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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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WORKING PROCEDURES OF THE PANEL

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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]

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[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]

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[*] 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.

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[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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