.2.3.3 The IC exception – no *de facto* discrimination

59. Canada argues that the EU Seal Regime creates inequality of competitive opportunities between Canadian seal products and Greenlandic seal products because the vast *majority* of Canadian seal products cannot be placed on the EU market, due to the fact that the east coast commercial harvest in Canada from which the products derived does not meet the definition of 'indigenous', whereas "seal products from Greenland meet all the conditions set out in the Implementing Regulation and are therefore entitled to be placed on the EU market".

60. Canada's "quantitative approach" is entirely without merit. Canada ignores the fact that the relevant *group* of imported products in this case not only includes Canadian seal products derived or obtained from non-Inuit commercial hunts but *also* Canadian seal products obtained from Inuit hunts. The European Union considers that, in order to examine whether there is less favourable treatment, the group of imported products (in particular, from Canada) and the group of products from other origin chosen (in particular, Greenland) must take into account the existence of the *legitimate regulatory differentiation* made in the Basic Regulation. When the treatment granted to the *group* of Canadian seal products (including both seal products derived from Inuit and commercial hunts) is *compared* to the treatment granted to the *group* of products from other origin covered by the EU Seal Regime (also including both seal products derived from Inuit and commercial hunts), the result is that no discrimination arises. What is crucial for this comparison, in order to examine whether there is less favourable treatment or not, is the *aggregate* competitive opportunities afforded to these two *groups* of products.

61. Thus, when making a *category-to-category comparison* within the groups of products in each side of the comparison (i.e., Canada versus other origins, such as Greenland/Norway), it should be concluded that there is *no alteration of the aggregate competitive opportunities* in favour of those other origins' groups of products. Put in simple terms, this approach shows that there is no discrimination since each category in the same situation (*by reference to the "purpose" of the hunt)* is treated equally and has identical access to (or prohibition to access) the EU market, regardless of the origin of the products. Moreover, as the EU replied to *Question 34 of the First Set of Questions from the Panel*, the trade data provided by the Complainants with regard to the alleged detrimental impact of the EU Seal Regime on the competitive conditions for their seal products are inconclusive. Indeed, the fact that there have not been imports from Canada (and Norway) falling under the IC exception is *the result of the inaction by the relevant entities in Canada* which have failed to request the certification envisaged in Article 6 of the Implementing Regulation. In other words, it is the action (or more concretely the omission) of the countries in question, and not the EU Seal Regime, that explains the relevant trade data.

62. The "regulatory distinction" made by the EU Seal Regime between conforming seal products under the IC exception and non-conforming products subject to the General Ban is "legitimate", and not discriminatory, because (i) it is based on a legitimate objective, and (ii) it is designed and applied in an even-handed manner.

63. Canada agrees that *the protection of public morals* is a legitimate objective under Article 2.2 of the TBT Agreement. The IC exception stems from the rule of public morality which the EU Seal Regime seeks to uphold. Even if the IC exception did not reflect a rule of morality, as Canada asserts, the European Union submits that the protection of Inuit and other indigenous communities would be a *legitimate* objective in itself. The protection of the economic and social interests of Inuit and other indigenous communities is widely recognised in the international forum. As explained in the European Union's response to *Question 39 of the First Set of Questions from the Panel*, the European Union considers that such international context supports the conclusion that the objective pursued by the IC exception, and on which the regulatory distinction is based, is "legitimate" for the purpose of Article 2.1 of the TBT Agreement.

64. Moreover, the IC exception is designed and applied in an *even-handed* manner. It is "calibrated" to the animal welfare concerns it pursues. More specifically, it strikes a *balance* between the welfare of seals and the subsistence of the Inuit and other indigenous communities and the preservation of their cultural identity. The latter provide benefits to humans that, *from a moral point of view*, outweigh the risk of suffering inflicted upon seals as a result of the hunts conducted by those communities. Moreover, the IC exception does not go beyond what it is necessary to achieve its purpose, and it applies only to seal products from genuinely hunts for subsistence purposes.

3.2.4. Less Favourable Treatment – MRM exception

65. Canada argues that the EU Seal Regime is a *de facto* violation of the national treatment obligation under Article 2.1 of the TBT Agreement because the MRM exception effectively permits all EU products to be placed on the EU market, while excluding 90-95% of Canadian seal products from the same market. Thus, Canada follows here the same "quantitative approach" as with respect to the IC exception to show de facto less favourable treatment. As the EU has explained in the context of the IC exception, such "quantitative approach" cannot be dispositive in finding a detrimental impact on Canadian imports.

66. More specifically, as the EU replied to *Question 28 of the First Set of Questions from the Panel*, when making a *category-to-category* comparison within each of the groups of products in each side of the comparison (i.e., Canada versus European Union), it should be concluded that there is *no alteration of the aggregate competitive opportunities* in favour of the EU's group of products. The EU Seal Regime equally affects all seal products derived from hunts for commercial purposes, as well as seal products derived from hunts for marine resource management purposes. The fact that Canada and Norway *have decided to structure their industries around hunts for commercial purposes* does not necessarily show

a detrimental impact in the sense of affording fewer competitive opportunities to the Canadian and Norwegian seal products. The EU Seal Regime accords the same competitive opportunities to all seal products falling under the same category, *on the basis of the purpose behind the hunt (the regulatory distinction)*.

67. Even if the Panel were to agree with Canada that the EU Seal Regime, through the MRM exception, modifies the conditions of competition to the detriment of Canadian imports, the European Union submits that such detrimental impact would not reflect discrimination because it would stem exclusively from the legitimate regulatory distinction embedded in the EU Seal Regime. The MRM exception reflects the EU legislators' assessment that hunts conducted exclusively for management purposes do not raise moral concerns, because the benefits to humans and other animals which are part of the same ecosystem, outweigh the risk of suffering being inflicted upon the relatively small number of seals concerned. Moreover, the prohibition of the marketing of products from the hunts covered by the MRM exception would not contribute to reduce the suffering of seals, because those hunts would take place in any event, as they are conducted exclusively for management purposes and not for commercial reasons.

68. The "regulatory distinction" made by the EU Seal Regime is also "legitimate" because it is designed and applied in an even-handed manner. Moreover, it contains elements which ensure the non-commercial purpose behind the hunt in question: the by-products of those seal hunts are placed on the market in a non-systematic way; the by-products of those seal hunts are placed on the market only on a non-profit basis; the 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; and finally, Article 3.2 of the Basic Regulation further provides that the application of this exception "shall not undermine the achievement of the objective of this Regulation". All these conditions ensure that only seal products from genuinely hunts for management purposes qualify for the MRM exception, avoiding potential circumvention of the General Ban.

3.3. ARTICLE 2.2 OF THE TBT AGREEMENT

69. Should the Panel find that the measure at issue falls within the scope of application of the TBT Agreement, the European Union submits, in the alternative, that the measure in dispute is fully consistent with Article 2.2 of the TBT Agreement. More specifically, the European Union has shown that the measure at issue has neither the purpose nor the effect of creating "unnecessary obstacles to trade", given that: it pursues a legitimate objective; and it is not more trade-restrictive than necessary in order to fulfil that objective.

70. The European Union has shown that the policy objective that it pursues is a legitimate objective for the purposes of Article 2.2 TBT. Unlike Article XX GATT, Article 2.2 TBT does not mention explicitly the protection of public morals as a legitimate objective. But the list of legitimate objectives in Article 2.2 TBT is not exhaustive. Moreover, the Appellate Body has indicated that the objectives recognised under other covered agreements may provide guidance for the purposes of the Article 2.2 TBT. The objectives cited in Article XX GATT are particularly relevant given that, as stated expressly in its preamble, the TBT Agreement seeks to "further the objectives of the GATT." The justifications provided by Article XX of the GATT 1994 and Article 2.2 of the TBT Agreement should be read harmoniously. Besides, the complaining parties agree that the protection of animal welfare is a "legitimate objective" for the purposes of Article 2.2 TBT, which is "related" to the protection of animal life or health, one of the objectives expressly mentioned in Article 2.2 TBT, as well as in Article XX(b) of the GATT.

71. With regard to the trade-restrictiveness of the measure, it is beyond question that the EU Seals Regime restricts trade to the extent that the General Ban provides for a prohibition, as a general rule, on the placing on the EU market of all seal products, whether domestic or imported. Indeed, the General Ban aims at being very trade-restrictive, *consistently with the high level of fulfilment of the EU Seal Regime's policy objective* that was sought by the EU Seal Regime. Unlike the General Ban, the three exceptions to that prohibition are not trade-restrictive. To the contrary, they allow trade which would otherwise be prohibited by the General Ban. The three exceptions could only be regarded as being

trade-restrictive if they discriminated in favour of domestic seal products or between different sources of imports. But neither the IC nor the MRM exceptions are discriminatory. Since the exceptions are not trade-restrictive, they do not require justification under Article 2.2 TBT.

3.3.1. The EU Seal Regime makes a substantial contribution to its objective

72. Through the General Ban the EU Seal Regime makes a very substantial contribution to its policy objectives. The EU Seal Regime pursues two closely related objectives: In the first place, the General Ban provides a direct response to the moral concerns of the EU population by prohibiting, as a general rule, the marketing within the EU territory of the products which the EU population regards as morally abhorrent. Furthermore, by limiting the global demand for seal products, the General Ban reduces the number of seals which are killed every year in a manner that may cause them excessive suffering, thereby contributing to the welfare of seals.

73. "Animal welfare" and "public moral concerns on animal welfare", albeit different objectives, are closely connected. More specifically, the public moral concerns on seal welfare fall within two related, but distinguishable categories. First, EU citizens are morally concerned, as an absolute measure of right and wrong, about the incidence of inhumane killing of seals as such. Second, they are morally concerned about their own, and the wider EU public's, agency in the context of violations of their standards of right and wrong, i.e., their individual and collective participation as consumers in, and exposure to, the economic activity which sustains the market for commercially-hunted seal products.

74. The General Ban makes a material, but necessarily partial, contribution to addressing the animal welfare concerns by reducing global demand for seal products resulting from commercial hunts, with the consequence that less seals are killed in an inhumane way. Contrary to the Complainants' allegations, the three exceptions to the General Ban do not nullify the contribution of the EU Seal Regime to the welfare of seals. The MRM exception is subject to strict conditions. Its scope is very limited and the trade potentially concerned very small. Moreover, prohibiting the placing on the market of products within the scope of the MRM exception would not prevent the killing of the seals concerned, which are hunted exclusively for management purposes, and could be counterproductive from an animal welfare point of view. With regard to the IC exception, it does not seek to promote exports from Greenland, but instead to mitigate the necessarily adverse impact of the EU Seal Regime on the Inuit and other indigenous populations to the extent compatible with the animal welfare objectives of the EU Seal Regime. In order to address in full the animal welfare concerns it would be necessary to put an end to the commercial seal hunts, given that humane killing methods cannot be applied on a consistent basis. This solution, however, is beyond the powers of the European Union.

75. On the other hand, the General Ban addresses successfully the second type of moral concerns of the EU population in two different ways: First, by prohibiting the marketing of seal products resulting from commercial hunts on the EU market, the General Ban seeks to reduce global demand for those products and, consequently, the number of seals which are not killed in a humane way in the commercial hunts. This improves the welfare of seals and, at the same time, addresses the public moral concerns with regard to the act of killing seals as such. Second, by prohibiting the marketing of seals, the EU Seal Regime addresses the moral concerns with regard to certain acts performed within the EU territory which are morally reprehensible in themselves: selling seal products from commercial hunts, because it involves an act of commercial exploitation of an immoral act (the killing of seals in an inhumane way); and purchasing those seal products, because it promotes such immoral killings. Furthermore, by prohibiting the marketing of seal products from commercial hunts in the EU market, the EU Seal Regime also addresses the broader concern of the EU population not to render itself accomplice collectively to an immoral act by tolerating the marketing of seal products within the European Union, while shielding the EU public from being confronted with the products resulting from such immoral act.

76. The contribution of the EU Seal Regime to its public moral objective is very substantial, notwithstanding the exclusion of exports and transit from the scope of the General Ban. Banning exports of seal products or the entry of goods in transit would indeed have made

a greater contribution to the public morals objective pursued by the European Union. However, the EU acceded to exclude transit and inward processing from the scope of the ban for reasons of comity. In any case, the exclusion of those activities does not prevent the EU Seal Regime from being justified under Article 2.2 of the TBT Agreement or Article XX of the GATT. The 'all or nothing' approach advocated by the Complainants on the grounds of 'consistency' or 'coherence' has no basis in the WTO Agreement. A Member may choose to pursue each of its policy objectives to a limited extent only, so as to take into account other policy objectives. Besides, a measure excluding also exports and transit would have been more trade-restrictive, and prima facie inconsistent with Articles XI and V of the GATT.

3.3.2. The alternative measures identified by the Complainants would fail to make an equivalent contribution to the objective of the EU Seal Regime

77. Both Canada and Norway identified as a less restrictive alternative measure a regime that would condition market access on compliance with animal welfare standards combined with a labelling requirement. In addition, Norway identified two other alternative measures: the removal of the three sets of requirements comprising the EU Seal Regime; and the removal from the MRM exception of the requirements that the product be placed on the market in a non-systematic way and on a non-profit basis.

78. With regard to the *first alternative* measure, this is essentially the same measure which had been proposed by the European Commission during the legislative process. However, the EU legislators rejected the derogation proposed by the European Commission because, in their view*, it failed to provide a sufficiently high level of fulfilment of the objective pursued by the EU Seal Regime*. The EU legislators concluded that, although it could be possible, *in theory*, to prescribe a humane method for killing seals, *in practice* the unique conditions in which commercial seal hunting takes place would render it *impossible to apply and enforce such method in an effective and consistent manner*. Contrary to what the Complainants appear to consider, there is no rule in the TBT Agreement or elsewhere in the WTO Agreement which would require a Member to tolerate certain risk merely because it is *unavoidable*. Where the unavoidable risks of an activity are excessive in light of a Member's chosen level of protection, as in the case of commercial seal hunting, a Member is entitled to ban the products resulting from such activity. According to the EU legislators' assessment, the *unavoidable* risks to the welfare of seals that are *inherent in commercial* seal hunting are *excessive and morally unacceptable*. Thus, the General Ban of those products is necessary in order to achieve the *high* level of protection that the EU Seal Regime is seeking to achieve.

79. According to the moral judgement made by the EU legislators, the inherent risks that seals could experience excessive suffering were too high and could not be tolerated having regard to the objective pursued by the measure. While the selection of a level of protection of public morals must certainly take into account relevant scientific evidence, it is not a scientific judgement. It is a policy decision involving a moral judgement which, in the present case, was the exclusive prerogative of the EU legislators. The moral judgement made by the EU legislators finds adequate support on qualified scientific opinions. Moreover, the Panel should not choose one among the various expert opinions available or substitute its own scientific judgement. Rather, the Panel's task is limited to examine whether, in so far as the policy choices reflected in the EU Seal Regime purport to be based on science, such choices find adequate support from qualified scientific opinions, irrespective of whether they represent the majority view.

80. Canada's and Norway's proposed alternative measure would fail to make an *equivalent contribution* to the objective pursued by the EU Seal Regime. Indeed, the proposed alternative presupposes that it is feasible to apply and enforce effectively and consistently a humane killing method. Yet, according to qualified scientific opinions, it is *not possible* to do so *in practice*. As a result, the proposed alternative would allow the placing on the market of seal products obtained from seals hunted for commercial purposes which may have been killed in a manner that causes them excessive suffering. In contrast, the General Ban prevents that result by prohibiting the placing on the market of any seal products, except when duly justified *on moral grounds* under one of the exceptions.

81. The complaining parties contend that it is perfectly feasible to prescribe animal welfare requirements for hunting seals. But the relevant issue is not whether it is feasible to prescribe just *any* kind of welfare requirements. Instead, the complaining parties are required to prove that it is feasible to prescribe *genuinely* humane killing methods which, *in practice*, can be *applied and enforced effectively and consistently*, *so as to achieve the level of protection selected by the EU legislators.*

82. What is more, Canada and Norway do not specify what welfare requirements should be prescribed as part of their proposed alternative measure, perhaps because they cannot agree even among themselves. Instead, each of them refers to different sets of criteria and recommendations contained in the reports issued by various groups of veterinary experts.

83. Article 2.2 of the TBT does not impose a requirement of "consistency". Members are free to set different policy objectives and to select different levels of protection in respect of different products or, as in this case, in respect of different species of animals. The examination of measures applied to other species of animals could be relevant only in so far as such measures concerned sufficiently similar situations and then only as a mere "indication" of the availability of alternative measures.[4] The measures applied by the European Union to other species and cited by the complainants are of little relevance as examples of available alternative measures because there are major differences between the situations concerned. At any rate, Members are entitled not only to select different levels of protection with regard to different species of animals, but also to legitimately take into account, in choosing the appropriate level of protection, together with the risk that individual animals may experience suffering, other pertinent moral considerations. Such moral considerations may relate, for example, to whether the animals concerned are wild or have been reared in farms for the purpose of being slaughtered, or the purpose for which animals are killed, or the use given to the products obtained from the killed animals.

84. The examples of certification and labelling systems mentioned by the Complainants lack pertinence. Some of them are not even primarily concerned with animal welfare (e.g. Krav and Label Rouge). Furthermore, in each case, the animals concerned are different, the environment is different, the killing methods are different and, consequently, the risks to animal welfare are also very different. Moreover, it appears that the various schemes mentioned by the Complainants are based on the assumption that the underlying animal welfare requirements can be applied on a consistent basis. However, in the case of commercial seal hunting such humane killing methods *cannot be applied effectively and consistently*. Since it would not be possible to certify *a priori* that all products originating in a given country or region or hunted by a certain person will comply with the requirements of such methods, it would be necessary to certify that each and every individual seal from which the marketed products are obtained has been hunted humanely. The effective monitoring and enforcement of such compliance, and thus the practical viability of such "seal-by-seal" certification system, is very questionable, and would fail to make an equivalent contribution to the objective pursued by the EU Seal Regime.

85. It should be pointed out that the practical difficulties faced by an inspector in fully monitoring the implementation by sealers of the sealing regulations are unique and have no equivalent in slaughterhouses. Slaughterhouses provide a controlled, predictable and safe environment, where both the effective implementation of the prescribed killing methods and adequate monitoring and enforcement is possible and common in practice.

86. With regard to the *second alternative measure* (removing the "three sets of requirements"), this measure amounts to repealing the EU Seal Regime and allowing the placing on the market of seal products without any restriction. While this alternative measure is certainly less trade-restrictive, it makes no contribution to the objective pursued by the EU Seal Regime.

87. With regard to the *third alternative measure* (removal from the MRM exception of the requirements that the product be placed on the market "in a non-systematic way" and "on

[4] Cf. Appellate Body Report, *Korea – Various Measures on Beef*, paras. 170 and 172.

a non-profit basis"), Norway has explained that this alternative relates only to the MRM exception. However, since that exception is not trade-restrictive, it does not require justification under Article 2.2 TBT. Moreover, contrary to Norway's assumption, the MRM exception does not seek to promote the sustainable management of marine resources. Therefore, this alternative measure would not contribute to the objective of the EU Seal Regime. At the same time, by removing from the MRM exception the requirements that the product be placed on the market "in a non-systematic way" and "on a non-profit basis", this alternative measure would enlarge considerably the scope of application of that exception, thereby undermining the objective of the EU Seal Regime.

3.4. ARTICLES 5.1.2 AND 5.2.1 OF THE TBT AGREEMENT

88. The provisions of the Implementing Regulation, which Canada and Norway challenge with their claims under Articles 5.12 and 5.2.1 of the TBT Agreement, set out procedures to determine whether the conditions of the IC and MRM exception are met. The European Union has submitted that its Seals regime, including the exceptions in question, is not a technical regulation within the meaning of Annex 1 of the TBT Agreement, and thus, the procedural provisions under the Implementing Regulation, which merely concern the operation of the exceptions do not constitute "conformity assessment procedures" within the meaning of Annex 1.3 of the TBT Agreement. Nevertheless, should the Panel find that the measures at issue do constitute conformity assessment procedures within the meaning of the TBT Agreement, the European Union submits, in the alternative, that the mechanism for assessing compliance with the Indigenous Communities and Marine Resources Management exceptions laid down in the Implementing Regulation is fully consistent with Article 5.1.2 and 5.2.1 of the TBT Agreement.

3.4.1. Article 5.1.2

89. The procedure put in place by the Implementing Regulation cannot be claimed to have been prepared, adopted or applied with a view to or with the effect of creating *unnecessary obstacles* to international trade. The procedure established under the Implementing Regulation is not a goal in itself. As reflected in the preamble of the Implementing Regulation, it serves the purpose of providing adequate assurance to the European Union, its Member States and citizens that the only seal products placed on the market in the European Union are those that comply with the exceptions established under the seals regime.

90. The European Union submits that its Implementing Regulation does not violate Article 5.1.2; on the opposite, it falls within the scope of regulatory autonomy that the TBT Agreement permits. The procedure that the Implementing Regulation introduced takes into account the particularities that the certification of conformity with the Indigenous Communities and Marine Resources Management exceptions entails. The TBT Agreement not only allows such a regime, but indeed encourages a number of the features that the Implementing Regulation adopts.

91. Both complaining parties seem to direct their claim under Article 5.1.2 against the fact that the Implementing Regulation establishes a third party conformity assessment mechanism, whereby the conformity assessment bodies need to be recognised by the European Commission before they can issue certificates of conformity. However, while acknowledging the need to show that a less trade-restrictive alternative is reasonably available to make a *prima facie* case under Article 5.1.2. Canada's submission that a supplier declaration would have constituted a less trade-restrictive measure fails to ensure adequate confidence that products conform with the applicable regulation, while taking into account the risks of non-conformity. Norway also fell short of making a *prima facie* case for its alternative of designating a "default" recognised body, as it failed to demonstrate why the proposed alternative would be equally effective in determining the product's conformity with the regulation concerned, and less trade restrictive than the conformity assessment procedure at issue.

92. Canada and Norway do not challenge the specific requirements that a recognised body needs to meet pursuant to Article 6(1)(a)-(h) of the Implementing Regulation in order to

be included on the list of recognised bodies. Moreover, an entity applying for designation from the European Commission is not subject to any substantive or procedural requirement in addition to those set out in Article 6(1)(a)-(h) of the Implementing Regulation in order to be included on the list.

93. The requirement to be included on the "list of recognised bodies" before a conformity assessment body can issue certificates of conformity serves to ensure *transparency* as to which conformity assessment bodies obtained recognition/designation from the European Commission. Designation is the validation that a certification body has the infrastructure, competencies and controls necessary to properly assess conformity and there is verification that a certification body does indeed comply with its own processes. As such the requirement to be included on the "list of recognised bodies" certainly does not pose an obstacle, but rather facilitates international trade by providing *an accessible authoritative reference to all* market operators. In the absence of these requirements for recognition and in the absence of a list that confirms it, the capability and credibility of certifying entities would be doubtful. The requirement that only recognised bodies, which meet the prerequisites for designation, may issue attesting documents is therefore *necessary* to give the European Union and its Member States the *adequate confidence* that the seal products imported under one of the exceptions to the Seals regime satisfy the requirements of such exception.

94. A key feature of the procedure under the Implementing Regulation is that it makes recognition available to public and private entities from both within and outside the territory of the European Union. Article 8 of the TBT Agreement, which constitutes relevant context for the interpretation of Article 5, makes it clear that WTO Members may confer conformity assessment procedures to non-governmental (i.e. private) bodies, provided that they take with respect to such bodies "such reasonable measures as may be available to them" to ensure that these non-governmental bodies comply with the obligations under Articles 5 and 6 of the TBT Agreement.

95. In the view of the European Union there is no basis in the text Article 5.1.2 of the TBT Agreement to argue that WTO Members should not allow government and non-governmental bodies from other WTO Members to apply for designation and subsequently act as recognised conformity assessment bodies. To interpret Article 5.1.2 in such manner would go against the ordinary rules of treaty interpretation, as it would ignore the obligations that bind WTO Members pursuant to Article 6 of the TBT Agreement. The European Union submits that it would not be tenable to interpret Article 5.1.2 in a manner whereby complying with Articles 6.2 and 6.3 could amount to a violation of Article 5.1.2.

96. The fact that the Implementing Regulation requires an application before conformity assessment bodies located in the territories of other Members can be recognised as conformity assessment bodies under Article 6 of the Implementing Regulation does not alter this conclusion. Without an application procedure it would have been impossible to verify compliance with the requirements that are in place to ensure the capability and impartiality of recognised conformity assessment bodies[5]. By applying a candidate conformity assessment body also gives its consent to being subject to a review of compliance with the criteria during the application process and being audited subsequently; an agreement which could – especially with respect to entities located in third countries – not have been simply presumed.

97. Finally, there is no basis in the text of Article 5.1.2 to argue that a WTO Member is required to designate a "back-up" or "default" public body in all cases where it decides to put in place a system of designated conformity assessment bodies. While the European Union does not exclude the possibility that the designation of one (or more public bodies) may be a desirable approach in certain cases, it calls on this Panel to reject a reading of the TBT Agreement whereby doing so would be a generalised obligation applicable to all conformity assessment procedures. The Explanatory note to point 3 of Annex 1 clarifies that conformity assessment procedures within the meaning of the TBT Agreement, include, *inter alia*, "procedures for sampling, testing and inspection; evaluation, verification and

[5] Pursuant to the Implementing Regulation the same substantive and procedural requirements apply to bodies located within and outside the territory of the European Union.

assurance of conformity; *registration, accreditation and approval as well as their combinations*" (emphasis added). It follows that the necessity of any system for accreditation/designation of certifying bodies put in place by a WTO Member must also be assessed based on its own merits. This interpretation is further supported by subsequent practice of WTO Members.

98. With regard to Norway's assertion that the designation of a public entity within the EU would have been less trade restrictive than the system in place under the Implementing Regulation, the European Union submits that such unsupported allegation is disingenuous. In a context, like the one at issue, where certification can entail inspections of compliance with the requirements of the IC or MRM exceptions *at the place of origin* of the product, the designation of a default public authority in the European Union could be a less efficient and considerable costlier certification mechanism, and thus could have greater trade distortive effect than the system that the European Union put in place through the Implementing Regulation. The raise in costs for certain operators by such alternative is also indicated by Article 5.2.5 of the TBT Agreement, according to which conformity assessment authorities are entitled to charge for "communication, transportation and other costs arising from differences between location of facilities of the applicant and the conformity assessment body". Given these considerations, what Norway describes as an "institutional lacuna" is rather a mechanism to try and ensure a *level playing field* and *avoid giving an inherent systemic advantage* to trade in seals products that would originate in the European Union or its immediate proximity.

3.4.2. Article 5.2.1

99. With regard to the claims against the Implementing Regulation *as such*, the EU notes that Article 5.2.1 requires Members to ensure that conformity assessment procedures, including the stage of accreditation/designation of conformity, are undertaken and completed as quickly as possible. The phrase "undertake and complete" covers all stages of the conformity assessment procedure and has been interpreted by the panel in *EC – Approval and Marketing of Biotech Products* as meaning that, *once an application has been received*, procedures must be started and then carried out from beginning to end. Like Annex C.1(a) of the SPS—the jurisprudence on which is relevant in interpreting the obligation under Article 5.2.1 of the TBT Agreement—Article 5.2.1 is a good faith obligation requiring Members to proceed with their conformity assessment procedures as promptly as possible.

100. As explained in the context of the Article 5.1.2 claim, the European Union acted in good faith when it adopted the Implementing regulation and put in place all the necessary elements to ensure that conformity assessment procedures pursuant to the Regulation can be conducted in accordance with the TBT Agreement disciplines (notably, Articles 5, 6, 7, 8 thereof). While unfortunate, the relatively low interest by public authorities from other WTO Members (including by the authorities in Canada and Norway) and the absence of interest in obtaining accreditation by private entities operating on the market *cannot be attributed to the European Union*. As Canada and Norway acknowledge, some entities have taken the decision not to submit a request. It seems clear that the reason why more requests had not been submitted is grounded in the lack of desire of the potential beneficiaries to make use of the system rather than in alleged deficiencies in the set-up of the system itself.

101. With regard to Canada's "as applied" claim under Article 5.2.1, the European Union submits that such a claim falls outside the Panel's terms of reference and should be rejected on those grounds. In the alternative, the European Union submits that the delay in processing Greenland's application can in any event not be considered as a violation of Article 5.2.1 imputable to the European Union, because the alleged delay is due to a deficiency in the application. As the panel in *EC – Approval and Marketing of Biotech Products* noted, "delays attributable to action, or inaction, of an applicant must not be held against a Member maintaining the approval procedure".

4. THE GATT

4.1. ARTICLE XI:1 OF THE GATT 1994

102. The European Union disagrees with the qualification by Canada and Norway of the EU Seal Regime as falling under Article XI:1 of the GATT 1994. A measure does not automatically fall under the scope of Article XI:1 just because it is *enforced* at the border. The relevant WTO case-law, on the basis of the *Ad* Note to Article III of the GATT 1994, has clarified that, when a measure of the kind referred in Article III:1 of the GATT 1994 applies *to an imported product and the like domestic* product and is collected or enforced in the case of the imported product at the time or point of importation, such a measure falls under the scope of Article III of the GATT. Consequently, in cases where a measure *amounts to an internal regulation affecting both domestic and imported* product, the mere fact that the measure is enforced at the border does not make it fall within the scope of Article XI of the GATT 1994. Rather, by virtue of the *Ad* Note to Article III of the GATT 1994, such measure should be examined under the prism of Article III of the GATT 1994.

103. The European Union submits that the EU Seal Regime does not fall under Article XI of the GATT 1994 because it is not a border measure (in the sense of affecting the importation of products). Rather, the EU Seal Regime should properly be characterised as an internal measure (affecting both domestic and imported products), and thus be examined under Articles I:I and III:4 and not Article XI of the GATT 1994.

104. Indeed, as stated in Article 1 of the Basic Regulation, the EU Seal Regime concerns "the placing on the market of seal products". Article 3.1 of the Basic Regulation further states that the conditions for placing on the EU market "shall apply at the time or point of import for imported products". As explained in Recital (10) of the Basic Regulation, this is made "in order to ensure effective enforcement" with respect to imported products. Thus, it is clear that the EU Seal Regime applies indistinctly to both domestic and imported products and that it concerns the placing on the market of seal products (i.e., as a regulatory internal measure as opposed to a border measure). What is more, the three exceptions it provides for are not trade restrictive and, therefore, cannot amount to import restrictions under Article XI of the GATT 1994. Furthermore, the EU Seal Regime permits the further processing of seal products by operators in the EU market. Thus, it does not operate "effectively" as a border measure. In any event, were the Panel nevertheless to find that Article XI of the GATT 1994 is applicable in this case, the European Union has showed that the EU Seal Regime is justified under the General Exceptions of Article XX of the GATT 1994.

4.2. ARTICLES III:4 and I:1 OF THE GATT 1994

105. The European Union has demonstrated that Canada's and Norway's claims under Article III:4 of the GATT 1994 are without merit. In essence, the European Union considers that the same legal standard with respect to the national treatment obligation under Article 2.1 of the TBT Agreement equally applies to claims under Article III:4 of the GATT 1994. Indeed, in *US – Clove Cigarettes*, the Appellate Body examined Article 2.1 of the TBT Agreement "in context" with Article III:4 of the GATT 1994. Thus, all the considerations made by the European Union with respect to Canada's claim under Article 2.1 of the TBT Agreement apply *mutatis mutandis* to Canada's and Norway's claims under Articles I:1 and III:4 of the GATT 1994. In any event, the European Union addressed the specific arguments raised by Canada and Norway with respect to this claim.

106. To begin with, the first element that needs to be examined under Article III:4 of the GATT 1994 is whether the EU Seal Regime is a law, regulation or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution or use of seal products. The European Union does not dispute that the EU Seal Regime amounts to a "law" "affecting the internal sale" of seal products within the EU. Second, like in the context of Article 2.1 of the TBT Agreement, when examining the Complaining Parties' claim under Article III:4 of the GATT 1994, the Panel is called upon to determine the *group* of domestic products that are "like" the *group* of products imported from the complaining Members. For the same reasons as those mentioned before, the European Union considers

that the relevant group of products with respect to the Complaining Parties' claim under Article III:4 of the GATT 1994 includes those seal products *conforming and non-conforming* with the EU Seal Regime.

107. The European Union submits that, for the same reasons as those mentioned in the context of Canada's claim under Article 2.1 of the TBT Agreement, the EU Seal Regime, through the MRM exception, does not provide for less favourable treatment to the group of imported products. In addition, the European Union has addressed the following specific arguments made by the Parties in the context of their claim under Article III:4 of the GATT 1994. First, the EU has rebutted Canada's claim that EU domestic seal products will benefit greatly from the Marine Management category, while Canadian seal products will not. The EU has showed that this is not the case. Any country in the world carrying out the type of hunts described in the MRM exception could fall under such exception. Second, the European Union has pointed that the fact that Canadian products *may* not fall under the MRM exception does not imply that there is *de facto* discrimination. The fact that Canada does not follow an ecosystem approach, whereas other countries do, does not make such a condition discriminatory. Those conditions do not mean to *de facto* discriminate between imported and domestic like products, but rather to state the situation where the placing of seal products on the EU market is morally acceptable. Third, contrary to Norway's allegations, the EU has showed that the conditions under the MRM exception target distinct elements which not only look into controlling seal population to limit the damage to the ecosystem, but also other elements in line with what is morally acceptable in those situations (e.g., not to obtain profit out of killing a seal, and limit the number and intensity of the killing). Fourth, the EU has argued that the fact that Norway does not meet the conditions of "non-systematic way" and "non-profit basis" does not imply that the measure is *de facto* discriminatory. Any country in the world, including Norway, could meet all the conditions set out in the MRM exception.

108. Similarly to the analysis under Article III:4 of the GATT 1994, the European Union submits that the Panel should dismiss these claims. In essence, the European Union considers that the same legal standard with respect to the MFN obligation under Article 2.1 of the TBT Agreement equally applies to claims under Article I:1 of the GATT 1994. Like the test of Article III:4 of the GATT 1994, the test of Article I is about discrimination, not about deregulation. Thus, for the same reasons as those mentioned above, the European Union considers that there is no *de jure* or *de facto* discrimination between the group of imported products and the group of like products from other origin (in particular Greenland). In any event, the European Union has also addressed the specific arguments raised by Canada and Norway in the context of this claim.

109. More specifically, the EU has showed that, contrary to Canada's claims, the advantage conferred upon by the IC exception does not grant market access to "products originating in Greenland". It does grant market access to products that meet certain origin-neutral conditions in connection to the type and purpose of the hunt, which is considered as morally acceptable in the European Union, including products resulting from hunts conducted by Inuit and other indigenous communities for the purpose of their subsistence in Canada and Norway. Thus, the advantage included in the Inuit exception has been extended, in the European Union's view, "immediately and unconditionally" to Canada and Norway.

110. Moreover, the EU has noted that, unlike Norway's contentions, the Basic Regulation does not contain a "closed list" of countries where seal hunting by Inuit or other indigenous communities may take place, but clearly an illustrative list. Besides, the EU has observed that like Canada, Norway provides government support to its commercial seal hunting. Further, no public or private entity in Norway has requested to become a recognised body either. Again, this is a matter of choice and judgement by Norway, despite the uncontested fact that Norway has seal hunts potentially falling under the IC exception. Norway's actions (omissions) and choices are, therefore, relevant in the examination of whether the EU Seal Regime, through the IC exception, modifies the conditions of competition to the detriment of Norway's imports (which is not the case, as the European Union pleads).

4.3. ARTICLES XX(a) and XX(b) OF THE GATT 1994

111. Should the Panel find that the EU Seal Regime is inconsistent with any of the provisions of the GATT invoked by the complainants, the European Union submits, in the alternative, that any such inconsistency would be justified under Article XX(a) of the GATT. More specifically, in accordance with the "weighing and balancing" test developed by the Appellate Body for assessing the "necessity" of a measure, the European Union has showed that the EU Seals Regime is "necessary" to achieve the policy objective of protecting the public morals of the EU citizens. This objective has been recognized by the panel in *China-Publications and AV products* as ranking among the most important values or interests pursued by members as a matter of public policy. Although the EU Seals Regime is indeed very trade-restrictive (consistently with the high level of fulfilment of the policy objective sought by the EU legislator), it makes a material contribution to its objective, while none of the alternatives proposed by the Complaining Parties would make an equivalent contribution to protecting public morals at the high level that the EU has chosen to protect them. Last, the EU Seals Regime also complies with the *chapeau* of Article XX of the GATT 1994, because it is not applied in a manner that constitutes "arbitrary or unjustifiable discrimination between countries where the same conditions prevail".

112. As regards Article XX(b), the European Union has shown that, even if the Panel were to decide that the EU Seal Regime does not seek to address the moral concerns of the EU public, but exclusively the concerns on seal welfare as such, the General Ban would be necessary in order to achieve the latter objective. Prohibiting the placing on the market of products falling within the IC exception and the MRM exception would not be necessary because those products result from hunts which take place under different conditions. Moreover, prohibiting the placing on the market of products within the scope of the MRM exception would not prevent the killing of the seals concerned, which are hunted exclusively for management purposes, and could be counterproductive from an animal welfare point of view.

4.4. ARTICLE XIII(b) OF THE GATT 1994

113. The European Union submits that the complaining parties have failed to establish that the tariff benefits cited by them have been nullified or impaired as a result of the application of the EU Seal Regime. First, the complaining parties have not shown that the EC Seal Regime upsets the competitive relationship between the seal products of the complainants' origin covered by the relevant tariff concessions and other products of domestic origin, because, as shown in the response to the complaining parties' claims under Articles I:1 and III:4, the EU Seal Regime does not discriminate, either *de jure* or *de facto*, between domestic and imported like products.

114. Second, the complaining parties have not shown that the measure in dispute could not have been reasonably anticipated by them. Among others, Canada adopted in 1964 the first Seal Protection Regulations, which prohibited the skinning of live animals, in response to growing public moral concerns. Moreover, public pressure led to the adoption of various restrictions on trade in seal products by several countries (among others, France, the Netherlands, Italy, the United Kingdom, and Germany) during the 1970s and early 1980s. Furthermore, in 1986 the Canadian Royal Commission on Seals and Sealing issued a very comprehensive report which examined inter alia the public moral concerns about sealing in view of what the Royal Commission termed the "Campaign against sealing" and the 1983 EC ban. In response to that report the Canadian government banned the killing of whitecoats and bluebacks in 1987. Given the longstanding public moral concerns with regard to the killing of seals, including in both Canada and Norway, the complaining parties cannot pretend now that they could not have reasonably anticipated the measure at issue. The governments of Canada and Norway could not have ignored those public moral concerns at the time when the relevant concessions were negotiated. Nor could those governments have ignored that the most obvious way to address such public moral concerns was by restricting or prohibiting the marketing of seal products, a measure which had been strongly advocated by some experts and animal rights activists since the 1960s.

115. In sum, the European Union has shown that the complaining parties have failed to meet their burden of proof under GATT Article XXIII(b). Accordingly, the European Union requests the Panel to reject this claim.

5. THE AGREEMENT ON AGRICULTURE

116. Article 4.2 of the AoA deals with border measures. As explained above, the EU Seal Regime is not a border measure but an internal regulatory measure applied to both domestic and imported seal products. Thus, Article 4.2 of the AoA does not apply to the EU Seal Regime. In addition, the European Union observes that Footnote 1 of the AoA excludes from the scope of "measures of the kind which have been required to be converted into ordinary customs duties" "measures maintained under balance-of-payments provisions or under other general, non-agriculture-specific provisions of GATT 1994 or of the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement". Since the EU Seal Regime is a measure "maintained … under other general…provisions of the GATT [i.e., Articles I, III and XX] or of the other Multilateral Trade Agreements in Annex 1A to the WTO Agreements [i.e., Articles 2.1 and 2.2 of the TBT Agreement]", Article 4.2 of the Agreement on Agriculture does not apply. Consequently, the European Union submits that Article 4.2 of the AoA is not applicable in the present dispute.

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ANNEX C

ARGUMENTS OF THIRD PARTIES

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF COLOMBIA[*]

1. Mr. Chairman, Members of the Panel, Parties to the dispute and Third Parties, on behalf of the Government of Colombia, I appreciate the opportunity that the Panel gives us to express our views.

2. While not taking a final position about the specific merits of this case, Colombia will provide its views on some of the legal claims advanced by the Parties to the dispute. In particular, Colombia will make submissions with respect to the following issues presented by the complainants, Canada and Norway, and the respondent, the European Union in its first written submission:

1. The identification of the policy objectives of the measures at issue;

2. Whether TBT Article 2.2 has been breached when there are several policy objectives at issue.

3. Moving on to the **first issue**, Colombia observes that the present case poses a difficult challenge to the Panel when analyzing the policy objective pursued by the EU when implementing Regulation EC No. 1007/2009 and Regulation EC No. 737/2010, jointly referred to as the "EU Seals Regime".

4. Apart from the obvious disagreement between the EU and the complainants of the objectives *actually* pursued by the EU Seal Regime, its design, structure and architecture makes it a difficult task for any impartial observer to assess the policy concerns the EU had in mind when enacting such a measure and, in particular, how the different concerns interact.

5. Colombia recognizes that the protection of animal welfare, the protection of indigenous communities and the protection of marine resources conservation, among others, are objectives that every Member should be allowed to pursue by means of a technical regulation.

6. However, Members must be careful when doing so, particularly when trying to address multiple policy concerns in a technical regulation. This may in some cases lead to situations where the manner by which the policy objectives are implemented may create a conflict between them.

7. In Colombia's view, this is precisely the case: the EU has drafted the EU Seals Regime in a way where pursuing some objectives materially undermines others. This conflict between the policy objectives raises several doubts about the consistency of the EU Seals Regime with the TBT.

8. Colombia will not enter into the debate of how many policy objectives are pursued by the EU when enacting the measure at issue. In Colombia's view, the important legal issue in this matter is not determining the number of different policy objectives pursued but the relationship that exists between them.

9. In the present case, Colombia considers that the way in which the EU Seal Regime is drafted causes a potential conflict between, on the one hand, the objective of ensuring animal welfare and on the other hand, the protection of the fundamental economic and social interests of indigenous communities and the encouragement of the sustainable management of marine resources.

10. As stated by the EU, the quintessential motivation behind the EU Seal Regime is addressing the moral concerns raised by the "*excessive pain, distress, fear or other forms of suffering*"[1]. Thus, although it would not be appropriate to establish a hierarchy among the several policy objectives, it is possible to state that this objective is the most important of all and that it should permeate

[*] Colombia requested that its oral statement serve as the integrated executive summary.
[1] EU's FWS, para. 33.

the entire EU Seal Regime in a manner that it ensured that each and every part of the measure, including its exceptions, directly contribute to the achievement of this end or at least do not undermine it.

11. However, the way the EU drafted the measure, in particular, the indigenous communities and marine resources management exceptions, goes directly against the objective of protecting the welfare of seals. Both exceptions are designed in a way that allow the access of seal products into the EU market without any consideration whatsoever as to the welfare of seals.

12. In Colombia's view, the above mentioned exceptions bear no connection with the moral impact that hunting seals in a manner that does not take into account their welfare has on consumers. It does not seem possible to argue that consumers would be more willing to accept such types of *cruel* practices for the sake of the conservation of marine resources conservation or for taking into account the interests of indigenous communities. If a seal is drowned or killed in any manner that causes excessive suffering, Colombia believes that the fact that this was done by hunters belonging to the Inuit community or as a part of a marine resources conservation plan does not make the practice any less morally reprehensible.

13. Colombia recognizes that, in general, these types of contradictions or conflicts between opposing policy objectives may arise in several situations.

14. However, it is difficult to understand the double moral standard that the EU is introducing by means of the exceptions. As way of example. and recognizing that there are important differences, what the EU is suggesting would imply that in cases such as *EC-Asbestos*, where a total ban on the importation on some products was enacted due to concerns of negative effects to the welfare of human beings, it would be possible to allow the entrance of some of the banned products in order to fulfill other objectives, irrespectively of the negative impact on the protection of human health.

15. Although it is difficult to assess such hypothetical situation without understanding the exact nature of the other policy objectives that would justify undermining such an important objective as the protection of human health –in this cases the protection of seal's welfare- what Colombia is trying to highlight is that it seems rather difficult to accept that it would be legitimate to enact a measure with one main objective and then impose exceptions to that measure that completely *pierce* and undermine the principal policy objective.

16. It does not seem logical to enact a ban on asbestos-containing products, due to its carcinogenic effects, but at the same time allow the entrance of these products regardless of the adverse health effects to human beings. In the same manner, it does not seem logical to enact a ban on seal products to protect them from excessive suffering but allow the entrance of these products, regardless of whether they were hunted using methods that prevented such excessive suffering.

17. With regards to the **second issue**, Colombia will provide its comments on whether there is a possible breach of TBT Article 2.2. Although it will not perform a complete assessment of this provision, nor conclude on whether this provision has been actually breached, it will lay out some concerns that may guide the Panel in assessing this matter.

18. To start with, Colombia notes that there is no fundamental disagreement among the parties on the legal standard that should be followed in order to assess a breach of this provision. Thus, it will not make any submissions in this respect.

19. Colombia will focus its comments on the necessity test established in this Article. In particular, Colombia will comment on the element of the degree of contribution made by the measure to the legitimate objective at issue.

20. As stated in the first submission of this Oral Statement, the EU Seal Regime was designed in a way to address several policy objectives that in some cases are conflictive with each other because of the manner in which they were addressed. In particular, the conflict arises with regards to, on one hand, assurance of animal welfare and, on the other hand, the protection of the fundamental economic and social interests of indigenous communities and the encouragement of the sustainable management of marine resources.

21. Since the main objective of the EU Seal Regime is to ensure animal welfare, Colombia believes the Panel should focus its analysis mainly on the contribution of the measure to this policy objective, but also taking into account the other objectives pursued.

22. Colombia agrees with Norway and Canada that the indigenous communities and marine resources management exceptions are *rationally disconnected*[2] from the main objective of the EU Seal Regime: it is clear that these exceptions undermine, or "run counter"[3] the "overreaching objective"[4] of the measure since they allow the access of seal products regardless of whether they were hunted in a manner that avoided *excessive pain, distress, fear or other forms of suffering*.

23. Thus, if the contribution were to be assessed by only taking into account the main objective, Colombia would be of the view that the *rational disconnection* mentioned by the complainants would mean that there is no contribution of the EU Seal Regime to this policy objective.

24. But this would be an incomplete analysis since it only took into account one policy objective pursued, but neglected to assess whether the measure contributed to the other objectives. Complainants expressly recognize this fact by making a contribution analysis of four different policy objectives[5].

25. However, Colombia believes that the question still remains on how to assess a situation where the measure contributes to some policy objectives but not to others. In addressing this challenge, Colombia suggests that the Panel should perform a weighing and balancing process of the different objectives, where the contribution to the most important one should be the guiding element in deciding whether this element of TBT Article 2.2 is fulfilled.

26. In this case, the undermining of animal welfare by means of the aforementioned exceptions should be heavily weighted.

27. Mr. Chairman, Distinguished Members of the Panel, Parties to the dispute and Third Parties, on behalf of my Government appreciates this opportunity to express our systemic views with respect to this case and hopes to contribute to the legal debate and analysis. With this, I conclude our Oral Statement.

[2] Norway's FWS, para. 678.
[3] Ibid, para.677.
[4] Ibid.
[5] Ibid, para.676; Canada's FWS, para.479.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF ICELAND

1. Sealing has a long tradition in Iceland and the rational utilization of seals is part and parcel of Iceland's policy of sustainable utilization of all its living marine resources. In view of this, Iceland's Written Submission and Oral Statement highlighted the fundamental difference in justifying trade restrictions by relying on conservation concerns on the one hand, and public morals concerns on the other. The former allows for a scientific and facts-based assessment on the merits of the arguments put forward for justifying the measure in question, while the latter is bound to be based on more subjective and less tangible arguments.

2. Iceland has therefore argued that the "public morals" exception of Article XX(a) should not be relevant in deciding this case. Iceland has argued that the European Union has not provided satisfactory evidence for its claim that there exists a public morals concern in this case and that the EU has sought to rely on an overly broad and elastic interpretation of Article XX(a).

3. Furthermore, Iceland has argued that even if there was an actual public moral concern justifying trade restrictions on seal products, the many and broad exceptions contained in the EU's Seal Regime means that neither the "necessity test" of Article XX(a) nor the requirements of the chapeau of Article XX's are met in this case.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

Third Party Submission

1. Justification invoked under Article XX(a) of the GATT 1994

1.1 "Public Morals"

1. Japan would like to raise two points in connection with the justification provided by the EU as to the protection of "public morals" by the EU Seal Regime.

2. First, although the concept of "public morals" may vary from one WTO Member to another, its nature of a moral norm of conduct shared by a community or nation implies that the norm is applied internally in a consistent manner. If, as the EU argues, the EU Seal Regime addresses the moral concerns of the EU public with regard to the presence on the EU market of seal products arising from the fact that they may have been obtained from animals killed in an inhumane way, this concern should logically apply to all seal products. Since the EU Seal Regime provides for broad exceptions in which the prohibition does not apply, it is questionable whether the Regime can be said to protect "public morals". In Japan's view, it appears to be contradictory to argue, on the one hand, that it is "morally" unacceptable to tolerate on the market seal products because they may have been obtained from animals killed in an inhumane way and, on the other hand, that it is "morally" acceptable that identical products obtained under certain broadly phrased exceptions are placed on the EU market. In Japan's view, the concept of "public morals" is a horizontal one and once a moral norm has been defined, its application must be internally consistent.

3. The EU argues that a distinction should be made between hunts conducted primarily for commercial purposes and other seal hunts with an allegedly non-commercial purpose, such as the subsistence of indigenous communities or the sustainable management of natural resources. According to the EU, in the first case, "it is warranted to adopt a high level of protection against the risk that seals will experience excessive suffering when they are killed" while in the second case "it may be justified, or even required, from a moral point of view to tolerate a higher level of risk to the welfare of seals."[1]

4. The EU claims that "the IC exception and the MRM exception are based on moral grounds" as well and that "[i]f the EU legislators have authorized the placing on the market of seal products under the IC exception and the MRM exception it is because they consider that the marketing of products complying with those exceptions does not raise the same moral concerns among the EU public."[2] The EU therefore seems to define the moral value it wants to protect as the moral concerns of EU citizens about the presence of seal products on the EU market that are the result of commercial hunts by non-indigenous communities. It is not clear why seal hunts with non-commercial purposes do not generate any animal welfare concerns.

5. Second, the Panel should carefully scrutinize the objective pursued by the EU Seal Regime. In that respect, Japan notes that the EU describes the EU Seal Regime as addressing the "moral concerns of the EU public with regard to the presence on the EU market of seal products" due to "the fact that seal products may have been obtained from animals killed in a way that causes them excessive pain, distress, fear or other forms of suffering."[3] The EU however considers also that "[t]hose concerns, nevertheless, vary according to the purpose of each type of hunt."[4]

[1] EU First Written Submission, para. 39.
[2] *Id*. para. 363.
[3] *Id*. para. 33.
[4] *Id*.

6. The above statements suggest that the objective of the EU Seal Regime is not to prevent the presence "as such" of seal products on the EU market. The moral objections of the EU citizens are caused by concerns regarding the manner in which the animals may have been killed. But, these concerns are not absolute since, under certain conditions, the EU public is willing to accept the presence of seal products on the EU market without any guarantees that these seal products have not been obtained from animals killed in a way that causes them excessive pain, distress, fear or other forms of suffering.

1.2 The Necessity Requirement

7. The EU argues that through the General Ban, the EU Seal Regime makes a very substantial contribution to its policy objective in two ways. But the EU only refers to the "General Ban", not to the exceptions which are an integral part of the EU Seal Regime. In assessing whether the EU Seal Regime makes a substantial contribution to its objective, the Panel will have to examine the exceptions under the EU Seal Regime as well. It is relevant for this analysis that the exceptions do not require that the seal products have been obtained from animals that have been killed in a way that does not cause them excessive pain, distress, fear or other forms of suffering.

8. Japan notes that the EU argues that "the exceptions do not undermine the objective of the EU Seal Regime which, to repeat, seeks to address the moral concerns of the EU public."[5] According to the EU, "[if] the EU legislators have authorized the placing on the market of seal products under the IC exception and the MRM exception it is because they consider that the marketing of products complying with those exceptions does not raise the same moral concerns among the EU public."[6] This appears to be a circular reasoning under which the scope of the "moral concerns" has been defined on the basis of the existing measures.

9. Moreover, the EU Seal Regime provides for a general prohibition of seal products on the EU market and thereby, as the EU itself acknowledged, "aims at being very trade-restrictive."[7] In fact, a prohibition is the most trade-restrictive approach possible.[8] The EU justifies this highly trade-restrictive measure by invoking a moral value that it qualifies to be of "high importance."[9] The fact, however, that the EU Seal Regime tolerates a number of broad exceptions seems to undermine the justification invoked by the EU. In light of the foregoing, the Panel will have to carefully assess to which extent a measure which is of "the most trade-restrictive" type may be regarded as "contributing" to "protect public morals" in a situation where the same public morals do not appear to object to the placing on the market of seal products falling within the scope of the IC exception, the MRM exception and the Travellers exception.

1.3 The *Chapeau* Requirement

10. Japan notes that the rationale invoked by the EU is to address the moral concerns of the EU public with regard to the presence on the EU market of seal products. The restrictions imposed in order to achieve this objective are, however, subject to broad exceptions. The analysis to be carried out under the *chapeau* of Article XX will therefore necessarily involve an examination of how these exceptions can be reconciled with the stated objective. Depending on the outcome of such analysis, it could be concluded that the scope and effect of the exceptions result in arbitrary or unjustifiable discrimination or in a disguised restriction on international trade.

2. Certain aspects of the claims made under Articles 5.1.2 and 5.2.1 of the TBT Agreement

2.1 Claim under Article 5.1.2 of the TBT Agreement

11. Article 5.1.2 itself has not yet been the subject to panel or the Appellate Body interpretation. The concept of "unnecessary obstacles to international trade" has, however, been discussed

[5] *Id*. para. 363.
[6] *Id*.
[7] *Id*. para. 586.
[8] Appellate Body Report, *China – Publications and Audiovisual Products*, footnote 567.
[9] EU First Written Submission, para. 585.

and examined in the context of other provisions under the TBT Agreement and, in particular, under Article 2.2 of the TBT Agreement which has a structure similar to the one of Article 5.1.2.

12. Both Articles 5.1.2 and 2.2 of the TBT Agreement refer in their first sentence to the concept of "unnecessary obstacles to international trade" and in their second sentence elaborate on that concept. While both provisions elaborate on the obligation contained in their first sentence, the wording is different in both provisions. Article 5.1.2 second sentence includes the words "*inter alia*" indicating that the description contained therein is not exhaustive. Article 2.2 does not contain the same terms. Thus, the case-law developed by the Appellate Body in *US – Tuna II* concerning Article 2.2[10] may provide useful guidance for the interpretation of Article 5.1.2.

13. In particular, it seems that the assessment of the consistency of the conformity assessment procedures with Article 5.1.2 implies the weighing and balancing of a number of different factors, including the trade-restrictiveness of the procedures, the contribution made by the procedures concerned to give the importing Member adequate confidence that products conform with the applicable technical regulations or standards and also the gravity of the consequences that would arise in case of non-conformity. As emphasised by the Appellate Body, in most cases, a comparison of the challenged measures and possible alternative measures should be undertaken.

14. Regarding the trade-restrictiveness of the measure, Japan notes that the EU acknowledges that the requirement to obtain a certificate under the EU Seal Regime constitutes an obstacle to trade. The EU, however, considers that the procedure put in place by the Implementing Regulation cannot be claimed to have been prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade.[11]

2.2 Claim under Article 5.2.1 of the TBT Agreement

15. There seems to be a discrepancy as to what is covered by the terms "conformity assessment procedures" between the EU and Canada. Canada claims that "a conformity assessment procedure that cannot function due to the absence of a body to undertake or complete it – and that absence that can be directly attributed to the European Union – can by definition not be undertaken or completed as expeditiously as possible."[12] Contrary, the EU argues that "Article 5.2.1 requires Members to ensure that conformity assessment procedures, including the stage of accreditation/designation of conformity, are undertaken and completed as quickly as possible."[13]

16. In Japan's view, it appears necessary for the Panel to examine in the first place what is covered by "conformity assessment procedures" in the present case. In particular, it appears important to clarify at the outset whether, as the EU claims, the conformity assessment procedures which must be undertaken and completed as quickly as possible include "the stage of accreditation/designation of conformity."

17. The EU claims that "[t]he phrase "undertake and complete" covers all stages of the conformity assessment procedure and has been interpreted by the panel in *EC – Approval and Marketing of Biotech Products* as meaning that, *once an application has been received*, procedures must be started and then carried out from beginning to end."[14] The circumstances and facts of that case were, however, different from the present case. In the *EC – Approval and Marketing of Biotech Products* case, the issue did not relate to the designation of the certifying body but rather to a *de facto* moratorium on approvals.

18. In Japan's view, one central issue is therefore likely to be for the Panel whether a system whereby the accreditation/designation of the certifying body(ies) is dependent on applications being made by third party entities is consistent with the obligation that

[10] See Appellate Body Report, *US – Tuna II (Mexico)*, paras. 318-322.
[11] EU First Written Submission, para. 431.
[12] *Id*. para. 730.
[13] *Id*. para. 481.
[14] *Id*.

"conformity assessment procedures are undertaken and completed as expeditiously as possible."

Third Party Oral Statement

1. Article 2.2 of the TBT Agreement

1.1 The objectives pursued by the EU Seal Regime

1. In its First Written Submission, the EU claims that the policy objective pursued by the measure at issue is to address the moral concerns of the EU public with regard to the presence of seal products on the EU market. These concerns arise from the fact that these products may have been obtained from animals killed in a way that causes them excessive pain, distress, fear or other forms of suffering. The EU, however, states that these concerns may vary depending on the type of hunt.[15] In Japan's view, the EU's description of the policy objective it pursues is not so sufficiently detailed as to enable the panel to assess whether the measure at issue is unnecessary trade restriction to achieve the objective.

2. If, as the EU claims, the objective of the measure is to address the moral concerns of the EU public arising from the fact that seal products may have been obtained from animals killed in an inhumane way, this concern should logically apply to all seal products. In Japan's view, as already explained in its Third Party Written Submission when discussing the concept of "public morals" under Article XX(a) of the GATT, "public morality" must be defined in an internally consistent manner. In fact, the EU, when examining the legitimacy of the policy objective of the measure, only focuses on the treatment of animals, and claims that "the way in which humans treat animals is a matter of public morals."[16] However, it appears that the objective of the measure at issue involves a single element (the treatment of animals) as claimed by the EU but other different elements (such as type of hunts) as explained by Norway and Canada. The EU fails to justify the legitimacy of an objective in which the treatment of animals is not the sole element but other elements are also taken into account.

3. In Japan's view, it is crucial that the Panel examines in detail the measure at issue to precisely identify the objective(s) pursued by the measure and assess whether all such objective(s) are legitimate before examining whether the trade-restrictiveness of the measure is necessary to fulfil such legitimate objectives.

1.2 The EU Seal Regime needs to be examined as a whole

4. The measure at issue is the EU Seal Regime. Although the EU Seal Regime include different elements, namely the General Ban, the IC exception, the MRM exception and the Travellers exception, Japan believes that the EU Seal Regime should, for the purposes of Article 2.2 of the TBT Agreement, be examined as a whole.[17]

5. In Japan's view, a similar integrated approach should be followed in the present case. For instance, when examining the trade-restrictive character of the measure at issue, the EU distinguishes between, on the one hand, the General Ban which "restricts trade" since it provides for a prohibition and, on the other hand, the exceptions which are not trade-restrictive because, according to the EU, "they allow trade which would otherwise be prohibited by the General Ban".[18] However, this approach does not make sense. The EU Seal Regime should be viewed as a whole since the exceptions exist only because of the General Ban. In Japan's view, the EU Seal Regime as a whole has a limiting effect on trade since seal products may be placed on the EU market only if the conditions to benefit from one of the three exceptions are fulfilled.

6. The same integrated approach is also important when examining the degree of contribution to the legitimate objective. In its First Written Submission, the EU claims that "through the General Ban the EU Seal Regime makes a very substantial contribution to its policy

[15] *Id*. para. 33.
[16] *Id*. para. 61.
[17] See Appellate Body Report, *EC – Asbestos*, para. 64.
[18] EU First Written Submission, para. 358.

objective."[19] As Japan noted in its Third Party Written Submission, this justification only refers to the General Ban but not to the exceptions. In this context, the Panel has to examine not only the General Ban but also the exceptions.

2. *De Facto* Discrimination under Articles I:1 and III:4 of the GATT 1994, and Article 2.1 of the TBT Agreement

7. In the context of the Article 2.1 of the TBT Agreement claim, the EU states that Canada takes an improper shortcut to argue that a particular category of its imports (i.e., seal products derived from non-Inuit commercial hunts) are "like" a particular category of imports of Greenlandic seal products (i.e., those derived from Inuit hunts) and thus both should be treated equally. The EU then submits that "in order to examine whether there is less favourable treatment, the group of imported products (in particular, from Canada) and the group of products from other origin chosen (in particular, Greenland) must take into account the existence of the regulatory differentiation made in the Basic Regulation."[20] According to the EU, there is no discrimination since "the Canadian seal products in *similar situation* to those of Greenland (i.e., those derived or obtained from tradition hunts by Inuit and other indigenous communities for the purpose of their subsistence) receive *identical treatment*."[21]

8. Likewise, in the context of the Article I:1 of the GATT 1994 claim, the EU argues that there is no discrimination because "a sub-category of like products (i.e. those obtained from Inuit and other indigenous communities for the purpose of their subsistence) is treated in the same manner by the EU Seal Regime regardless of whether those products originate in Canada, Norway or Greenland".[22]

9. Through these statements, the EU appears to argue that there will be no *de facto* discrimination, when all products within a sub-category of like products are treated in the same manner regardless of the origin of the products. This may amount to rejecting the possibility that measures which are an origin-neutral on its face may be *de facto* inconsistent with Article 2.1 of the TBT Agreement or Article I:1 of the GATT 1994.

10. Japan wishes to recall in this respect that as the Appellate Body explained in the previous dispute, a panel, after ascertaining the detrimental effects on a group of imports, must then determine whether such detrimental impact stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products under Article 2.1 of the TBT Agreement.[23] This EU's position may be justified in so far as it is also demonstrated that the different sub-category of like products, which detrimental impact on imports exclusively stems from, is legitimate under Article 2.1 of the TBT Agreement.

11. Thus, it cannot be concluded that there is no violation of Article I:1 of the GATT 1994 or Article 2.1 of the TBT Agreement merely because the measure at issue treats identically all products of each of the sub-categories of the like product on the basis of regulatory distinctions that are, on their face, origin-neutral.

12. Finally, the EU appears to argue that the same legal standard under Article 2.1 of the TBT Agreement applies to claims under Article III:4 of the GATT 1994.[24] Japan wishes to note that the test developed by the Appellate Body "in the context of Article III:4 of the GATT 1994 [is] instructive in assessing the meaning of "treatment no less favourable."[25] However, this is so "provided that the specific context in which the term appears in Article 2.1 of the TBT Agreement is taken into account",[26] and such context includes Article 2.2 and the preamble of the TBT Agreement. Thus, although these two provisions are

[19] *Id*. para. 359.
[20] *Id*. paras. 292-293.
[21] *Id*. para. 294.
[22] *Id*. para. 547.
[23] Appellate Body Report, *US – Clove Cigarettes*, para. 182.
[24] EU First Written Submission, paras. 502, 505. The EU also claims that the legal standard under Article 2.1 of the TBT Agreement applies to Article I:1 of the GATT 1994. *Id*. paras. 528, 539.
[25] Appellate Body Report, *US – Clove Cigarettes*, paras. 180, 215.
[26] *Id*.

similar, they are situated in a different context and "the scope and content of these provisions" is not identical.[27]

[27] Appellate Body Report, *US – Tuna*, para. 405.

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS MEXICO[*]

I. INTRODUCTION

1. Mexico expressed its intention to participate as a third party in these proceedings because they involve systemic issues relating to the proper and coherent interpretation and application of the provisions at issue in this dispute.

II. THE MEASURE AT ISSUE

2. Mexico considers that the interests or concerns pursued by the European Union through the various exceptions should be considered part of the main objective pursued via the measure in question. Consequently, the Panel must consider the measure as a whole, considering the three exceptions as part of the measure. The foregoing is in line with what was stated by the Appellate Body in *EC – Asbestos*.[1]

3. The Panel in *US – 1916 Act (EC)* noted that panels are not bound by a Member's characterization of its measure.[2] In this case, the Panel will need to analyse the regulatory framework of the European Union in relation to trade in seal products.

III. LEGAL ARGUMENTS

A. Interpretation of most-favoured-nation treatment and national treatment obligations

4. Mexico observes that both the General Agreement on Tariffs and Trade of 1994 (GATT 1994) and the Agreement on Technical Barriers to Trade (TBT Agreement) contain most-favoured-nation (MFN) and national treatment (NT) obligations; however, the scope and application of those obligations and their review is different in each of the agreements mentioned. The different obligations under the WTO Agreements must be interpreted in a harmonious manner that gives meaning to the relevant provisions, since they are applied cumulatively. This cannot be taken to imply that the obligations of one agreement can be replaced, excluded or subsumed by the obligations of another.[3] Mexico therefore disagrees with the European Union's arguments for transposing an analysis under Article 2.1 of the TBT Agreement to the GATT 1994.

1. Legal examination of Article I:1 of the GATT 1994

5. In order to establish a violation of Article I:1 of the GATT 1994, three elements need to be demonstrated: (i) that the imported products at issue are like products; (ii) that the measure at issue accords an advantage, favour, privilege or immunity to products originating in or destined for any country; and (iii) that this advantage, favour, privilege or immunity is not accorded immediately and unconditionally to the like product originating in or destined for the territories of other Members.

6. As regards the third element, the European Union states that the observations made by the Appellate Body in the context of Article 2.1 of the TBT Agreement with respect to the term "treatment no less favourable" must apply *mutatis mutandis* in the context of Article I:1 of the GATT 1994, particularly in relation to the phrase "any advantage … shall be accorded … unconditionally".[4]

[*] This text was originally submitted in Spanish by Mexico.
[1] Report of the Appellate Body, *EC – Asbestos*, paragraph 64.
[2] Report of the Panel, *US – 1916 Act (EC)*, paragraph 6.51.
[3] Report of the Panel, *US – Upland Cotton*, paragraph 7.1003.
[4] First written submission by the European Union, paragraph 539.

7. Mexico does not agree with this interpretation. By bringing the examination of the MFN obligation provided for in the TBT Agreement into the context of the GATT 1994, the scope and application of that obligation in the GATT 1994 are impaired, since Article 2.1 of the TBT Agreement is limited to a single type of measure (i.e. technical regulations as defined in Annex 1.1 of the TBT Agreement). Mexico considers that, in interpreting Article I:1 of the GATT 1994, the Panel must focus on the text of that article within the context of the GATT 1994, including the general exceptions clause in Article XX.

2. Legal examination of Article III:4 of the GATT 1994

8. For a violation of Article III:4 of the GATT 1994 to be established, the Appellate Body in *Korea – Various Measures on Beef*[5] stated that three elements must be satisfied, namely: (i) that the imported and domestic products at issue are like products; (ii) that the measure at issue is a law, regulation or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution or use; and (iii) that the imported products are accorded less favourable treatment than that accorded to like domestic products.

9. For the examination of the third element, it is necessary to analyse whether the measure in question modifies the conditions of competition in the relevant market to the detriment of imported products.[6] In this connection, Mexico does not agree with the European Union's position that the legal parameters for the purpose of analysing the NT obligation in Article III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement should be the same.[7] Mexico considers that, in interpreting Article III:4 of the GATT 1994, the Panel should focus on the text of that article within the context of the GATT 1994, including the general exceptions clause in Article XX.

3. Legal examination of Article 2.1 of the TBT Agreement

10. Regarding MFN treatment and national treatment obligations under Article 2.1 of the TBT Agreement, Mexico notes that their scope and application are more restricted in that they refer only to technical regulations and not to any "measure" as provided for in the GATT 1994. However, as in the case of the GATT 1994, these obligations under the TBT Agreement prohibit *de jure* and de facto discrimination.

11. The Appellate Body in *US – Clove Cigarettes* determined the elements that must be satisfied for a violation of the NT obligation in Article 2.1 to be established[8]: (i) the measure at issue must be a technical regulation; (ii) the imported and domestic products at issue must be like products; and (iii) the treatment accorded to imported products must be less favourable than that accorded to like domestic products.

12. The first element must be assessed in the light of the definition of "technical regulation" in Annex 1.1 of the TBT Agreement. In the context of Article 2.1, the measure in question can only be of one type in order to satisfy that definition.

13. Regarding the likeness examination, the Appellate Body in *US – Clove Cigarettes* rejected the Panel's interpretation according to which that examination must focus on the legitimate objectives and purposes of the technical regulation, and reverted to the analysis of Article III:4 of the GATT 1994 which takes account of the competitive relationship between products. However, it pointed out that the regulatory purposes of technical regulations could be evaluated under traditional criteria to the extent that they have an impact on the competitive relationship between the products concerned.[9]

14. Regarding the likeness element, the European Union considers that the relevant group of products comprises those that comply with the measure as opposed to those that do not comply.[10] If the Panel were to accept the European Union's approach involving the creation of subcategories in the group of like domestic and imported products based on the regulatory distinction of the

[5] Report of the Appellate Body, *Korea – Various Measures on Beef*, paragraph 133.
[6] Report of the Appellate Body, *Korea – Various Measures on Beef*, paragraph 137.
[7] First written submission by the European Union, paragraph 505.
[8] Report of the Appellate Body, *US – Clove Cigarettes*, paragraph 87.
[9] Report of the Appellate Body, *US – Clove Cigarettes*, paragraphs 117-120.
[10] First written submission by the European Union, paragraph 254.

measure in question, the discrimination provisions of Article 2.1 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994 would be deprived of all meaning when it comes to their application in de facto discrimination cases.

15. The European Union also appears to be altering the likeness element of the discrimination obligation by adding a "similar situation" requirement. Under this interpretation, the analysis of "treatment no less favourable" would not merely concern like products, but like products that are also in a similar situation. There is no legal basis for including this requirement in the discrimination analysis. If the negotiators of the WTO Agreement had intended to include additional requirements such as this one, they would have done so explicitly. The "similar situation" requirement is clearly a deviation from the already well-established approach used by panels and the Appellate Body for determining de facto discrimination.

16. Finally, let us turn to the third element, where, in the matter of technical regulations, another examination is required in the case of de facto discrimination. In other words, it is not enough to establish that the technical regulation in question modifies the conditions of competition in the relevant market to the detriment of the imported products, but an analysis also has to be made to determine whether this de facto detrimental impact derives from a legitimate regulatory distinction and does not reflect discrimination, and whether the technical regulation is impartial.

17. The concept of "legitimate regulatory distinction" was introduced by the Appellate Body in *US - Clove Cigarettes*.[11] This analysis was based on the difference between the GATT 1994, which strikes a balance between Article III:4 and the general exceptions contained in Article XX, and the TBT Agreement which does not contain a general exceptions clause. In other words, the genesis and basis of the concept of "legitimate regulatory distinction" and hence the concept of "impartiality" reflects the absence in the TBT Agreement of a general exceptions clause equivalent to Article XX. Consequently, there is no basis for importing these two concepts into Articles I:1 and III:4 of the GATT 1994.

18. Mexico notes, therefore, that these additional particularities (i.e. legitimate regulatory distinction and impartiality) cannot simply be transposed to the Article III:4 examination, since they arise from a context, object and purpose specific to the TBT Agreement, and from the difference between the GATT 1994 and that agreement.

19. Mexico further notes that the European Union appears to believe that, in addition to the above-mentioned examination, there is also a requirement to demonstrate that the objective pursued by the technical regulation is legitimate. In the European Union's view, if the objective pursued is legitimate, then so is the regulatory distinction.[12] In other words, the European Union justifies the legitimate objectives pursued by the exceptions to the measure and argues that, if the objectives pursued by the exceptions are legitimate, the regulatory distinction must also be considered legitimate.[13] The European Union's argument creates a relationship between the concept of "legitimate objective" and that of "legitimate regulatory distinction".

20. In this connection, Mexico considers that the European Union's interpretation of Article 2.1 of the TBT Agreement is incorrect. The analysis of "treatment no less favourable" is independent from the determination of the legitimacy of the objective pursued by the Member adopting the technical regulation. The fact that an objective is legitimate within the meaning of Article 2.2 of the TBT Agreement does not mean that the technical regulation is being applied in an impartial manner or that the distinction it makes between the products is legitimate.

21. The concept of "legitimate regulatory distinction" was developed by the Appellate Body when interpreting the concept of "treatment no less favourable" in Article 2.1 of the TBT Agreement. The concept of "legitimate objective" can be found in Article 2.2 of the TBT Agreement, and was expressly omitted from Article 2.1 of the TBT Agreement. This omission is important and must have some meaning[14] because the two provisions deal with different aspects of the same measure (discrimination on the one hand and trade restriction on the other). It would therefore be incorrect to read the concept of "legitimate objective" into Article 2.1.

[11] Report of the Appellate Body, *US – Clove Cigarettes*, paragraph 181.
[12] First written submission by the European Union, paragraph 261.
[13] First written submission by the European Union, paragraph 261.
[14] Report of the Appellate Body, *Japan – Alcoholic Beverages II*, paragraph 111.

B. Article 2.2 of the TBT Agreement: Objective of the measure

22. The European Union argues that its measure addresses moral concerns of its population with respect to seal hunting, which vary according to the purpose of each type of hunting.[15] It would appear that the moral concerns alleged by the European Union in fact run counter to the animal welfare concerns reflected in its measure.

23. The Panel should therefore first analyse the legitimacy of the principal objective of the measure. The list of legitimate objectives referred to in Article 2.2 of the TBT Agreement may serve to provide a benchmark when considering other objectives not listed in that article as legitimate; likewise, the objectives referred to in the sixth and seventh recitals of the preamble to the Agreement, and the objectives recognized in other covered agreements may also serve to provide guidance and to inform the Panel's analysis.[16]

24. Although the TBT Agreement recognizes the right of WTO Members to establish for themselves the objectives of their technical regulations, the Appellate Body has indicated that panels are not bound by a Member's characterization of the objectives it pursues through its measure, but must objectively and independently analyse the measure and what the WTO Member seeks to achieve thereby, taking into account the text of the measure, and its legislative history, design, structure and application. In this case in particular, Mexico considers that an important issue to be taken into account in the above-mentioned assessment will be the relationship of the principal objective of the measure and its interaction and consistency with the aims pursued by each of the exceptions.

C. Relationship between GATT Article III:4 and GATT Article 11

25. Mexico notes that both complainants argue that the measure at issue is inconsistent with both Article III:4 of the GATT 1994 and Article XI of the GATT 1994. Mexico calls on the Panel to be mindful of the possibility that a measure may contain certain elements that violate Article III:4 of the GATT 1994 and others that violate Article XI:1 of the GATT 1994, since these provisions have different fields of application. This possibility was recognized by the Panel in *India - Autos*.[17]

D. The debate over unilateralism and multilateralism in the analysis of the preamble to Article XX of the GATT

26. Mexico notes that the European Union justifies its measure as a public morals issue under Article XX(a) of the GATT 1994, but that justification essentially derives from a concern over animal welfare in relation to seals (i.e. over the manner and purpose of slaughtering seals).

27. In this case it appears that the European Union has decided to deal unilaterally with issues relating to seal hunting in the territory of other Members instead of joining in a multilateral effort to address those issues. That being the case, it would be relevant for the Panel to take into consideration the points noted by the Appellate Body in *US - Shrimp*, in its analysis of the concept of "unjustifiable discrimination" referred to in the chapeau of Article XX of the GATT 1994, where it emphasized the importance of participating in a multilateral effort instead of unilaterally developing and imposing internal policies that affect international trade.[18]

E. Analysis of Article XX(a) of the GATT 1994

28. The Panel should recognize the difference in the language used in relation to the different categories of exceptions contained in Article XX of the GATT 1994.[19] Mexico notes that paragraph (a) of Article XX has similarities with paragraphs (b) and (d) of the same article, for which a review of necessity is required. Therefore, the determinations made in relation to the exceptions under paragraphs (b) and (d) of Article XX of the GATT 1994 are of illustrative import for the Panel.

[15] First written submission by the European Union, paragraph 33.

[16] Report of the Appellate Body, *US – Tuna II (Mexico)*, paragraph 313. See also the Report of the Appellate Body, *US – COOL*, paragraph 370.

[17] Report of the Panel, *India - Autos*, paragraphs 7.223, 7.224 and 7.296.

[18] Report of the Appellate Body, *US - Shrimp*, paragraphs 161 to 176.

[19] Report of the Appellate Body, *US - Gasoline*, paragraphs 44 and 45.

29. Notwithstanding the foregoing, there is an important difference in the interpretation and application of Article XX(a) of the GATT 1994, which gives rise to systemic concerns. This difference relates to the nature of the subject of the exception concerned: public morals. In this case, Mexico considers that the Panel must take account of the singular nature of the concept of public morals in the context of the general exception. At the same time, Mexico considers that the Panel should take care to ensure that its interpretation of Article XX(a) of the GATT 1994 does not give rise to any abuse in the use of that exception to justify any kind of measure.

30. Paragraph (a) must make an exception for measures necessary to protect the public morals of a Member from the disciplines of the GATT 1994, and at the same time recognize that the public morals of that Member may not be the same as those of other Members.

31. Mexico notes that the term "public morals" has not been interpreted by the Appellate Body but has been addressed by the panels in *China - Publications and Audiovisual Products* and *US - Gambling*.[20] Taking account of the matters noted in those disputes, it would appear that the singular nature of the term "public morals" in the exception under Article XX(a) of the GATT 1994 supports an interpretation limiting the scope of that exception to the protection of public morals within the territory of each Member.

[20] Report of the Panel, *China - Publications and Audiovisual Products*, paragraph 7.759 (footnotes omitted).

ANNEX C-5

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF NAMIBIA

Introduction

1. Namibia demonstrated in the first written submission (Nam-2) and in the oral statement (Nam-3) that the EU has violated its obligations under the Agreement on Technical Barriers to Trade (TBT), and more specifically the obligation embedded in Articles 2.1, 2.2 and 5.1 of TBT and its obligations under Articles I, III, and XI of the GATT.

2. Namibia has a long history of harvesting Cape fur seals (*Arctocephalus pusillus pusillus*) that spans from the 17th century. The 1893 Act stipulated that no seals might be taken without a permit. In 1909 a limit was placed on the harvesting season. Legislative framework was further put in place with the enactment of the Sealing and Fisheries Proclamation in 1922 and the Sealing and Fisheries Ordinance in 1949. The Sea Birds and Seals Protection Act, No 46 of 1973 repealed the previous legislation to include specific regulations on age, size, sex and location of seals.[1]

3. With the Independence of Namibia in 1990, the Sea Fisheries Act, No 29 of 1992 was promulgated but it was repealed together with the Sea Birds and Seal Protection Act and was replaced by the Marine Resources Act, 2000 (Act No. 27 of 2000) which draw on modern instruments and best practices. This Act brought the date of commencement of the harvesting season forward from the 1st of August in earlier years to the 1st of July to 15 November. The harvesting of seals is conducted in terms of the Regulations related to exploitation of Marine Resources made under the Marine Resources Act, 2000. The Marine Resources Act 2000, complies with the provisions of the United Nations Convention in the Law of the Sea of 1982.[2]

4. Presently, harvesting is only permitted until mid-November when the breeding season commences. In terms of the Marine Resources Act 2000, harvesting is controlled through Total Allowable Catches ("TAC") from the best scientific evidence available. Namibia ascribes to the implementation of ecosystem based management and this is taken into account in the conservation and management of all commercially harvested living marine resources, including seals. Namibia is the only developing country where commercial seal harvesting is taking place. Globally, Namibia ranks 3rd behind Denmark and Canada.[3]

Seal Stock Status

5. Cape fur seals are distributed along the southern and western coasts of Southern Africa. They aggregate at 42 colonies extending from Baia dos Tigres in southern Angola to Black Rocks near Port Elizabeth in South Africa. In Namibia, seals occupy twenty six colonies along the coast. Colonies are located either on the mainland or on small, rocky islands and are either breeding or non-breeding sites.[4]

6. The Namibian Cape fur seal population was estimated for the year 2011 at 1.2 million. Scientists have estimated the food consumption rate for the Cape fur seal at 1.4 to 6.8 kg per day per animal, depending on the age, the sex and reproductive status. Using the best available information, scientists have estimated the annual consumption at around 1.68 million ton of food per year. Their diet compositions mainly consist of commercial important fish stock such as Hake, Horse Mackerel and Pilchard. This figure (1.68 million tons of food) is three (3) times more than all TAC issued to the Namibian fishing industry of commercial important stock added together.[5]

[1] NAM-2, pg 4 and pg 10, footnote 10; NAM-3, pg 1, para 1.4
[2] Regulation 20 is discussed in NAM-2, pg 9; NAM-3, pg 1, para 1.5
[3] NAM-2, pg 4; NAM-3, pg 1, para 1.6
[4] NAM-2, pp 4-5; NAM-3, pg 2, para 2.1
[5] NAM-2, pg6; NAM-3, pg 2, para 2.2

7. Namibia's management decisions are based on the best available scientific advice and precautionary principle as stipulated in section 38 (2) of the Marine Resources Act 2000.[6]

Legislative framework: Sustainable Management

8. Namibia has comprehensive legislation on fishing, including seal harvesting. Article 95(l) of the Namibian Constitution, the Supreme Law of Namibia, provides that the State shall actively promote and maintain the welfare of the people by adopting, inter alia, policies aimed at the "*maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and utilization of living natural resources on a sustainable basis for the benefit of all Namibians, both present and future….*" Further, Namibia has the Marine Resource Act, 2000 (Act No. 27 of 2000) and the Marine Fisheries Regulations (Government Notice No. 241, Regulations relating to the exploitation of marine resources, 2001). [7]

9. In 2012, the Marine Resources Act won Kungsfenan (Swedish Sea Food Award) as the world's most inspiring, innovative and influential instrument on the protection of oceans and coasts that allowed Namibia to successfully manage its marine resources and instituted a more ecologically and economically sustainable fishing industry. [8]

Monitoring of Seals in Namibia

10. Namibia ensures that TAC's are set for the purpose of ensuring that the harvest is conducted sustainably with effective monitoring and enforcement mechanisms. The Cabinet (the Executive branch of the State) is required to endorse TAC for each year to ensure sustainability. Seal harvesting is monitored by Fisheries Inspectors to ensure that it is carried out in accordance with the Marine Resources Act 2000. In its management of the seals, Namibia is also guided by policies, best practices, standards and other instruments such as the FAO Code of Conduct for Responsible Fisheries. [9]

Markets: Exportation of Namibian Seal Products

11. Exportation of seal products goes back to the 19th century with respect to the United Kingdom and Germany. In addition, before the EU seal regime, Namibia used to export substantial volumes to Greece, Italy, Germany and Sweden amongst others. The fishing sector is the second highest contributor to the GDP from 2008 to 2011 ranges from 3.7% to 5.3%. In addition, employment in the seal sector is an important element especially to coastal communities (Henties Bay and Luderitz). Due to the EU prohibition these markets are lost, resulting in severe loss of income and unemployment. This has increased poverty levels in the country. [10]

12. Seals are considered as a natural resource from which Namibia can derive consumptive and non-consumptive benefits. The seal products derived from the commercial seal harvesting are pelts of pups (exported and used locally), genitalia of seal bulls (for export to Asia), omega 3 oils and capsule, and by-products which include oil (medicinal value), meat, meat-meal, bone-meal and leather products such as shoes, purses and jackets. [11]

13. Namibia's statistics recorded that the dependency ratio in the above coastal towns is 1:6 on average. In the town of Henties Bay, during the harvesting season, the sealing industry is the biggest employer. In the leather industry, seal products sustains a substantial number of communities and in the tanning industry, a significant portion of employment opportunity is supported by seal skins. The EU ban undermines the expansion in growth of the sealing industry, thereby exacerbating the high unemployment rate in Namibia, which currently stands at 51%. [12]

[6] NAM-2, pg 7; NAM-3, pg 2, para 2.3
[7] NAM-2, pg 8, para 3; NAM-3, pg 3, para 3.3
[8] NAM-2, pg 9; NAM-3, pg 3, para 3.2
[9] NAM-2, pp 8-9
[10] NAM-2, pp 10-11; NAM-3, pg 3, para 5.1
[11] NAM-2, pg 11; NAM-3, pg 4, para 5.2
[12] NAM-2, pg 12

14. Unlike the entirety of the Northern hemisphere, in Namibia – the only sealing nations south of the equator – seals are NOT hunted, they are harvested. As such, certain misgivings are not applicable to Namibia. Namibia has always been cooperative and welcoming of views and suggestions on how to improve animal welfare during the harvesting process. It is admitted that, even in the EU, addressing such concerns does not guarantee establishment of a hundred percent fool-proof system, not even in slaughter houses.[13]

15. Namibia endeavours to maximize animal welfare between the brief period when a pup become conscious of human presence and its death. Being systematic is a pre-requisite in any conservation. Namibia harvests from three out of twenty six colonies, unlike elsewhere, where hunting accesses the entire seal population at once.[14]

16. Employees in the seal industry are all indigenous Namibians and have acquired harvesting skills as per the Marine Resource Act, 2000. Taken together, the economic ripple effect derived from the exportation of seal products is of great benefit to the Namibian employment figures.[15]

The Discriminatory Nature of the EU Seal Regime

17. The EU Seal Regime states, in its preamble, the reasons for its existence, necessity and presumably its goals and objectives. Yet, its design, structure, and operations amount at the same time to: (a) unfair economic restrictions; (b) violations of WTO Agreements; (c) violations of TBT Agreement and (d) contradicting and undermining own goals and objectives.[16]

VIOLATION OF TBT and GATT

(a) TBT and GATT

18. Namibia respectfully requests the Panel to find that the EU, by adopting a series of measures described below as 'the EU Seal Regime', has violated its obligations under the TBT, and more specifically the obligations contained in Articles 2.1 (by discriminating across like products based solely on their origin), Article 2.2 (by adopting unnecessary measure), and Article 5.1 of TBT (by failing to provide a conformity assessment-procedure). Were the Panel to take the view that the measures described as 'the EU Seal Regime' do not properly come under the disciplines of the TBT Agreement, then Namibia submits that they should be understood as internal measures, and the EU has anyway, violated its obligations under Articles I, III and XI of GATT.[17]

19. Namibia respectfully submits that the EU measures cannot be justified through recourse to Article XX of GATT. The Panel, following its case law in this respect so far, should first review the consistency of the challenged measures with the TBT Agreement, and revert to an examination under the GATT only if it feels that the challenged measure does not come under the purview of the TBT. The challenged measure constitutes a 'technical regulation' in the sense of Annex 1 to the TBT Agreement since (a) it applies to an identifiable group of products (seal products), (b) it explains the product characteristics that should not be present for products to circulate in the EU market (all seal products are, in principle, banned), and (c) compliance with the product characteristics is a necessary pre-condition for market access.[18]

(b) The Reasons Why the EU Violates the TBT

20. Namibia is in agreement with the EU in respect of protection of animal welfare. The purpose of the WTO, with the exception of TRIPs that call for common policies in specific areas, is to harmonize conditions of competition within and not across markets. The key obligation in the TBT-context (and the GATT-context as well) is that, once the EU has revealed its preference to pursue a legitimate objective, products of WTO Members and products originating in the EU

[13] NAM-2, pg 13, para 7
[14] NAM-2, pg 9, para 4
[15] NAM-3, pg 5, para 6.4
[16] NAM-2, pp 14-18
[17] NAM-2, pg 19, para 11
[18] NAM-2, pg 20

will be placed in equal footing: those that respect the EU measure will be allowed to circulate in the EU market, and those that do not, will be denied market access. Further, the EU must choose a measure that is necessary to achieve its social preference, that is, the measure that constitutes the least restrictive option for international trade. The EU has failed to live up to this test.[19]

21. The EU does not prohibit sales of seal products from its market, it prohibits some sales only. Three exceptions have been included in the EU relevant Regulations which allow seal products bought for personal use, produced by indigenous communities, as well as conforming with marine resources management to be traded inside the EU. These three exceptions have nothing to do with animal welfare. Significantly, the Preamble states that the objective of the EU measure is protection of animal welfare.

22. The EU does not prescribe a particular production method that must be followed for seals products to be legally sold in its market. It is a fact that indigenous communities kill seals in rather brutal ways, and Canada's submission to this effect is quite telling. Seals products bought for personal use could be seals products from seals that have been hunted in equally brutal ways.

23. The exception in favour of indigenous communities is limitless: the Inuit communities can produce and sell in the EU market without any hunting method being prescribed. Rationally, the Inuit communities will hunt more than before, since the EU market will be left to their mercy, since their only competition will come from goods imported for personal use as well as the marine resource management-related production, and we all agree that these two sources of supply are limited in volume. Thus, assuming demand remains constant, production by the Inuit communities will rise to fill the gap.

24. All of the above considerations suggest that: (a) the EU measure in name aims to protect animal welfare, but in practice does not, since there is no guarantee that fewer seal products will circulate in the EU market, and there is no guarantee as to the hunting method; (b) the measure is discriminatory since the Inuit communities of Greenland are accorded a trade advantage (sale of seals products) that other WTO Members (including Namibia) are not. The EU has conceded that the seals products produced by the Inuit communities and elsewhere in the world are 'like' goods.

25. The 'EU Seal Regime' fails the necessity-requirement, as stipulated in the GATT, for one simple reason: if the regulatory objective pursued is protection of animal welfare, then the measure that meets the requirement must at the very least distinguish between methods that meet and methods that do not meet this objective. The 'EU Seal Regime' imposes an outright ban on sales of seal products produced outside the EU, and this a disproportionate cost on international trade flows, even though some or many of them might genuinely meet the regulatory objective pursued by the EU. The 'EU Seal Regime' does not even provide for conformity assessment, so there is no way the EU can ever know whether seal products originating in other WTO Members do or do not protect animal welfare.

(c) The 'EU Seal Regime' Violates the GATT

26. Seal products originating in countries other than the defined indigenous communities in the sense of the challenged measure (Regulation 737/2010), cannot be marketed in the EU. Since the EU has conceded that products originating in the Inuit communities and elsewhere are 'like', the only reason why some products will and some will not be marketed in the EU is the origin of the products. This is a clear violation of Article I of the GATT.[20]

27. Seal products produced by the Inuit communities can be sold in the EU market. Seal products originating in Namibia cannot be sold in the EU market, since Namibia does not include any indigenous communities in the sense of Regulation 737/2010. By allowing domestic products to be marketed, and simultaneously denying the same opportunity to imported goods, the EU is according less favourable treatment to imported like goods. This is so because the only

[19] NAM-2, pg 22, para 12
[20] NAM-2, para 20

reason why the EU is distinguishing say between Inuit and Namibian seals is their origin. This is a clear violation of Article III of the GATT.[21]

28. With respect to the personal use, we observe that the measure amounts to an import restriction: only those travelling abroad (Article 4 of Regulation 737/2010) can benefit from this exception when re-entering the EU market. The measure then is an import quantitative restriction since travelers cannot import as many seal products as they wish but only those that are destined for personal use. The EU is thus, with respect to the personal use-condition only, acting in violation of Article XI of the GATT.[22]

29. If the objective of the EU is animal welfare, EU would have to invoke Article XX (b) of the GATT. Article XX (g) of the GATT does not even come into the frame, because seals are not an exhaustible natural resource. Further, Article XX (b) of the GATT would require from the EU to demonstrate that its measures are necessary to protect animal life or health. The EU does not prescribe any method for hunting seals. It does not even limit the amount of seals killed through its measures. The measure is thus, unnecessary to reach the stated objective, since neither the amount of seals sold in the EU will be limited, nor the hunting method will change. Further, the EU fails the chapeau-test since producers producing like goods (and thus finding themselves in 'similar conditions' with the Inuit communities) cannot market their goods in the EU market.[23]

30. Were the EU to invoke that its measure aims at protecting the manner in which seals are being hunted by indigenous communities like the Inuit, it would have to, at the very least, describe first this method and then explain which provision of Article XX of the GATT is relevant. It did not prescribe any production process. Moreover, Article XX of the GATT includes an exhaustive list and none of the sub-paragraphs of this provision could be construed as adequate to entertain similar claims.[24]

Conclusions

31. Namibia demonstrated in the first written submission and in the oral statement that the design, structure and operations of the EU measures prohibiting the importation of seal products- (a) constitute unfair economic restrictions; (b) are in in violations of the WTO Agreements; (c) are in violations of TBT Agreement and (d) contradicts and undermines the goals and objectives of those measures.

32. Namibia respectfully submits that Canada and Norway have made out a case for the relief sought in their application.

33. In view of the above, Namibia respectfully requests the Panel to consider the first written submission and the oral submission of Namibia favourably.

[21] NAM-2, para 20
[22] NAM-2, para 20
[23] NAM-2, pg 33, para 20.4
[24] NAM-2, pg 33, para 20.4

ANNEX C-6

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

I. GATT 1994: Article XX(a)

1. With respect to considering whether a measure meets paragraph (a) of Article XX of the GATT 1994, the proper elements to consider are whether the measure protects public morals and whether the measure is "necessary" to do so. This calls for determining whether the measure in question has the objective of protecting a value that is a public moral in the respondent's community or nation. When considering a respondent's claim that the measure is designed to protect a value that is a public moral, one must consider the concept of "public morals" as defined and applied by the responding Member according to their own systems and scales of values. A panel is not to substitute its own judgment as to what a "public moral" is, but rather is to determine what a public moral is in the responding Member's system. Nevertheless, while the focus must be on the responding Member's system and scale of values, what Members other than the responding Member consider to be public morals can offer confirmation of a panel's determination as to what constitutes a public moral within the system of the responding Member.

2. Next, it is necessary to consider whether the measures are "necessary" to protect public morals. To do so, the Appellate Body has set forth a process consisting of a number of possible lines of inquiry – the relative importance of the values furthered by the measure, the contribution of the measure to the objective, the restrictive impact of the measure – and the consideration of alternative measures. The Appellate Body has stated that "[i]t is on the basis of this 'weighing and balancing' and comparison of measures, taking into account the interests or values at stake, that a panel determines whether a measure is 'necessary' or, alternatively, whether another, WTO-consistent measure is 'reasonably available'."

3. Under Article XX, Members have agreed that the objectives listed justify providing for exceptions from the other provisions of the GATT 1994, subject to certain conditions. This means that it is not required, nor is it appropriate, to determine whether the trade-restrictiveness of the measure is justified by the importance of the objective. The text does not require a panel to assign some sort of quantitative or qualitative value to the trade-restrictiveness of the measure and the importance of the objective, and then compare those two values; such an inquiry would be extraordinarily difficult, if not impossible. Nor is there any support in the text of Article XX for a view that a measure that has been found to be designed to achieve one of the exceptions set out in Article XX can be found to be unnecessary (if a WTO-consistent alternative is not available) simply because a panel may find the objective of the measure insufficiently important to justify the measure's trade- restrictiveness.

4. With respect to the contribution of the measure to its objective, it is for the Member, in designing its measure, to select the level at which the objective will be achieved. It is well established that the determination of what is the respondent Member's actual desired level is based on the design of the measure and the evidence provided.

5. Finally, if presented with an alternative measure by Canada or Norway, the inquiry then will be whether the alternative measure is WTO-consistent, is "reasonably available," and will achieve the EU's objective at the level chosen by the EU. The EU incorrectly states that the alternative measure must be "less trade restrictive" than the EU measure. This implies that the alternative measure could be WTO-inconsistent, but so long as it is less trade restrictive than the EU measure, the EU measure will be deemed unnecessary. The United States disagrees: in determining "necessity" the comparison is between the GATT 1994-inconsistent measure and an alternative measure that is GATT 1994-consistent.

6. A "less trade restrictive" standard is not supported by the text of Article XX(a), which requires that the measure be "necessary." The ordinary meaning of the term "necessary," in context and in light of the object and purpose of the GATT 1994, does not encompass a "least trade restrictive" test. Rather, the trade-restrictiveness of a measure is one of the factors that may be helpful in evaluating the "necessity" of the measure, as the Appellate Body has recognized.

According to the Appellate Body, the ordinary meaning of the term necessary as used in Article XX is "located significantly closer to the pole of 'indispensable' than to the opposite pole of 'making a contribution to'." In this regard, the Appellate Body's interpretation of the ordinary meaning of the term "necessary" is clearly related to the degree of contribution the measure makes to an objective set out in Article XX (a), (b), or (d). Additionally, context provided by the *Agreement on Technical Barriers to Trade* ("TBT Agreement") and the *Agreement on the application of Sanitary and Phytosanitary Measures* ("SPS Agreement") demonstrates that where Members sought to provide an obligation that a measure is required to be no more trade restrictive than required or necessary, the WTO Agreement sets out that standard clearly. As the *US – Tuna-Dolphin* panel noted when comparing the text of TBT Article 2.2 to GATT Article XX, under Article XX the "trade restrictiveness" of the measure as compared to an alternative is not relevant; what must be considered is the necessity of relying on a measure inconsistent with the GATT 1994 to achieve an objective listed in Article XX.

7. The United States also finds instructive the Appellate Body's discussion in *US – Tuna-Dolphin* of the circumstances in which, when considering a claim under TBT Article 2.2, a panel may not need to consider an alternative measure. The Appellate Body stated that, if a measure is not trade restrictive, then it would not be inconsistent with Article 2.2. Article XX of the GATT 1994, however, does not operate in this manner. Article XX is an affirmative defense. One conducts an analysis under Article XX because of a finding of inconsistency with another provision of the GATT 1994. One is not excused from a breach by showing lack of trade restrictiveness. Rather, a measure qualifies for an exception under Article XX by meeting the conditions of Article XX. In other words, a measure found to be GATT 1994-inconsistent is not excepted from that finding under Article XX on the basis that it has no or limited trade effect. Similarly, a GATT 1994-inconsistent measure otherwise excepted from the obligations of the GATT 1994 does not become "unnecessary" simply because it is highly trade restrictive.

II. TBT Agreement

8. With respect to the TBT Agreement, the United States presents its views on: (1) the definition of "technical regulation," and in particular, the meaning and relevance of product characteristics in that definition under Annex 1.1; (2) the concept of "less favorable treatment" under Article 2.1 and the related approach recently utilized by the Appellate Body regarding "legitimate regulatory distinction"; and (3) the definition of the term "conformity assessment procedures" under Annex 1.3 and the implications for the scope of Articles 5.1 and 5.2.

9. First, Annex 1.1 of the TBT Agreement defines a "technical regulation" as a "document which lays down product characteristics or their related processes and production methods ... ." Stated differently, to be a technical regulation, a document must either set out that a product possess or not possess a particular characteristic, or it must prescribe certain processes or production methods related to a product characteristic. In this regard, the United States observes that a measure that simply prohibits the sale of a product does not prescribe a product characteristic. For example, a measure that prohibits the sale of asbestos does not prescribe any characteristics of that product. Such a ban would not operate by allowing asbestos with certain intrinsic characteristics to be sold while restricting the sale of asbestos with other intrinsic characteristics; that measure would simply ban the sale of asbestos *per se*.

10. It is also useful to note that Annex 1 relies on the sixth edition of the ISO/IEC Guide 2: 1991, General Terms and Their Definitions Concerning Standardization and Related Activities ("Guide"). In particular, the Guide notes that: "Important benefits of *standardization* are improvement of the suitability of products, processes, and services for their intended purposes, prevention of barriers to trade and facilitation of technological cooperation." Similarly, the Guide states that: "*Standardization* may have one or more specific aims, to make a product, process or service *fit for its purpose*. Such aims can be, but are not restricted to, *variety control*, usability, *compatibility*, *interchangeability*, health, *safety*, *protection of the environment*, *product protection*, mutual understanding, economic performance, trade. They can be overlapping." It is also helpful to consider definition 5.4 in the Guide of a "product standard": "*Standard* that specifies *requirements* to be fulfilled by a product or a group of products, to establish its *fitness for purpose*."

11. These statements in the Guide show that the focus of standards, and by extension technical regulations (certain types of standards with which compliance is mandatory), is on ensuring that a

product is fit for its purpose or aim. However, the purpose or aim of a sales ban is not to ensure that a product is fit for its purpose, but to prohibit the sale of the product entirely. The purpose of technical regulation, on the other hand, is to set out product characteristics (or their related processes or production methods), which if met, allows the product to be marketed. In other words, a technical regulation's aim is not to ban a product but to ensure that the product possesses or does not possess a product characteristic that makes it usable, compatible, safe, protective of the environment or health, etc.

12. While the result of a technical regulation may be that a form of a product that possesses (or does not possess) a particular characteristic may not be sold, this result alone is not what makes a measure a technical regulation. Rather, for a measure to constitute a technical regulation, it must be a "document which lays down product characteristics or their related processes and production methods ...." and compliance with the document must be mandatory. A prohibition on the sale of a product that possesses (or does not possess) a particular characteristic is the *mechanism* through which compliance with the "document which lays down product characteristics...." is made mandatory. However, unlike a *per se* ban on the product, a technical regulation sets out product characteristics that, if met, do allow the product to be marketed.

13. For example, consider a measure that (1) bans asbestos and (2) requires that any cement sold not contain asbestos. One aspect of the measure bans a product *per se*, asbestos. Another aspect of the measure allows cement to be sold if it does not possess a particular characteristic – namely, if the cement does not contain asbestos. In this example, the ban on asbestos *per se* is not a technical regulation and would not be subject to the TBT Agreement; it is simply a ban on the sale of asbestos. However, the aspect of the measure that sets out that any cement marketed must not contain asbestos, is a technical regulation for cement. The same cannot be said for the aspect of the measure that simply bans the sale of asbestos, as there are no product characteristics that asbestos could possess or not possess that would allow it to be sold under the measure. Thus, to the extent a measure bans the sale of a product, rather than prescribing that the product possess or not possess a certain product characteristic, the measure is not a technical regulation.

14. Second, with respect to TBT Article 2.1, when considering whether a measure applies less favorable treatment to like products, it is necessary to consider the proper scope for the comparison between products. As the Appellate Body stated in *US – Clove Cigarettes*, a panel is to "compare, on the one hand, the treatment accorded under the technical regulation at issue to all like products imported from the complaining Member with, on the other hand, that accorded to all like domestic products." Though the Appellate Body in that dispute was addressing a national treatment claim under Article 2.1, the United States believes the scope of comparison is similar when considering a most favored nation claim under the same article; that is, the proper scope of comparison is between the treatment accorded to all like products from one Member to all like products "originating in any other country."

15. The United States notes, however, that within the scope of the products being compared, Article 2.1 does not require Members to accord no less favorable treatment to each and every imported product as compared with each and every like domestic product or like product originating in any other country. Technical regulations, "by their very nature," establish distinctions between products. Such distinctions between groups of like products do not breach Article 2.1 so long as the distinction is based on a legitimate regulatory distinction, and not on some impermissible basis, such as the origin of a product. Moreover, when considering whether a distinction drawn between like products is legitimate, a panel may consider the objective behind the distinction being drawn. In making that consideration, a panel should not just consider the "central" or overarching objective of the measure. Measures often have multiple objectives. And in the case of exceptions to a measure, the objectives of the measure may even be competing with each other. Indeed, it is difficult to conceive of another reason why a measure would make exceptions in the first place. It is natural for governments to need to balance competing legitimate objectives. Thus, to suggest that an exception to a measure is not based on a legitimate regulatory distinction because it does not contribute – or may even detract – from the "central" objective of the measure is incorrect. Rather, the proper question for the panel to consider is whether that distinction reflects discrimination. That test can only be satisfied while taking into account all objectives of the measure.

16. Third, with respect to the claims under Articles 5.1 and 5.2 of the TBT Agreement, it is useful to recall that those Articles provide obligations with respect to "conformity assessment procedures." Accordingly, another important threshold question under the TBT Agreement is what is a "conformity assessment procedure."

17. "Conformity assessment procedures" are defined in Annex 1.3 as: "Any procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled." While Canada and Norway allege, and the EU appears to accept, that the determination as to whether a product falls within the marine resource management or indigenous communities exceptions are conformity assessment procedures, the United States believes the Panel should consider whether these exceptions are technical regulations, and thus, whether any determination concerning eligibility for these exceptions is subject to Articles 5.1 and 5.2.

18. The United States recalls that when a measure is alleged to be a technical regulation within the meaning of the first sentence of Annex 1.1, that measure must set out "product characteristics or their related processes and production methods...." The meaning of product characteristics was just discussed in our statement. With respect to the rest of the sentence, the words "their" and "related" refer to the term "product characteristics," and indicate that the processes and production methods addressed by the first sentence of the definition of a technical regulation are those that relate to product characteristics. Processes or production methods unrelated to product characteristics are not covered by the first sentence of the definition of a technical regulation.

19. Therefore, if an exception does not concern a requirement in a technical regulation (and by definition those requirements would concern product characteristics or processes or production methods related to product characteristics), then a determination as to whether a particular product was eligible for the exception would not be the type of determination specified in the definition. That is, it would not involve a determination as to whether relevant requirements in technical regulations are fulfilled. If an exception does not depend on or prescribe any characteristic of the product or a process or production method related to the characteristic of the product, then it would appear that the exception is not a technical regulation. Accordingly, any procedure for determining eligibility with the exception would not be a procedure for "a positive assurance of conformity with" a technical regulation.

20. Therefore, where a determination is required with respect to whether a product satisfies a measure (or an aspect of a measure) that is not a technical regulation, that requirement does not come under Article 5.1. Since Article 5.2 applies to situations in which a Member is implementing the provisions of Article 5.1, Article 5.2 also would not apply to measures or aspects of measures that are not technical regulations or standards.

21. Thus, to the extent that a determination of eligibility for an exception that sets out non-product characteristics is required, that determination is *not* within the scope of Article 5.1 or 5.2. However, a determination procedure may of course still be amenable to challenge under other WTO agreements, including Article III:4 of the GATT 1994 as a measure that accords less favorable treatment to like products.

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