BEFORE THE WORLD TRADE ORGANIZATION

European Communities – Measures Prohibiting the Importation and Marketing of Seal Products
(WT/DS401)

First Written Submission of Norway

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EC – Poultry	Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, 2031
EC – Sardines	Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3359
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EEC – Oilseeds I	GATT Panel Report, *European Economic Community – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*, L/6627, adopted 25 January 1990, BISD 37S/86
EU – Footwear (China)	Panel Report, *European Union – Anti-Dumping Measures on Certain Footwear from China*, WT/DS405/R, adopted 22 February 2012

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Japan – SPF Dimension Lumber	GATT Panel Report, *Canada/Japan – Tariff on Imports of Spruce, Pine, Fir (SPF) Dimension Lumber*, L/6470, adopted 19 July 1989, BISD 36S/167
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US – Clove Cigarettes	Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012

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US – Clove Cigarettes	Panel Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/R, adopted 24 April 2012, as modified by Appellate Body Report WT/DS406/AB/R
US – COOL	Appellate Body Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R / WT/DS386/AB/R, adopted 23 July 2012
US – COOL	Panel Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R / WT/DS386/R, adopted 23 July 2012, as modified by Appellate Body Reports WT/DS384/AB/R / WT/DS386/AB/R
US – FSC (Article 21.5 – EC)	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, 55
US – FSC (Article 21.5 – EC)	Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/RW, adopted 29 January 2002, as modified by Appellate Body Report WT/DS108/AB/RW, DSR 2002:I, 119
US – Gambling	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, 5663 (Corr.1, DSR 2006:XII, 5475)
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3
US – Non-Rubber Footwear	GATT Panel Report, *United States – Countervailing Duties on Non-Rubber Footwear from Brazil*, SCM/94, adopted 13 June 1995, BISD 42S/208
US – Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755
US – Tuna II (Mexico)	Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012
US – Tuna II (Mexico)	Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, adopted 13 June 2012, as modified by Appellate Body Report WT/DS381/AB/R

LIST OF ABBREVIATIONS

Abbreviation	Description
AIDCP	Agreement on the International Dolphin Conservation Programme
AGRI	Committee on Agriculture and Rural Development of the European Parliament
AVMA	American Veterinary Medical Association
Basic Seal Regulation	European Parliament and Council of the European Union, *Regulation (EC) No. 1007/2009 on Trade in Seal Products*
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
Commission Impact Assessment (or Impact Assessment)	European Commission, *Impact Assessment on the potential impact of a ban of products derived from seal species*, COM(2008) 469 (23 July 2008)
Conduct Regulation	*Regulations 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
[*Redacted due to withdrawal of evidence*]	[*Redacted due to withdrawal of evidence*]
Danielsson Statement	Expert Statement of Mr. Jan Vikars Danielsson (7 November 2012)
DFO	Canadian Department of Fisheries and Oceans
DFO FAQs	Canadian Department of Fisheries and Oceans, *Sealing in Canada – Frequently Asked Questions*, available at http://www.dfo-mpo.gc.ca/fm-gp/seal-phoque/faq2012-eng.htm#h (last checked 30 October 2012)
DHA	Docosahexaenoic acid
DPA	Docosapentaenoic acid
EC Treaty	Treaty establishing the European Community
EFSA	European Food Safety Authority

Abbreviation	Description
ENVI	Committee on the Environment, Public Health and Food Safety of the European Parliament
EPA	Eicosapentaenoic acid
European Parliament Debates	European Parliament, *Debates – Item A6-0118/2009*, P6_CRE(2009)05-04 (4 May 2009)
EU	European Union
EU Parliament Declaration	European Parliament, *Declaration on Banning Seal Products in the European Union*, P6_TA(2006)0369, September 2006
EU Parliament Draft Report on Trade in Seal Products	European Parliament, *Draft Report on the Proposal for a Regulation of the European Parliament and of the Council concerning Trade in Seals Products (COM(2008)0469 – C6-0295/2008 – 2008/0160(COD))*, 2008/0160(COD) (7 January 2009)
EU Parliament Final Report on Trade in Seal Products	European Parliament, *Report on the Proposal for a Regulation of the European Parliament and of the Council concerning Trade in Seals Products* (COM(2008)0469 – C6-0295/2008 – 2008/0160(COD)), A6-0118/2009 (5 March 2009)
Fortuna Statement	Statement by Ms. Linn Elice Kanestrøm on behalf of Fortuna Oils AS (31 October 2012)
GATS	*General Agreement on Trade in Services*
GATT	*General Agreement on Tariffs and Trade*
HS	Harmonised Commodity Description and Coding System
IDCP	International Dolphin Conservation Programme
ICES	International Council for the Exploration of the Sea
IMCO	Committee on the International Market and Consumer Protection of the European Parliament
Implementing Regulation	European Commission, *Regulation (EU) No. 737/2010 Laying Down Detailed Rules for the Implementation of Regulation (EC) No. 1007/2009 of the European Parliament and of the Council on Trade in Seal Products*

Abbreviation	Description
Knudsen Statement	Expert Statement of Professor Siri Kristine Knudsen (6 November 2012)
Knudsen, "The Dying Animal"	S. Knudsen, "The Dying Animal: A Perspective from Veterinary Medicine", in A. Kellehear (ed.), *The Study of Dying: From Autonomy to Transformation*, Cambridge University Press (2009), pp. 27-50
Kvernmo Statement	Expert Statement of Mr. Bjørne Kvernmo (2 April 2012)
Landmark Statement	Expert Statement of Mr. Vidar Jarle Landmark (7 November 2012)
Leghold Trap Regulation	Council of the European Union, *Regulation (EEC) no. 3254/91 prohibiting the use of leghold traps in the Community and the introduction into the Community of pelts and manufactured goods of certain wild animal species originating in countries which catch them by means of leghold traps or trapping methods which do not meet international humane trapping standards*, Official Journal of the European Communities (1991) L 308/34 (4 November 1991)
Members States' Comments on the Proposed Regulation (19 January 2009)	Council of the European Union, *Member States' Comments on the Proposal for a Regulation Concerning Trade in Seal Products*, 5404/09 (19 January 2009)
Members States' Comments on the Proposed Regulation (20 January 2009)	Council of the European Union, *Member States' Comments on the Proposal for a Regulation Concerning Trade in Seal Products*, 11152/09 ADD 1 (20 July 2009)
MEP	Member of the European Parliament
MFN	Most favoured nation
Moustgaard Statement	Expert Statement of Ms. Anne Moustgaard (25 May 2012)
MSC	Marine Stewardship Council
NAFO	Norhtwest Atlantic Fisheries Organization
NAMMCO	North Atlantic Marine Mammal Commission
NGO	Non-Governmental Organization

Abbreviation	Description
Øen, "Norwegian Sealing"	E. O. Øen, *The Norwegian Sealing and the Concept of 'Humane Hunting'*, Meeting on Seals and Sealing, Brussels, Belgium (7 September 2006)
Proposed Regulation	European Commission, *Proposal for a Regulation of the European Parliament and of the Council Concerning Trade in Seal Products*, COM/2008/0469, 2008/0160 COD (23 July 2008)
Rieber Statement	Statement by Mr. Anders Arnesen on behalf of GC Rieber Skinn AS (31 October 2012)
SCM Agreement	*Agreement on Subsidies and Countervailing Measures*
SCOS	University of St. Andrews' Sea Mammal Research Unit, Special Committee on Seals
TAC	Total allowable catch
TBT Agreement	*Agreement on Technical Barriers to Trade*
Technical Guidance Note	European Commission, *Technical Guidance Note Setting out an Indicative List of the Codes of the Combined Nomenclature that May Cover Prohibited Seal Products*
Topaz Statement	Statement by Mr. Helge Reigstad on behalf of Topaz Arctic Shoes AS (30 October 2012)
VCLT	*Vienna Convention on the Law of Treaties*
VKM	Norwegian Scientific Committee for Food Safety
WGHARP	ICES/NAFO/Joint Working Group on Harp and Hooded Seals
White Paper No. 27	Norwegian Ministry of Fisheries and Coastal Affairs, *White Paper No. 27 (2003-2004) on Norway's Policy on Marine Mammals* (19 March 2004), section 3.4.1
VKM Report	Norwegian Scientific Committee for Food Safety ("VKM"), Panel on Animal Health and Welfare, *Scientific Opinion on Animal Welfare Aspects of the Killing and Skinning in the Norwegian Seal Hunt* (8 October 2007)
WTO	World Trade Organization

Abbreviation	Description
2004 EFSA Scientific Opinion	EFSA Panel on Animal Health and Welfare, *Scientific Opinion on a request from the Commission related to welfare aspects of the main systems of stunning and killing the main commercial species of animals*, The EFSA Journal (2004) 45, pp. 1-29
2004 EFSA Scientific Report	EFSA Panel on Animal Health and Welfare, *Scientific Report on a request from the Commission related to welfare aspects of animal stunning and killing methods*, Question no. EFSA-Q-2003-093, AHAW/04-027 (15 June 2004)
2007 EFSA Scientific Opinion	[EFSA Panel on Animal Health and Welfare], *Scientific Opinion on Animal Welfare Aspects of the Killing and Skinning of Seals*, The EFSA Journal (2007) 610, pp. 1-122 (6 December 2007)
2008 COWI Report	COWI, *Assessment of the Potential Impact of a Ban of Products Derived from Seal Species* (April 2008)
2009 Management and Utilization of Seals in Greenland	Greenland Home Rule Department of Fisheries, Hunting and Agriculture, *Management and Utilization of Seals in Greenland* (revised in January 2009)
2009 NAMMCO Report	NAMMCO Expert Group, *Report on the Meeting on Best Practices in the Hunting and Killing of Seals* (24-26 February 2009)
2010 COWI Report	COWI, *Study on Implementing Measures for Trade in Seal Products*, Final Report (January 2010)
2012 Animal Welfare Assessment	European Commission, *Impact Assessment accompanying the Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the European Union Strategy for the Protection and Welfare of Animals 2012-2015*, COM (2012) 6 final, SEC(2012) 56 final (19 January 2012)
2012 Management and Participation Regulation	*Regulation Relating to Regulatory Measures and the Right to Participate in Hunting of Seals in the West Ice and East Ice in 2012*, adopted by the Norwegian Ministry of Fisheries and Coastal Affairs as Regulation of 30 January 2012 No. 108
2012 Management and Utilization of Seals in Greenland	Greenland Home Rule Department of Fisheries, Hunting and Agriculture, *Management and Utilization of Seals in Greenland* (revised in April 2012)

Abbreviation	**Description**
2012 Nunavut Report	Nunavut Department of Environment, Fisheries and Sealing Division, *Report on the Impacts of the European Union Seal Ban, (EC) No. 1007/2009, in Nunavut* (2012)

I. INTRODUCTION

A. Background to the EU Seal Regime

1. This dispute concerns Norway's ability to harvest living marine resources in a manner that ensures full respect for animal welfare and that is environmentally sustainable, and to trade with the European Union in the resulting seal products.

2. In September 2009, the European Union adopted 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 the European Parliament and of the Council on trade in seal products (the "Basic Seal Regulation").[1] In August 2010, the European Commission adopted a regulation to implement the Basic Seal Regulation, which provides further details on the requirements that must be satisfied for products to contain seal (the "Implementing Regulation").[2] Throughout this submission, we refer to these measures together as the "EU Seal Regime". Thus, the EU Seal Regime dictates when a product may contain seal.

3. As described below, the EU Seal Regime establishes three sets of requirements for seal products to be placed on the EU market.[3] Each of these three sets of requirements serves as a distinct gateway to market access for products containing seal: if a seal product meets the conditions set forth in one of these three requirements, it may be placed on the EU market; and if it does not, access to the EU market is blocked. The restrictive character of these requirements effectively bars Norwegian seal products from the EU market.

4. The first set of requirements, referred to below as the "Indigenous Communities Requirements", derives from Article 3(1) of the Basic Seal Regulation, which provides:

> The placing on the market of seal products shall be allowed only where the seal products result from hunts traditionally conducted by Inuit or other indigenous communities ...

[1] European Parliament and Council of the European Union, *Regulation (EC) No. 1007/2009 on Trade in Seal Products*, Official Journal of the European Union (2009) L 286/36 (16 September 2009) (the "Basic Seal Regulation"), Exhibit JE-1.
[2] European Commission, *Regulation (EU) No. 737/2010 Laying Down Detailed Rules for the Implementation of Regulation (EC) No. 1007/2009 of the European Parliament and of the Council on Trade in Seal Products*, Official Journal of the European Union (2010) L 216/1 (10 August 2010) (the "Implementing Regulation"), Exhibit JE-2.
[3] *See* paras. 161-166 below.

5. The Indigenous Communities Requirements include several other conditions that are described more fully below.[4]

6. The second set of requirements, which we refer to as the "Sustainable Resource Management Requirements", allows seal products to be placed on the market where they are derived from hunts "regulated by national law" and conducted for the "purpose of the sustainable management of marine resources",[5] subject to certain conditions that restrict the possibility of placing products of sustainable harvesting on the EU market. These conditions include requirements that seal products result from hunting with the "sole purpose" of sustainable resource management, and are sold in a "non-systematic"[6] way and on a "non-profit basis".[7]

7. The third set of requirements, referred to as the "Personal Use Requirements", provide that the importation of seal products for the "personal use of travellers and their families" is permitted, again provided that certain restrictive conditions are satisfied.[8]

B. The EU Seal Regime Violates the WTO Covered Agreements

8. The three sets of requirements established under the EU Seal Regime give rise to discrimination on grounds of origin, which is contrary to the cornerstone non-discrimination principles of WTO law, and they impose restrictions on international trade that are neither necessary to achieve legitimate objectives, nor consistent with other basic WTO requirements. As a result, the EU Seals Regime is contrary to the GATT 1994, the *TBT Agreement* and the *Agreement on Agriculture*.

9. The apparent objectives of the EU Seal Regime centre on protecting animal welfare. Norway entirely shares and supports this objective. Indeed, as described in detail below,[9] animal welfare is at the heart of Norwegian legislation relating to animals, in general, and of Norwegian sealing regulations and practices, specifically.

10. However, although the EU Seal Regime purports to pursue an animal welfare objective, *none* of the conditions imposed under *any of the three* sets of market access

[4] *See* paras. 161-163 below.
[5] Basic Seal Regulation, Exhibit JE-1, Article 3(2)(b).
[6] Implementing Regulation, Exhibit JE-2, Article 5(1)(c).
[7] Basic Seal Regulation, Exhibit JE-1 Article 3(2)(b) and Implementing Regulation, Exhibit JE-2, Article 2(2).
[8] Basic Seal Regulation, Exhibit JE-1, Article 3(2)(a).
[9] *See* paras. 231-257 below.

requirements addresses animal welfare. As a result, seal products may be placed on the EU market whether or not they are derived from seals killed inhumanely, for instance, through being drowned in nets, as occurs in Denmark (Greenland).[10] Conversely, seal products derived from hunting that is strictly regulated to ensure respect for animal welfare, such as in the Norwegian hunt, are barred from the EU market.

11. Moreover, seal products that may be placed on the EU market need not be labelled, meaning consumers receive no information as to whether or not the products they consume contain seal. They certainly receive no information as to whether or not seal products marketed in the European Union were derived from hunts that respected animal welfare requirements. Thus, despite the European Union's assertion in the preamble of the Basic Seal Regulation that it seeks to address concerns that consumers may unknowingly purchase seal products in the European Union, the absence of labelling requirements for seal products admitted to the EU market creates the very risks for EU consumers that the legislator sought to avoid.

12. The three sets of market access requirements pursue objectives other than animal welfare. The European Union states that the Indigenous Communities Requirements pursue the objective of protecting the "economic and social interests" of indigenous communities.[11] The measure pursues this objective by affording market access to seal products derived from seals hunted by indigenous communities, while restricting importation and sale from other sources. Under the Indigenous Communities Requirements, these market access benefits accrue to a defined category of producers located in a closed group of countries inhabited by indigenous communities, in particular producers in Denmark (Greenland). As a result, the EU Seal Regime discriminates in favour of seal products originating in Denmark (Greenland), which is contrary to the non-discrimination principles of WTO law.

13. Norway recognizes, as a State party to ILO Convention No. 169 (1989) concerning Indigenous and Tribal Peoples in Independent Countries, the aspirations of indigenous peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the

[10] As discussed in the factual section below (*see* below, paras. 71-72), Greenland is a self-governing part of the Kingdom of Denmark, which in turn is a WTO Member. Unlike mainland Denmark, however, Greenland is *not* part of the European Union, but rather a country or territory associated with the European Union. For purposes of this submission, Norway refers to Denmark (Greenland).
[11] Basic Seal Regulation, Exhibit JE-1, Preamble, recital 14.

framework of the States in which they live. In conformity with the Convention and other applicable legal instruments, Norway itself takes active steps to promote the economic and social interests of indigenous communities through measures that do not involve the imposition of international trade restrictions to the prejudice of Norway's trading partners under the *WTO Agreement*.

14. As Norway's example shows, these social and economic interests can be protected perfectly consistently with international trade obligations. Thus, where a WTO Member prepares, adopts or applies a technical regulation, Norway does not consider that such a Member is authorized to establish discriminatory trade preferences that, through a technical regulation, limit market access to products from producers located in certain WTO Members. Such discriminatory, special and differential treatment must be authorized by the WTO Membership as a whole.

15. A further objective of the EU Seal Regime, implemented through the Sustainable Resource Management Requirements, is the promotion of the sustainable management of marine resources. Norway strongly supports this objective, and indeed leads the field in the sustainable management of marine resources, both in its domestic legislation and practice.

16. Addressing the sustainable management of marine resources in the context of a resolution on the EU Common Fisheries Policy, the European Parliament recently noted that "*rapidly growing populations* of seabirds and *seals are putting further pressure on depleted fishery resources* in some regions of the EU",[12] and consequently urged "the Commission to take measures *to reduce the negative effects of seals* and certain seabirds on fish stocks, particularly where these are invasive species in a particular region".[13]

17. Although the European Union purports to pursue the objective of the sustainable management of marine resources, the conditions established to implement that objective include requirements that seal products result from hunting with the "*sole purpose*" of sustainable resource management, and are sold in a "*non-systematic*"[14] way and on a "*non-*

[12] European Parliament, *Resolution on reporting obligations under Regulation (EC) No. 2371/2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy (2011/2291(INI))*, P7_TA(2012)0335 (12 September 2012) ("EU Parliament Resolution on Reporting Obligations under Regulation (EC) no. 2371/2002"), Exhibit NOR-1, Preamble, recital E.
[13] EU Parliament Resolution on Reporting Obligations under Regulation (EC) no. 2371/2002, Exhibit NOR-1, para. 13.
[14] Implementing Regulation, Exhibit JE-2, Article 5(1)(c).

profit basis".[15] These conditions on the marketing of seal products have no rational relationship to marine resource management and even undermine the achievement of that objective.

18. Rather than promoting the sustainable management of marine resources, these unnecessary conditions seem to be tailored to ensure that seal hunting in the European Union may "carry on as before",[16] with an EU market outlet provided for the EU seal products derived from sustainable hunting. Correspondingly, the conditions serve to exclude seal products from hunts conducted in non-EU countries, such as Norway, whose hunt is conducted pursuant to rigorous and scientifically robust sustainable marine resource management plans.

19. The Personal Use Requirements establish the third and final set of requirements permitting import of seal products. These Requirements promote a consumer choice objective, enabling EU consumers to choose to purchase seal products for their own personal use. However, to take advantage of this opportunity, EU consumers must travel beyond the borders of the European Union. Norway supports the objective of allowing EU consumers to choose to purchase seal products for their personal use; however, Norway believes that it is unnecessary to compel EU consumers to travel abroad to purchase seal products.

20. In sum, the EU Seal Regime pursues a patchwork of disparate objectives, through three distinct sets of restrictive requirements that involve discrimination, undermine animal welfare, and do not achieve the other stated objectives of the EU Seal Regime. The result is a trade regime that is at once discriminatory, unnecessarily restrictive, ineffective in achieving its ends, contradictory, and incompatible with the European Union's obligations under the *WTO Agreement*. As a Member of the European Parliament noted at the time of voting on the Basic Seal Regulation, the measure is a "poor compromise" that results in the issues that the measure was intended to address being "swept under the carpet".[17]

C. Structure of This Submission

21. As Norway demonstrates in this submission, the EU Seal Regime violates a number of provisions of the covered agreements, and otherwise nullifies or impairs benefits accruing

[15] Basic Seal Regulation, Exhibit JE-1, Article 3(2)(b) and Implementing Regulation, Exhibit JE-2, Article 2(2).
[16] European Parliament, *Debates – Item A6-0118/2009*, P6_CRE(2009)05-04 (4 May 2009), ("European Parliament Debates"), Exhibit JE-12, p. 72. For discussion, *see* para. 413 below.
[17] European Parliament Debates, Exhibit JE-12, p. 64.

to Norway from successive rounds of tariff negotiations. Norway addresses its claims in the following manner.

22. First, in Section II, Norway provides an overview of the facts relevant to the EU Seal Regime. We describe the sealing industry generally, focusing on the nature of the hunt, catch levels, and relevant regulation in the various countries where sealing primarily takes place. We provide a description of the production process of, and trade in, products resulting from seal hunting. We also address the regulatory components of the EU Seal Regime itself, noting that the measure cherry picks seal products from certain sources that enjoy access to the EU market, through the requirements for importation and sale of seal products. We address specifically the animal welfare aspects of the killing of animals, including seals. We also provide a detailed overview of the Norwegian seal hunt.

23. Next, in Section III, we show that the EU Seal Regime is discriminatory, contrary to the requirements of Articles I:1 and III:4 of the GATT 1994.

24. The EU Seal Regime allows access to the EU market for products that meet the Indigenous Communities Requirements. Norway shows that, through their design, structure and expected operation, these requirements operate to the predominant benefit of Denmark (Greenland). By advantaging products of Denmark (Greenland) over like products originating in other WTO Members, including Norway, the European Union violates Article I:1 of the GATT 1994.

25. The EU Seal regime also allows access to the EU market for products that meet the Sustainable Resource Management Requirements. Norway shows that, through their design, structure and expected operation, these requirements allow virtually all seal products derived from hunting in the European Union to be placed on the EU market, whereas the overwhelming majority of seal products from Norway are excluded. By according less favourable treatment to imported product from Norway than is accorded to like products from the European Union, the EU Seal Regime fails to comply with the requirements of Article III:4 of the GATT 1994.

26. In Section IV, Norway demonstrates that the EU Seal Regime is inconsistent with Article XI:1 of the GATT 1994 because of its limiting effect on importation of seal products. In addition, because the *Agreement on Agriculture* applies to those seal products falling

within the scope of Annex 1 to that Agreement, the EU Seal Regime also violates Article 4.2 of the *Agreement on Agriculture* since it introduces a quantitative import restriction on agricultural products, contrary to that provision.

27. In Section V, Norway shows that the EU Seal Regime is a technical regulation within the meaning of Annex 1.1 of the *TBT Agreement*. This is because: (i) the EU Seal Regime applies to identifiable products; (ii) the EU Seal Regime lays down product characteristics and applicable administrative provisions; and (iii) compliance with the requirements of the EU Seal Regime is mandatory. As a technical regulation, the EU Seal Regime is subject to the disciplines on technical regulations prescribed by Articles 2.2 and 5 of the *TBT Agreement*.

28. In Section VI, Norway shows that the EU Seal Regime violates Article 2.2 of the *TBT Agreement*. The EU Seal Regime pursues a patchwork of objectives in a manner that is trade restrictive, replete with rational disconnects between the measure and its stated objectives, and introduces arbitrary or unjustifiable discrimination between countries where the same conditions prevail and disguised restrictions on international trade. Further, not all of the objectives pursued by the EU Seal Regime justify trade restrictions under Article 2.2. Moreover, the measure is more trade restrictive than necessary to fulfil the legitimate objectives it pursues, since the measure either does not contribute to these objectives or does not contribute more than would less trade restrictive alternatives.

29. In Section VII, Norway addresses the failure by the European Union to respect the requirements of Article 5 of the *TBT Agreement*. The European Union has prepared, adopted and applied conformity assessment procedures in a way that unnecessarily obstructs international trade, contrary to Article 5.1.2 of the *TBT Agreement*. This is because the European Union has conditioned placing on the market of seal products upon certification of conformity with the marketing requirements of the EU Seal Regime, but has failed to designate any body as competent to certify conformity. Through this failure, the European Union also violates the requirement, under Article 5.2.1, to undertake and complete conformity assessment procedures "as expeditiously as possible".

30. In Section VIII, Norway shows that, irrespective of whether the EU Seal Regime violates relevant WTO provisions, the EU Seal Regime nullifies or impairs benefits accruing

to Norway, in the sense of Article XXIII:1(b) of the GATT 1994, with respect to seal products not permitted onto the EU market.

31. Finally, in Section IX, Norway concludes with requests to the Panel for certain findings and recommendations.

II. FACTUAL BACKGROUND

32. In this section of the submission, we provide an overview of the facts relevant to the EU Seal Regime. In section II.A, we describe the sealing industry generally, focusing on the nature of the hunt, catch levels, and relevant regulations where sealing primarily takes place, namely: Norway, Canada, Denmark (Greenland), Iceland, Namibia, Russia, the United States (Alaska) and the European Union (Finland, Sweden, and the United Kingdom). As we will describe, the hunts in these territories are conducted for a variety of often combined purposes – whether commercial, subsistence or sustainable resource management – and they are subject to different degrees of regulation.

33. Norway bases its discussion on reports commissioned by the European Union in connection with the European Union's assessment of the animal welfare aspects of the killing and skinning of seals, as well as certain related documents, notably:

- **The 2007 EFSA Scientific Opinion:** In response to a request from the European Union, the European Food Safety Authority[18] ("EFSA") adopted, on 6 December 2007, a scientific opinion of the Panel on Animal Health and Welfare on the Animal Welfare aspects of the killing and skinning of seals (the "2007 EFSA Scientific Opinion").[19] The 2007 EFSA Scientific Opinion addresses the animal welfare aspects of the methods currently used for the killing and skinning of seals, and provides its scientific assessment of the most appropriate killing methods for seals to reduce unnecessary pain, distress and suffering.[20]

[18] The European Food Safety Authority ("EFSA") is an independent agency of the European Union funded by the EU budget, and "applies a robust set of internal mechanisms and working processes to safeguard the independence of the scientific work of its Scientific Committee and Panels". EFSA web site, *Who we are*, available at http://www.efsa.europa.eu/en/aboutefsa/efsawho.htm (last checked 14 October 2012), Exhibit NOR-2. The Scientific Panel for Animal Health and Welfare ("AHAW") of EFSA was charged with reviewing the animal welfare aspects of the seal hunt. This Panel "provides independent scientific advice on all aspects of animal diseases and animal welfare". EFSA web site, *About the AHAW Panel and the Animal Health and Welfare Unit*, available at http://www.efsa.europa.eu/en/ahaw/aboutahaw.htm (last checked 14 October 2012), Exhibit NOR-3.

[19] EFSA Panel on Animal Health and Welfare, *Scientific Opinion on Animal Welfare Aspects of the Killing and Skinning of Seals*, The EFSA Journal (2007) 610, pp. 1-122 (6 December 2007), ("2007 EFSA Scientific Opinion"), Exhibit JE-22.

[20] 2007 EFSA Scientific Opinion, Exhibit JE-22, Summary, p. 3.

- **The VKM Report:** In connection with the preparation of the 2007 EFSA Scientific Opinion, EFSA requested data on the animal welfare aspects of the methods currently being used for the killing of seals from different countries. In response to this request, on 8 October 2007, the Norwegian Scientific Committee for Food Safety ("VKM") provided a Scientific Opinion of the Panel of Animal Health and Welfare on the Animal Welfare Aspects of the Killing and Skinning of Seals in the Norwegian Seal Hunt (the "VKM Report").[21] The VKM panel established an *ad hoc* group of national experts to prepare the scientific documents necessary to respond to EFSA's request.

- **The 2008 COWI Report:** As a component of the European Union's analysis of the animal welfare aspects of seal hunting, the European Union requested the COWI Consultancy within Engineering, Environmental Science and Economics ("COWI") to evaluate the regulatory framework and seal hunt management practices in the territories where seals are present and hunted. In April 2008, COWI issued its Assessment of the Potential Impact of a Ban of Products Derived from Seal Products (the "2008 COWI Report"),[22] which includes an evaluation of EU member states and overseas territories.

- **The 2010 COWI Report:** Following the adoption of the Basic Seal Regulation, the European Union commissioned COWI to undertake a study on the measures to be adopted by the European Commission to implement the Basic Seal Regulation. COWI issued its Final Report on the Study on Implementing Measures for Trade in Seal Products in January 2010 (the "2010 COWI Report").[23]

34. In section II.B, Norway provides an overview of the production process of, and trade in, seal products, namely meat, skin, blubber and downstream products. In this section, Norway also briefly reviews the analysis that COWI provided to the European Union in 2008, explaining that a measure such as the EU Seal Regime would have a minor impact on EU Member States, and a much more significant impact on the trade of countries outside the European Union.

35. In section II.C, we address the regulatory components of the EU Seal Regime itself. The measure cherry picks certain seal products for sale on the EU market, by laying down requirements for the importation of seal products that bear no relationship to animal welfare. At the same time, the measure prohibits the importation of all other seal products irrespective of whether the seals were hunted in a humane manner.

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[21] VKM Panel on Animal Health and Welfare, *Scientific Opinion on Animal Welfare Aspects of the Killing and Skinning in the Norwegian Seal Hunt* (8 October 2007), ("VKM Report"), Exhibit JE-31.
[22] COWI, *Assessment of the Potential Impact of a Ban of Products Derived from Seal Species* (April 2008), ("2008 COWI Report"), Exhibit JE-20.
[23] COWI, *Study on Implementing Measures for Trade in Seal Products*, Final Report (January 2010), ("2010 COWI Report"), Exhibit JE-21.

36. In section II.D, based on veterinary science, we provide a summary of the animal welfare aspects of the killing of animals. The process for ensuring humane killing requires that an animal be first rendered rapidly unconscious (to avoid pain and suffering), and then killed by bleeding out. This killing method that involves stunning (inducing unconsciousness) prior to bleeding out is required in slaughterhouses in the European Union and Norway, and in the Norwegian seal hunt. In this section, we also describe the different killing methods used in seal hunting around the world – firearms, hand held harpoons, hakapiks, clubs, nets and traps – and assess each from an animal welfare perspective. For comparative purposes, we discuss the stunning and killing methods used in EU slaughterhouses and in wild game hunting.

37. In section II.A.1, we provide a detailed overview of the Norwegian seal hunt. The Norwegian seal hunt mandates stunning prior to bleeding out, qualifications and training of the hunting participants, and the presence of an independent seal hunt inspector throughout the hunt. We discuss the ways in which each of these elements ensures compliance with animal welfare requirements.

* * * * *

38. Norway submits five statements from expert witnesses, in the fields of veterinary science, seal hunt inspection and the Norwegian seal hunt:

- **Jan Danielsson:**[24] Mr. Danielsson has served as an official inspector of the Norwegian seal hunt for the Norwegian Directorate of Fisheries for the past nine years. In 2011 and 2012, he served as lecturer of the mandatory training course for seal hunters and inspectors that took place in Tromsø prior to the start of the hunting seasons. He received a Veterinary License Certificate at the Royal Veterinary College, in Stockholm, Sweden, and currently serves as a Veterinary Inspector for the Swedish Board of Agriculture in the department of animal welfare and health. Mr. Danielsson has served as an official veterinary inspector in slaughterhouses in Sweden.

  In his expert report, Mr. Danielsson describes how the Norwegian hunt follows the process of stunning prior to bleeding out and, thereby, ensures that seals are killed in compliance with animal welfare requirements. Drawing on his vast experience as a seal hunt inspector and veterinarian, he describes the mandatory qualifications and training required to become an inspector, the role of the inspector and his or her observation of the hunt, and the inspector's requirement to report to the Directorate of Fisheries.

[24] Expert Statement of Mr. Jan Vikars Danielsson (7 November 2012) ("Danielsson Statement"), Exhibit NOR-4.

- **Siri Kristine Knudsen:**[25] Professor Knudsen is an Associate Professor and Head of Comparative Medicine at the Faculty of Health Sciences at the University of Tromsø, in Norway. She has a PhD in Arctic Veterinary Science from the Norwegian School of Veterinary Science in Oslo, and has researched and written extensively on the question of death and dying in animals from a veterinary perspective. Professor Knudsen has participated in numerous workshops on hunting methods for seals and also served as an observer of the Greenlandic seal hunts for the North Atlantic Marine Mammal Commission ("NAMMCO").

  In her expert report, Professor Knudsen discusses the principle of "humane killing of animals" and the process of stunning followed by bleeding out, which ensures that an animal is killed humanely. She describes the stunning and killing methods used in the Norwegian seal hunt, concluding that the Norwegian hunt shows it is feasible to implement a hunting and inspection system that ensures compliance with animal welfare requirements.

- **Anne Moustgaard:**[26] With a degree in veterinary medicine from the Royal Veterinary and Agricultural College, in Copenhagen, Denmark, Ms. Moustgaard has been an inspector on the Norwegian seal hunt for fifteen seasons. She also has considerable experience as a meat inspector in slaughterhouses in Denmark as well as for the Norwegian Food Safety Authority.

  In her expert report, Ms. Moustgaard describes her experience from the hunt, and outlines the steps taken throughout the hunt to ensure compliance with animal welfare.

- **Bjørne Kvernmo:**[27] With over forty years of experience in the maritime industry, including over eight years as captain of his fishing vessel, Mr. Kvernmo has participated in the Norwegian seal hunt each year since 1973.

  In his expert report, Mr. Kvernmo provides an overview of the training and qualifications required to participate in the Norwegian seal hunt before turning to a discussion of the Norwegian seal hunt itself.

- **Vidar Jarle Landmark**:[28] the Director General of the Department of Fisheries and Aquaculture provides the regulator's perspective. A lawyer by training, Mr. Landmark has been Director General of the Department of Marine Resources and Coastal Management in the Norwegian Ministry of Fisheries and Coastal Affairs since January 2011, and before that has held other positions in the same Ministry. He has also worked in the Ministry of Justice and for the Parliamentary Ombudsman.

  Mr. Landmark provides an overview of the policy considerations underlying the Norwegian regulation of the seal hunt, and the rules adopted on the basis of such policy considerations.

[25] Expert Statement of Professor Siri Kristine Knudsen (6 November 2012) ("Knudsen Statement"), Exhibit NOR-5.
[26] Expert Statement of Ms. Anne Moustgaard (25 May 2012) ("Moustgaard Statement"), Exhibit NOR-6.
[27] Expert Statement of Mr. Bjørne Kvernmo (2 April 2012) ("Kvernmo Statement"), Exhibit NOR-7.
[28] Expert Statement of Mr. Vidar Jarle Landmark (7 November 2012) ("Landmark Statement"), Exhibit NOR-8.

A. Description of Seal Hunting around the World

39. Throughout history, the hunting of different species of seal has taken place in various parts of the world for a variety of purposes, including: (i) commercial purposes, namely the sale of seal products such as meat, blubber, and skins; (ii) subsistence and cultural purposes; and (iii) the sustainable management of living marine resources.[29] A particular hunt may, of course, be conducted for one or more of these purposes.

40. There are just over 30 species of seals (*Pinnipedia*) worldwide, divided into three families - ear seals (*Otaridae*), walruses (*Obenidae*) and true or earless seals (*Phocidae*). Seven of the species are distributed in Norwegian and adjacent waters in the North Atlantic and Arctic. Other species are found in the Pacific Ocean, South Atlantic and in Antarctic waters. The true or earless seals include harp seals, bearded seals, hooded seals, ringed seals, grey seals and harbour seals, which are all distributed in the North Atlantic and Arctic waters.

41. Currently, seal hunting takes place, to varying extents, in Canada, the European Union (Finland, Sweden and the United Kingdom), Greenland, Iceland, Namibia, Norway, Russia and the United States. The following section provides an overview of the nature of the hunting, catch levels, and relevant regulations in the countries and territories where sealing takes place. We begin with Norway.

1. Sealing in Norway

a. History of the Norwegian seal hunt

42. Norway has a long tradition of hunting marine mammals. The first written source documenting the Norwegian hunt of marine mammals is from 890 AD,[30] but research has shown that seals were an important part of the diet of early cave dwellers.

43. The British and Dutch originally dominated the commercial sealing industry in the North Atlantic from around 1700 and the Norwegian involvement did not commence until the

[29] *See* 2007 EFSA Scientific Opinion, Exhibit JE-22, section 1, p. 12.
[30] *See* Norwegian Ministry of Fisheries and Coastal Affairs, *White Paper No. 27 (2003-2004) on Norway's Policy on Marine Mammals* (19 March 2004), section 3.4.1, p. 35, Exhibit NOR-11.

late 18th century.[31] From the first half of the 19th century Norwegian commercial sealing became an important industry providing substantial profit and considerable employment.

44. The hunt focused primarily on harp and hooded seals, and the hunting grounds were the three whelping areas known as the "West Ice" around the island of Jan Mayen, the White Sea, and Newfoundland. After World War II the Soviet Union banned Norwegian sealers from the White Sea, but Norwegian sealing continued in the "East Ice", *i.e.* in the Barents Sea north of the mouth of the White Sea. The considerable Norwegian seal hunt in Newfoundland came to an end in 1982.

45. The seal hunt peaked between 1921-25, when more than 200,000 animals were caught annually, and in 1959, when 67 vessels landed almost 300,000 seals. On average around 40-50 vessels participated in the yearly hunt in the West Ice from after World War II until the 1960s.[32] The seal populations in the East Ice and West Ice could not withstand the large-scale seal hunt that had been established between the two world wars and catches have therefore been regulated by quotas since the 1970s, leading to the re-growth of all three populations of harp seal.[33] The harp seal population in the West Ice is now the largest on record.[34] Due to the uncertainty regarding the size of the population of hooded seals in the West Ice, a ban on the hunt of hooded seals has been in place since 2007.

46. Fur skin and blubber have traditionally been the commercially most important products. The blubber was boiled to obtain oil for industrial use, both for soap and margarine. The meat has been regarded as a local delicacy. In the 1990s, development of Omega 3 fatty acids from seal oil for human consumption began.

b. Overview of the Norwegian seal hunt today

47. In sections II.E and II.F below, Norway provides a more detailed description of the Norwegian regulation of the seal hunt. As described in those sections, the core considerations underlying such regulation are: animal welfare; the sustainable management of marine resources; and the viability of the coastal districts. In this section, Norway provides a

[31] O. Vollan, *The Seal Hunt in the Nordic Countries* (Forlaget Nordvest, 1985), p. 35, Exhibit NOR-10.
[32] *See* Norwegian Ministry of Fisheries and Coastal Affairs, *White Paper No. 27 (2003-2004) on Norway's Policy on Marine Mammals* (19 March 2004), section 3.4.1.2, p. 36, Exhibit NOR-11.
[33] *See* ICES/NAFO Joint Working Group on Harp and Hooded Seals, *Report on the Meeting Held in St. Andrews, Scotland, UK* (15-19 August 2011) ("2011 WGHARP Report"), Exhibit NOR-12, p. 7.
[34] *See* 2011 WGHARP Report, Exhibit NOR-12, p. 3.

summary overview of the Norwegian seal hunt today, referring to sections II.E and II.F for a fuller description of its regulation.

48. Today, the Norwegian seal hunt is conducted for commercial, cultural and sustainable resource management purposes,[35] and is primarily focused on harp seals.[36]

49. The Norwegian seal hunt takes place each year between 10 April and 30 June when harp seals gather in their traditional whelping areas. The hunt mainly takes place in the drift ice areas north of the island of Jan Mayen, east of Greenland known as the "West Ice",[37] as shown on the map in Exhibit NOR-14. Hunting also takes place, to a lesser extent, in the areas east of 20ºE in the Russian Economic Zone known as the "East Ice".

50. The Ministry of Fisheries and Coastal Affairs is responsible for regulating the Norwegian seal hunt. It is assisted by the Directorate of Fisheries, which administers the national regulations.[38] As discussed further in sections II.E and II.F below, the Norwegian seal hunting regulations provide detailed rules regarding *inter alia*: hunting seasons; quotas; the conditions for participating in the hunt; mandatory training and testing requirements for the hunt participants; the authorized hunting methods, weapons and ammunition; other requirements for ensuring animal welfare; and sanctions for non-compliance.[39] In addition, the Norwegian authorities require that trained sealing inspectors be present throughout the hunt.[40] These inspectors report directly to the Directorate of Fisheries and are tasked with

[35] *See* 2008 COWI Report, Exhibit JE-20, section 3.5.1, p. 61.
[36] *See, e.g.*, 2007 EFSA Scientific Opinion, Exhibit JE-22, section 1.3.2, p. 26.
[37] *Regulation Relating to Regulatory Measures and the Right to Participate in Hunting of Seals in the West Ice and East Ice in 2012*, adopted by the Norwegian Ministry of Fisheries and Coastal Affairs as Regulation of 30 January 2012 No. 108 ("2012 Management and Participation Regulation"), Exhibit NOR-13, section 1. The provisions concerning regulatory measures and the right to participate in seal hunt in the West Ice and the East Ice are contained in an annual regulation issued ahead of each hunting season. These provisions were between 2007 and 2010 set in two different regulations. There have been a limited number of substantial amendments during the last ten years. For this reason, we have chosen to refer to the regulation of 2012 with respect to the provisions on management of and access to participate in the seal hunt. The 2012 Management and Participation Regulation, section 1, defines the West Ice as "the drift ice areas in the fisheries zone around Jan Mayen and in the sea areas around Jan Mayen outside the Economic Zone of Greenland and southwest of Svalbard, and in adjacent areas in the Economic Zones of Greenland and Iceland".
[38] *See* VKM Report, Exhibit JE-31, section 9, p. 44. *See also, for example*, the 2012 Management and Participation Regulation, Exhibit NOR-13, and the *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 (the "Conduct Regulation"), Exhibit NOR-15.
[39] *See generally*, the 2012 Management and Participation Regulation, Exhibit NOR-13, and the Conduct Regulation, Exhibit NOR-15. *See also* 2008 COWI Report, Exhibit JE-20, section 3.5.4, pp. 67-68.
[40] According to the 2012 Management and Participation Regulation, Exhibit NOR-13, section 10, the Directorate of Fisheries is designated with the authority to require the presence of sealing inspectors. The

ensuring compliance with the regulations throughout the hunt.[41] The Norwegian regulations also allow for observers.[42] The consultancy COWI, mandated by the European Union to evaluate, among others, seal hunting regulation and practices in different countries,[43] found that Norway has among "the most extensive legislation" on sealing.[44]

51. The Norwegian seal hunt is conducted by vessels licensed by the Directorate of Fisheries.[45] The conditions for obtaining a license, without which a vessel cannot participate in the hunt, include "that the vessel is suited and equipped for seal hunting and that the vessel's master has attended the Directorate of Fisheries course for seal hunters".[46] In recent years, usually two to four ships have participated in the annual hunt in the West Ice, each with a crew of 13 to 15 people.[47]

52. On an annual basis, the Ministry of Fisheries and Coastal Affairs sets the quota for harp seals that may be caught each year (Total Allowable Catch, or "TAC"), based on joint scientific advice from the International Council on the Exploration of the Sea (ICES) and the Northwest Atlantic Fisheries Organization (NAFO) in the West Ice, and the Joint Norwegian-Russian Fisheries Commission in the East Ice. The TAC is set at a level recommended for ecosystem-management purposes, sustaining seal populations.[48] In 2012, the TAC for the West Ice was 25,000,[49] and 5,593 seals were caught.[50] For the East Ice, the TAC was 7,000 but Norwegian vessels did not participate in the hunt in the East Ice in 2012.

Directorate has on an annual basis since at least 1989 required that an inspector be on board each vessel participating in the seal hunt: 2008 COWI Report, Exhibit JE-20, section 3.5.4, p. 67; Danielsson Statement, Exhibit NOR-4, paras. 4 and 17; Moustgaard Statement, Exhibit NOR-6, para. 3.

[41] 2008 COWI Report, Exhibit JE-20, section 3.5.4, p. 68; Danielsson Statement, Exhibit NOR-4, para. 17; Moustgaard Statement, Exhibit NOR-6, paras. 25-30.

[42] The 2012 Management and Participation Regulation, Exhibit NOR-13, section 10; 2008 COWI Report, Exhibit JE-20, section 3.5.4, p. 68.

[43] *See* para. 33 above.

[44] 2008 COWI Report, Exhibit JE-20, section 3.5.3, p. 63.

[45] According to the 2012 Management and Participation Regulation, Exhibit NOR-13, section 3, only registered vessels that are considered to be "suitable and equipped for seal hunting" may participate in the Norwegian seal hunt.

[46] The 2012 Management and Participation Regulation, Exhibit NOR-13, section 3.

[47] *See* 2007 EFSA Scientific Opinion, Exhibit JE-22, section 1.3.2.1, p. 27; 2008 COWI Report, Exhibit JE-20, section 3.5.1, p. 62. In 2012, two ships participated in the hunt.

[48] *See* VKM Report, Exhibit JE-31, section 2, pp. 10 and 14-15. 2010 COWI Report, Exhibit JE-21, annex 4, table 7-1, p. 4, showing the quotas recommended by ICES, the Norwegian quotas and the yearly catch from 2004 to 2009.

[49] The 2012 Management and Participation Regulation, Exhibit NOR-13, section 4.

[50] Joint Norwegian/Russian Fisheries Commission, *Report of the Working Group on Seals to the 42th Session – Appendix 8*, available at http://www.regjeringen.no/upload/FKD/Vedlegg/Kvoteavtaler/2013/Russland/Vedlegg_8.pdf (last checked 6

53. Sustainable, ecosystem-based marine resource management strategies take into account all major interactions in the marine ecosystem. Harp seals are top predators in the marine food chain, their main prey being crustaceans, capelin, cod, and herring.[51] For example, the current Barents Sea seal population of an estimated 2.2 million individuals consumes approximately 3.35 million tonnes of prey each year.[52]

54. In accordance with sustainable, ecosystem-based management principles, the TAC is normally set to a level necessary in order to achieve population stability over a ten year period. The harp seal population in the Greenland Sea was estimated to 649,566 individuals in 2011, making it the largest population on record.[53] Due to the large population, the TAC has in recent years been set to a level conducive to a reduction in the overall population.

55. The coastal seal hunt, which involves mainly grey seals and harbour seals living in colonies along the entire Norwegian coast, is conducted on a small scale. Yearly quotas are set for population management purposes. The indigenous Sami communities living in northern Norway have a long-standing tradition of seal hunting and are among those who currently participate in the hunt of a small number of coastal seals.[54]

2. Sealing in Canada

56. Norway understands that Canada addresses the regulations and practices surrounding the Canadian seal hunt in its first written submission, submitted on 9 November 2012 in this joint dispute before the World Trade Organization. Norway refers to section III.A.4 of Canada's first written submission, "Overview of the Federal Regulatory Framework that Governs Sealing in Canada", for a discussion of this topic.

November 2012) ("2012 Report of the Norwegian/Russian Working Group on Seals"), Exhibit NOR-16, p. 2. In addition, 21 seals were caught for scientific purposes. *Ibid*.

[51] K.T. Nilssen et al., "Food consumption estimates of Barents Sea harp seals", *NAMMCO Scientific Publications*, Vol. 2 (2000), Exhibit NOR-17, p. 9.

[52] *See* K.T. Nilssen et al., "Food consumption estimates of Barents Sea harp seals", *NAMMCO Scientific Publications*, Vol. 2 (2000), Exhibit NOR-17, p. 9.

[53] NAFO Scientific Council Meeting, *Report on the Joint ICES/NAFO Working Group on Harp and Hooded Seals Meeting Held in St. Andrews, Scotland, 2011*, NAFO SCS Doc. 12/17 (June 2012) ("2012 NAFO Scientific Council Meeting"), Exhibit NOR-19, p. 2.

[54] *See* 2008 COWI Report, Exhibit JE-20, section 3.5.1, p. 61; 2010 COWI Report, Exhibit JE-21, section 3.1, p. 31.

57. According to the Canadian Department for Fisheries and Oceans, 11,364 licenses were issued to commercial sealers and 2,500 licenses were issued for personal use in 2011;[55] and the sealing season ranges from 15 November to 14 June (but in practice is much shorter, beginning on March 15 and ending some time in mid-April to mid-May[56]) in three main areas – the southern Gulf of St. Lawrence, the northern Gulf of St. Lawrence, and the Front[57] – with quotas divided between those regions.[58] Each year, the Canadian Minister of Fisheries and Oceans sets a TAC.[59] For example, the TAC for Canada's harp seal hunt was and 400,000 in 2011.[60]

58. In addition, Canada allows "individuals living in traditional sealing areas" to hunt up to six seals annually for their personal consumption.[61] Residents of Labrador north of 53°N latitude do not need a license to hunt seals for subsistence purposes.[62] Canada also permits hunting by Inuit for subsistence and commercial purposes.[63] In Nunavut, the largest Inuit territory where approximately 50 per cent of all Canadian Inuit live, it is estimated that approximately 30,000 ringed seals are hunted annually.[64] In addition to ringed seals, the Inuit

[55] Out of the total number of commercial licenses issued, only 225 were actually used. Canadian Department of Fisheries and Oceans, *Canadian Commercial Seal Harvest Overview 2011*, statistical and economic analysis series (October 2012), ("DFO, Canadian Commercial Seal Harvest Overview 2011"), Exhibit JE-27, p. 2.
[56] Canadian Department of Fisheries and Oceans, *Sealing in Canada – Frequently Asked Questions*, available at http://www.dfo-mpo.gc.ca/fm-gp/seal-phoque/faq2012-eng.htm#h (last checked 30 October 2012), ("DFO FAQs"), Exhibit JE-28, p. 4.
[57] "The Front" refers to an area off the coast of northeast Newfoundland or southern Labrador, whose exact location "changes year on year". 2007 EFSA Scientific Opinion, Exhibit JE-22, section 1.3.1.1, p. 25.
[58] 2007 EFSA Scientific Opinion, Exhibit JE-22, section 1.3.1.1, p. 25. 2008 COWI Report, Exhibit JE-20, section 3.1.4, p. 31, referring to *Improving Humane Practice in the Canadian Harp Seal Hunt: A Report of the Independent Veterinarians' Working Group on the Canadian Harp Seal Hunt*, 2005: The majority of the hunt takes place on the Front and between late-March and early-April, although the season is much longer.
[59] *See* 2008 COWI Report, Exhibit JE-20, section 3.1 (noting that TACs have been set on an annual basis since 2006), p. 23.
[60] *See* DFO FAQs, Exhibit JE-28, p. 6.
[61] 2007 EFSA Scientific Opinion, Exhibit JE-22, section 1.3.1.1, p. 25.
[62] Canadian Department of Fisheries and Oceans, *2011-2015 Integrated Fisheries Management Plan for Atlantic Seals*, available at http://www.dfo-mpo.gc.ca/fm-gp/seal-phoque/reports-rapports/mgtplan-planges20112015/mgtplan-planges20112015-eng.htm (last checked 4 November 2012), ("DFO 2011-2015 Integrated Management Plan"), Exhibit JE-29.
[63] Four territories fall under land claims agreements with Canada, and there are approximately 45,000 to 50,000 Inuit in Canada. *See* 2008 COWI Report, Exhibit JE-20, section 3.1.1, p. 25; and 2010 COWI Report, Exhibit JE-21, section 3.1, p. 26.
[64] Nunavut Department of Environment, Fisheries and Sealing Division, *Report on the Impacts of the European Union Seal Ban, (EC) No. 1007/2009, in Nunavut* (2012), available at http://env.gov.nu.ca/sites/default/files/impactssealban_web.pdf (last checked 30 October 2012), ("2012 Nunavut Report"), Exhibit JE-30, p. 1. *See* also 2010 COWI Report, Exhibit JE-21, section 3.1, p. 27, indicating that at the time of compiling the COWI report, approximately 35,000 seals were harvested annually in Nunavut; and 2008 COWI Report, Exhibit JE-20, section 3.1.1, p. 25, noting that "around 30,000 seals were killed by Nunavut communities in 2004".

in Canada hunt harp, bearded, and harbour seals.[65] Canadian sealing is conducted under the authority of the Department of Fisheries and Oceans ("DFO"), and the regulations in place establish the conditions under which the seal hunt can take place, including license and vessel requirements, annual TAC, animal welfare considerations, and permissible hunting methods.[66] Failure to comply with these regulations results in sanctions.[67]

59. The DFO monitors the conduct of the Canadian seal hunt, through the appointment of fishery officers who are employees of the DFO, report back to the DFO and are responsible for "monitoring catches, ensuring humane hunting practices, and enforcing regulation and license conditions".[68]

3. Sealing in the European Union

60. Seal hunting in the European Union takes place in three EU member states, predominantly for resource management purposes.[69]

a. Sealing in Finland

61. In Finland, the hunt is rooted in culture and tradition, as well as the need to "reduc[e] the negative implication of seals on fisheries".[70] A variety of commercial products is derived from seals hunted in Finland: "meat at restaurants, fur details in souvenirs, leather, whole pelts, blubber-made oil for eco-painting of buildings in the coastal area, and bones for jewellery".[71]

62. Today, the primary seal species hunted in Finland (and Sweden) is the grey seal, although ringed seals and harbour seals are also located in the Baltic Sea.[72] Between 2000 and 2006, the quotas for grey seals were between 100 and 675 in mainland Finland, and

[65] 2008 COWI Report, Exhibit JE-20, section 3.1.1, p. 25.
[66] 2008 COWI Report, Exhibit JE-20, section 3.1.2, pp. 26-29, citing to the Canadian Marine Mammal Regulations, SOR/93-56, 4 February 1993, sections 5, 26 (licenses), 7-10 (animal welfare) and 28-29 (killing methods). *See also id*., section 3.1, p. 22: Inuit seal hunting is "not regulated to the same extent" as the commercial or personal use hunts.
[67] 2008 COWI Report, Exhibit JE-20, section 3.1.3, p. 31. *See also* DFO FAQs, Exhibit JE-28.
[68] 2008 COWI Report, Exhibit JE-20, section 3.1.3, p. 29, citing to the Fisheries Act, sections 5(1)-(2).
[69] *See* 2008 COWI Report, Exhibit JE-20, sections 3.2.1 and 3.7.1, pp. 35 and 78-79 (Finland and Sweden, respectively); and 2007 EFSA Scientific Opinion, Exhibit JE-22, sections 1.3.8.1-1.3.8.2, pp. 33-34 (Scotland).
[70] 2008 COWI Report, Exhibit JE-20, section 3.2.1, p. 35; 2010 COWI Report, Exhibit JE-21, section 3.1, p. 27.
[71] 2008 COWI Report, Exhibit JE-20, section 3.2.2, p. 36.
[72] 2007 EFSA Scientific Opinion, Exhibit JE-22, section 1.3.6.1, p. 31. In Finland, only the grey seal is hunted. In Sweden, some hunting of harbour seals is permitted to protect fisheries from damage: *see* 2008 COWI Report, Exhibit JE-20, section and 3.7.1, p. 79.

between 84 and 390 in the Åland islands.[73] The quota "for the hunting year 2009/2010" was 1050 grey seals in mainland Finland, and "[a]n additional 450 individuals were added to the quota around the Åland Islands in 2009.[74]

63. In Finland, the Ministry of Agriculture and Forestry is responsible for management and conservation of the seal population. The hunt in mainland Finland takes place under various legal instruments that set forth: the conditions for the hunt (including the season during which hunting may take place and who is eligible to participate); hunting license requirements; animal welfare principles; and, rules on the hunting methods and weapons that may be used.[75] Training of seal hunters is voluntary, and shooting tests are not required of seal hunters.[76] The use of traps is allowed for the capture of live animals.[77]

64. In addition to the Ministry of Agriculture and Forestry, a number of organisations, including the "Hunters' Central Organisation", and authorities including in particular the coast guard, participate in the supervision of the hunt and enforcement of the Finnish regulations and legislation.[78]

65. According to COWI, "Åland has a separate legislation, and [the hunt there] is the responsibility of the Government of Åland".[79]

b. Sealing in Sweden

66. In Sweden, the hunt is to a large extent conducted for sustainable resource management purposes, and seal hunters – approximately half of whom are commercial

[73] 2008 COWI Report, Exhibit JE-20, section, 3.2.1, table 3.2.2, p. 36, on the Finnish grey seal hunt quota and catch for 1998-2006 (quotas for mainland Finland). A limited seal hunt also takes place in the Åland islands. *See* 2008 COWI Report, Exhibit JE-20, section 3.2.1, p. 35, and table 3.2.2, p. 36.
[74] M. Kunnasranta & P. Suuronen, "Dealing with Success: Seals vs. Fisheries in the Baltic", *ICES Insight*, Issues 46 (September 2009) ("ICES Insight 46"), Exhibit NOR-18, pp. 9.
[75] 2008 COWI Report, Exhibit JE-20, section 3.2.3, p. 38, citing to the Hunting Act 615/1993, the Hunting Decree 666/1993, the Act of Game Management Fee and Hunting License Fee 616/1993, the Guidelines for Hunting issued on an annual basis by the Ministry of Agriculture and Forestry, the Law on Animal Protection 247/1996, and the Penalty Code 39/1889.
[76] 2008 COWI Report, Exhibit JE-20, section 3.2.3, p. 39-40, and table 3.2.5, p. 43, entitled "Assessment Summary Sheet, Finland".
[77] 2008 COWI Report, Exhibit JE-20, section 3.2.5, table 3.2.5, p. 43, entitled "Assessment Summary Sheet, Finland".
[78] 2008 COWI Report, Exhibit JE-20, section 3.2.4, p. 41.
[79] 2008 COWI Report, Exhibit JE-20, section 3.2.3, p. 36.

fishermen – use the skin and meat for commercial purposes or for their own personal use.[80] Between 2001 and 2007, the Swedish quota for grey seals was between 150 and 200.[81]

67. The Ministry of the Environment and the Ministry of Agriculture share responsibility for wildlife management, and the Swedish Environmental Protection Agency has overall authority for monitoring hunting, with the regional County Administrative Boards reporting to it.[82] The Swedish Environmental Protection Agency has the authority to issue decisions allowing the controlled hunting of seals to prevent, among other things, damage to fisheries.[83] The Swedish legislation mandates the use of firearms; requires exams to obtain a firearms license; outlines animal welfare principles; and, allows permits to be issued for hunting in public waters.[84] Seal hunters may receive training on a voluntary basis.[85]

68. According to the 2010 COWI Report, "Saami [indigenous] communities also live and hunt seals in Sweden".[86]

c. Sealing in the United Kingdom

69. In the United Kingdom, the killing of seals is part of a resource management plan to protect fisheries or fish farms.[87] The majority of seals (harbour and grey) are located around the Scottish coast, and the Scottish government is responsible for seal management.[88] An estimated 3,500 seals are killed annually.[89]

70. Until recently, the Conservation of Seals Act of 1970 provided the legislative framework for regulating the killing of seals, and allowed for Conservation Orders delineating the seasons for hunting, licensing and training requirements, and the type of

[80] 2008 COWI Report, Exhibit JE-20, section 3.7.2, p. 80.
[81] *See* 2008 COWI Report, Exhibit JE-20, section 3.7.1, table 3.7.1, p. 79, on Swedish grey seal hunt quota and catch, 2001-2007.
[82] 2008 COWI Report, Exhibit JE-20, sections 3.7.3 and 3.7.4, pp. 80-85.
[83] 2008 COWI Report, Exhibit JE-20, section 3.7.3, p. 81.
[84] 2008 COWI Report, Exhibit JE-20, section 3.7.3, pp. 82-83.
[85] 2008 COWI Report, Exhibit JE-20, section 3.7.3, p. 83, and table 3.7.2, p. 86, entitled "Assessment Summary Sheet, Sweden".
[86] *See* 2010 COWI Report, Exhibit JE-21, section 3.1, p. 33 (noting, in its assessment of whether the Sami communities were likely to qualify for the Indigenous Communities Requirements, that these communities "can be defined as indigenous" and "have a tradition for seal hunting").
[87] 2007 EFSA Scientific Opinion, Exhibit JE-22, section 1.3.8.1, p. 33.
[88] 2008 COWI Report, Exhibit JE-20, section 3.8.1, p. 87.
[89] Figures as of 2007. 2008 COWI Report, Exhibit JE-20, section 3.8.1, p. 87. As of 31 August, licenses to kill a total of 1,167 seals had been granted in 2012. *See* Scottish Government web site, *Seal Licensing*, available at http://www.scotland.gov.uk/Topics/marine/Licensing/SealLicensing (last checked 12 October 2012), ("Scottish Government Website"), Exhibit JE-5.

equipment to be used.[90] This act was superseded by the Marine (Scotland) Act of 2010, which similarly sets out conditions for obtaining sealing licenses, authorized methods for killing seals, reporting requirements, and sanctions for non compliance.[91]

4. Sealing in Denmark (Greenland)

71. Greenland is a self-governing part of the Kingdom of Denmark, which in turn is a WTO Member. Unlike mainland Denmark, however, Greenland is *not* part of the European Union, but rather a country or territory associated with the European Union in accordance with the provisions of Part Four of the Treaty on the Functioning of the European Union, Article 355 of the Treaty on the Functioning of the European Union and Protocol No. 34 on Special Arrangements for Greenland.

72. As to the status of Greenland in the WTO, Greenland was notified in 1951 by Denmark as a territory to which the GATT 1947 applied.[92] Denmark makes WTO notifications and statements on behalf of Greenland, [93] and has stated that Denmark represents, in the WTO, "Greenland (which is not part of the EU)".[94] For purposes of this submission, therefore, Norway refers to "Denmark (Greenland)".

73. The seal hunt in Denmark (Greenland) is conducted for both commercial and other reasons, and "contributes to the subsistence of hunters, while being an important part of the cultural and social identity" of the region.[95]

74. Six seal species (harp, ringed, hooded, harbour, bearded and grey seals) are found in the waters of Denmark (Greenland). Each of these species has been hunted traditionally, but ringed and harp seals currently represent the majority of the Greenlandic hunt.[96] Seal hunting

[90] *See* 2007 EFSA Scientific Opinion, Exhibit JE-22, section 1.3.8.2, p. 33.
[91] *Marine (Scotland) Act 2010 (asp 5)*, promulgated by the Scottish Parliament on 10 March 2010, Part 6, ("Marine (Scotland) Act 2010"), Exhibit JE-6, section 107 *ff*.
[92] *See* GATT Contracting Parties, *The Territorial Application of the General Agreement: A Provisional List of Territories to Which the Agreement Is Applied – Addendum*, GATT/CP/108/Add.1 (30 July 1951), Exhibit NOR-20.
[93] *See*, *e.g.*, Denmark, *Notification of Laws and Regulations under Article 63.2 of the Agreement*, Revision, IP/N/1/DNK/1/Rev. 1 (22 June 1999); *Schedule XXII – Denmark, Invocation of Paragraph 5 of Article XXVIII*, G/MA/188 (25 January 2003); and *Schedule XXII – Denmark, Invocation of Paragraph 5 of Article XXVIII*, G/MA/232 (16 January 2006).
[94] *See*, *e.g.*, *Preparations for the 1999 Ministerial Conference, Communication from Denmark*, WT/GC/W/384 (8 November 1999)
[95] 2008 COWI Report, Exhibit JE-20, section 3.3.1, p. 44.
[96] 2007 EFSA Scientific Opinion, Exhibit JE-22, section 1.3.3.1, p. 28-29. *See also* 2008 COWI Report, Exhibit JE-20, section 3.3.1, p. 44; and Greenland Home Rule Department of Fisheries, Hunting and Agriculture, *Management and Utilization of Seals in Greenland* (revised in January 2009) ("2009 Management and

is conducted by individual hunters and occurs year round.[97] Depending on the season, the seal hunting methods vary, and "netting is the prevailing method from October to the end of March".[98]

75. No quotas are set for the seal hunt in Denmark (Greenland), but hunters are required to report their catches to the Department of Fisheries, Hunting and Agriculture on an annual basis.[99] Between 1993 and 2009, more than 2,800,000 seals were hunted in Denmark (Greenland), with an average reported catch of about 165,000 seals per year.[100] The seal hunt in Denmark (Greenland) is, therefore, the largest in the world in recent years, and more than half of the sealskins derived from this hunt is traded.[101]

76. The Greenland seal hunt is managed by the Department of Fisheries, Hunting and Agriculture. Regulations detail the scope and requirements for obtaining these hunting permits, reporting requirements and sanctions.[102] The Greenland seal hunt is characterized as "dispersed and opportunistic" and one that "pose[s] a challenge to control".[103] Enforcement of the hunt is carried out by wildlife officers "in the form of daytrips out to the areas where hunting is undertaken".[104]

5. Sealing in Iceland

77. In Iceland, the seal hunt is primarily carried out by, or with the permission of, landowners. Harbour and grey seals are hunted, "primarily for their fur, but the meat,

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Utilization of Seals in Greenland"), Exhibit JE-25, section 2, p. 2 (noting that the two populations represent 96 percent of the Greenlandic hunt). Norway understands that, pursuant to regulations adopted in November 2010, harbour and grey seals are currently protected.

[97] *See* 2007 EFSA Scientific Opinion, Exhibit JE-22, section 1.3.3.1, p. 28; 2008 COWI Report, Exhibit JE-20, section 3.3.1. p. 44.

[98] 2009 Management and Utilization of Seals in Greenland, Exhibit JE-25, section 5, p. 7.

[99] 2007 EFSA Scientific Opinion, Exhibit JE-22, section 1.3.3.2, p. 29; 2009 Management and Utilization of Seals in Greenland, Exhibit JE-25, section 8, p. 16.

[100] Greenland Home Rule Department of Fisheries, Hunting and Agriculture, *Management and Utilization of Seals in Greenland* (revised in April 2012) ("2012 Management and Utilization of Seals in Greenland"), Exhibit JE-26, p. 22. *See also* 2008 COWI Report, Exhibit JE-20, section 3.3.2, table 3.3.2, p. 46 (setting out total annual catches of between 153,000 and 186,000 between 2000 and 2005).

[101] *See* 2012 Management and Utilization of Seals in Greenland, Exhibit JE-26, p. 27: on average more than 50% of the sealskins are traded.

[102] 2008 COWI Report, Exhibit JE-20, section 3.3.3, p. 47 (noting athat Greenland has legislation on the protection of animals that addresses animal welfare generally and that applies to seals). "In Greenland, the law on protecting nature and wildlife from 2003 constitutes the overall frame regarding wildlife regulation. From spring 2009 a national regulation regarding the protection of seals and sealing will come into force, this will include a year round protection of harbour seals". 2009 Management and Utilization of Seals in Greenland, Exhibit JE-25, section 8, p. 16.

[103] 2008 COWI Report, Exhibit JE-20, section 3.3.4, p. 49.

[104] 2008 COWI Report, Exhibit JE-20, section 3.3.4, table 3.3.3, p. 51.

blubber and flippers are also used".[105] Hunting of pups is allowed in Iceland.[106] Netting is the most common method used for hunting harbour seals. Annual takes are typically in the order of 100 harbour seals and a similarly small number of grey seals.[107] The grey seal pups are caught using either a seal club or a rifle of .22 calibre from a very short distance, whereas adult grey seals are hunted with a rifle of calibre .222-.243.[108]

6. Sealing in Namibia

78. Seal hunting in Namibia is limited to Cape fur seals and takes place for commercial and other reasons.[109]

79. The Namibian commercial seal hunt is the third largest in the world behind Denmark (Greenland) and Canada, and it is the only seal hunt to take place in the southern hemisphere.[110] Between 2000 and 2007, TACs for adult male seals were between 5,000 and 7,000, while TACs for pups were between 50,000 and 85,000.[111]

80. Commercial seal hunters are employed on a seasonal basis by two private concessionaires.[112] The main seal products resulting from the commercial hunt and sold on the international market are sealskins, seal oil, seal carcass meal and seal genitals.[113] In addition to the commercial hunt, Namibian legislation allows for trophy hunting of adult male Cape fur seals between 15 September and 15 November.[114]

81. The Namibian seal hunt is administered by the Ministry of Fisheries and Marine Resources.[115] Namibian legislation sets forth the factors to be considered in granting licenses

[105] 2007 EFSA Scientific Opinion, Exhibit JE-22, section 1.3.7.1, p. 32, referring to the Report of the NAMMCO Workshop on Hunting Methods for Seals and Walrus, 7-9 September 2004 ("2004 NAMMCO Report").
[106] 2007 EFSA Scientific Opinion, Exhibit JE-22, section 1.3.7.1, p. 32.
[107] Icelandic Marine Research Institute, *Summary of State of Marine Stocks in Icelandic Waters 2011/2012; Prospects for the Quota Year 2012/2013* (2012), Exhibit NOR-21, p. 180.
[108] 2007 EFSA Scientific Opinion, Exhibit JE-22, section 1.3.7.1, p. 32.
[109] 2008 COWI Report, Exhibit JE-20, sections 3.4.1, p. 52 and 3.4.3, pp. 54-55, citing the Namibian regulation relating to the exploitation of marine resources, 241/2001, section 18.1.a; 2010 COWI Report, Exhibit JE-21, section 3.1, p. 30.
[110] 2008 COWI Report, Exhibit JE-20, section 3.4.1, p. 52.
[111] 2007 EFSA Scientific Opinion, Exhibit JE-22, section 1.3.5.1, p. 30; 2008 COWI Report, Exhibit JE-20, section 3.4.1, table 3.4.1, p. 53.
[112] 2008 COWI Report, Exhibit JE-20, section 3.4.2, p. 53.
[113] 2008 COWI Report, Exhibit JE-20, section 3.4.2, p. 53.
[114] 2008 COWI Report, Exhibit JE-20, section 3.4.2, p. 53; 2007 EFSA Scientific Opinion, Exhibit JE-22, section 1.3.5.1, p. 30.
[115] 2008 COWI Report, Exhibit JE-20, section 3.4.3, p. 54.

to "right holders" that allow them to engage in sealing.[116] In addition, right holders are subject to hunting conditions that are "directed both at the training, killing methods and enforcement of the hunt".[117] These conditions include, among others, that: (i) quota applications be made on an annual basis; (ii) hunting take place under the supervision of a trained inspector; and (iii) hunters receive annual training and meet certain levels of proficiency in the use of clubs.[118]

7. Sealing in Russia

82. One of the breeding grounds for harp seal is in Russian waters, on the pack ice in a sea area known as the White Sea. Norway understands that, pursuant to regulations in force since 2009, the hunting of harp seal pups less than one year old has been banned by Russian authorities, as is hunting of adult female harp seals in close vicinity to the pups. Hunting is thus permitted on adult male seals (older than 1 year) and adult females (older than 1 year) not in vicinity of their pups. Norway and Russia manage the hunt for seals in the White Sea/Barents Sea jointly. The specific hunting period as well as quotas for the catch and hunting permits for scientific purposes in these areas are set annually by the Joint Russian-Norwegian Fisheries Commission, based on scientific advice by ICES/NAFO.[119]

83. Various indigenous peoples living in Russia's Arctic areas conduct traditional seal hunts.

8. Sealing in the United States

84. In the United States seal hunting is a right allocated to Alaska Natives (Indians, Aleuts and Eskimos) only, provided that the harvest is intended for subsistence purposes, or

[116] 2008 COWI Report, Exhibit JE-20, section 3.4.3, pp. 55 and text box 3.3, citing section 33 of the *Act on the Management of Wild Living Marine Resources*, promulgated by the Norwegian Parliament as Act of 6 June 2008 No. 37, available at http://www.regjeringen.no/upload/FKD/Vedlegg/Diverse/2010/MarineResourcesAct.pdf (last checked 12 October 2012) ("Norwegian Marine Resources Act"), Exhibit NOR-44.
[117] 2008 COWI Report, Exhibit JE-20, section 3.4.3, p. 55, noting that this is according to the Ministry of Fisheries and Marine Resources.
[118] 2008 COWI Report, Exhibit JE-20, section 3.4.3, p. 55; 2007 EFSA Scientific Opinion, Exhibit JE-22, section 1.3.5.2, p. 31.
[119] *See, e.g.,* Joint Norwegian/Russian Fisheries Commission, *Report of the Working Group on Seals to the 40th Session – Appendix 8*, available at http://www.regjeringen.no/upload/FKD/Vedlegg/Kvoteavtaler/2012/Russland/NORRUS2011Appendix8.pdf (last checked 11 October 2012) ("2011 Report of the Norwegian/Russian Working Group on Seals"), Exhibit NOR-22.

for creation and personal use or sale of authentic native handicrafts or clothing.[120] The hunt takes place on the Pribilof Islands, and the numbers of seals harvested were 498, 454 and 435 seals for 2008, 2009 and 2010 respectively.[121]

B. Description of the Trade in Seal Products

85. As described in the previous section, the hunting of different species of seals has taken place worldwide for a variety of purposes, including commercial purposes. Three main raw products – meat, skins and blubber – are derived from sealing and, in section II.B.1, we describe the initial processing that takes place with respect to each of these products once the seal hunt is complete. In this context, we focus on the trade chains and main players involved in such processing, which vary by product type. Next, we describe further downstream products as well as the trade flows associated with them. Finally, in section II.B.2, we provide a short overview of the European Union's preliminary assessment of the likely impact of the EU Seal Regime on international trade flows.

1. The production process and trade flows for key seal products

a. Seal meat

86. Seal meat is used for both human and animal consumption, and the initial processing of seal meat takes place on the sealing vessels. By way of example, in his expert statement captain and hunter Mr. Kvernmo explains the process of preparing, preserving and selling the meat harvested during the course of the Norwegian hunt:

> The meat (the front and back flippers, breast and back steaks) is cut out and put aside for rinsing and cooling in tanks/containers with circulating sea water. [...] The meat remains in the containers with circulating sea water throughout the night until the morning after when the process of salting the meat in barrels and packaging and freezing begins.[122]

[120] *Marine Mammal Protection Act*, promulgated by the Congress of the United States of America, 1972, as amended ("USMMPA"), Exhibit JE-15, Title I, section 101(b).
[121] United States Department of Commerce, *Marine Mammals; Subsistence Taking of Northern Fur Seals; Harvest Estimates*, Federal Register, Vol. 77, No. 27 (9 February 2012) ("2012 USDOC Harvest Estimate"), Exhibit NOR-23, pp. 6682-6683. COWI noted that the US seal hunt figure was 1600 for purposes of its 2010 Report: *see* 2010 COWI Report, Exhibit JE-21, section 3.1, p.23 (unspecified year).
[122] Kvernmo Statement, Exhibit NOR-7, para. 24.

87. Thereafter, "[t]he boat owners can sell the meat to restaurants, at local markets, or directly to customers who come to the ships to buy".[123]

88. The trade in seal meat is relatively limited, with Denmark (Greenland) providing the entirety of imports of seal meat into the European Union.[124]

b. Seal skins

89. Seal skins may be raw or processed, namely, tanned, dressed, and incorporated into another finished product. Following completion of the seal hunt, the seal skins are delivered to receiving stations where they are bought by commercial purchasers.[125] The purchasers either send the skins directly to a tannery for further processing or collect the skins into "lots" which are traded at auction houses.[126] Some purchasers control several parts of the chain: the receiving station, the tannery, processing, design and marketing.[127] "The tanneries are either 'part of a bigger business' such as Great Greenland[128] or operate as an 'independent entity' where skins are tanned and dressed on a fee basis", which fee varies from tannery to tannery.[129] Auction houses "constitute a global market where bidders from all over the world gather to trade a few times a year".[130] The skins are sold in "lots" according to type, quality, and whether they are raw or tanned.[131] "The auction house takes a certain percentage fee for each skin traded from the hunter and a fee from the buyer", totalling roughly eight to ten per cent of the trading price.[132]

90. Denmark (Greenland) provides one example of the trade chain described above. The main exporter of seal products in Denmark (Greenland) is an organization called Great Greenland, which purchases skins "directly from the hunter through a network of purchasers" according to agreed-upon instructions.[133] The majority of seal skins are sold by the hunters to

[123] Kvernmo Statement, Exhibit NOR-7, para. 25.
[124] *See* Trade tables handed to Norway by the EU during the course of consultations (December 2009), Exhibit NOR-24.
[125] *See* 2010 COWI Report, Exhibit JE-21, section 4.2, p. 43: Greenland has 40 such receiving stations; in Canada, the main harvest places are in Newfoundland and Labrador. During the 2012 season two receiving stations qualified to receive subsidies from the Norwegian government.
[126] *See* 2010 COWI Report, Exhibit JE-21, section 4.2, p. 43.
[127] *See* 2010 COWI Report, Exhibit JE-21, section 4.2, pp. 43-44.
[128] *See* para. 55.
[129] 2010 COWI Report, Exhibit JE-21, section 4.2, p. 44 (footnote omitted).
[130] 2010 COWI Report, Exhibit JE-21, section 4.2, p. 44.
[131] 2010 COWI Report, Exhibit JE-21, section 4.2, p. 44.
[132] 2010 COWI Report, Exhibit JE-21, section 4.2, p. 44.
[133] 2010 COWI Report, Exhibit JE-21, annex 3, p. 2.

the Great Greenland tannery, located in Qaqortoq in South Greenland,[134] "where [the skins] are tanned and prepared for sales, either in Greenland or through an agent in Denmark".[135] "All furs are manufactured in Great Greenland's facilities in Qaqortoq. Accessories are mainly manufactured in Turkey or Greece".[136]

91. By way of another example, Canada has three "internationally attended, producer-owned auction houses", and most seal skin "will find its way to markets via fur auction houses".[137] "[M]ost seal skin is destined for export markets, with Asian markets being the most important (growth) markets".[138] "Some products also move directly from the harvest stations to buyers overseas".[139]

i Raw seal skins

92. The range states listed in section II.A above export raw seal skins to the European Union in varying degrees.[140] According to COWI and the European Commission, imports from non-EU range states come primarily from Denmark (Greenland) and Canada.[141]

93. According to COWI, with respect to Canada, "the bulk of export value of Canadian seal product is generated by the trade in raw furskins – accounting for more than 90 per cent of the total in 2006".[142] In 2006, "around a third" of Canada's raw seal furskins was exported to the EU.[143] Further, "around a fourth of Greenland's export goes to the EU market – *i.e.* an export of raw furskins of seal of around Euro 5 million compared with a registered EU import

[134] 2009 Management and Utilization of Seals in Greenland, Exhibit JE-25, section 7, p. 13. According to this report, "50 people are employed at the tannery – making it one of the largest companies in South Greenland. In addition, the tannery operates 50 trading stations all over the country, making it possible for hunters in small communities to sell their sealskins". *Ibid*.
[135] 2010 COWI Report, Exhibit JE-21, annex 3, p. 3.
[136] 2010 COWI Report, Exhibit JE-21, annex 3, p. 3.
[137] 2010 COWI Report, Exhibit JE-21, annex 2, p. 4.
[138] 2010 COWI Report, Exhibit JE-21, annex 2, p. 5.
[139] 2010 COWI Report, Exhibit JE-21, annex 2, p. 5.
[140] *See* generally 2008 COWI Report, Exhibit JE-20, section 5.2, tables 5.2.2 and 5.2.3, pp. 105-106, which provide data, as of 2006, for trade between the EU-27 Member states and 8 range states (Canada, Finland, United Kingdom, Greenland, Namibia, Norway, Russia and Sweden). *See* also identical tables in European Commission, *Impact Assessment on the potential impact of a ban of products derived from seal species*, COM(2008) 469 (23 July 2008), ("Commission Impact Assessment"), Exhibit JE-16, tables 6.2.3.2 and 6.2.3.3, pp. 34-35.
[141] 2008 COWI Report, Exhibit JE-20, section 5.2, p. 104; Commission Impact Assessment, Exhibit JE-16, section 6.2.3, p. 33.
[142] 2010 COWI Report, Exhibit JE-21, annex 2, p. 3. *See* also 2008 COWI Report, Exhibit JE-20, section 3.1.1, table 3.1.2, p. 25, "Commercial Seal Landings in Atlantic Canada, 2002-2007", reflecting the value of seal skins compared to meat and blubber.
[143] 2008 COWI Report, Exhibit JE-20, section 5.2, p. 110.

of Euro 1.3 million – excluding goods in transit".[144] In 2006, Norway exported 373 raw seal skins.[145]

94. According to Eurostat data from 2006 – on which both COWI and the European Commission rely – Denmark and Italy were the two largest EU importers of raw seal fur skins for further processing and sale on the EU market.[146] Denmark houses "numerous small furrieries producing the final seal products for the markets"[147] and Italy is "among the world's leading producers of coats and other clothing items made from seal skin".[148] Denmark imports seal skins from Canada and Denmark (Greenland).[149] Italy purchased seal skins from non-EU countries typically through Finland and the United Kingdom.[150]

ii Tanned seal skins

95. Seal skins are typically tanned and used to produce articles of clothing[151] and accessories, such as hats and the sporrans that adorn kilts. According to COWI and the European Commission, more EU Member States are engaged in the trade of tanned or dressed fur skins than in the trade of raw fur skins.[152] "Although Denmark and Italy remain important traders, Greece and the United Kingdom, but also Latvia, are significant importers".[153] In 2006, the value of Norwegian exports of tanned or dressed seal skins to the European Union totalled ca. 290,000 Euros,[154] with the United Kingdom representing Norway's primary trading partner.[155]

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[144] 2008 COWI Report, Exhibit JE-20, section 5.2, p. 112 and table 5.2.8; Commission Impact Assessment, Exhibit JE-16, section 6.2.3, p. 40 and table 6.2.3.8. Norway understands that the difference between the export and import statistics reflects the value of goods in transit. *See also id.*, pp. 103-104.
[145] 2008 COWI Report, Exhibit JE-20, section 5.3, p. 110 and table 5.2.7, p. 112. Eurostat has registered 12 such skins as exported to the European Union (*see* 2008 COWI Report, Exhibit JE-20, section 5.2 p. 110, table 5.2.3, p. 106); however, this appears to be a mistake.
[146] 2008 COWI Report, Exhibit JE-20, section 5.2, p. 106. *See* also 2008 COWI Report, Exhibit JE-20, section 5.2, table 5.2.4, p. 107; Commission Impact Assessment, Exhibit JE-16, section 6.2.3, table 6.2.3.4, p. 36.
[147] Commission Impact Assessment, Exhibit JE-16, section 6.2.3, p. 36.
[148] Commission Impact Assessment, Exhibit JE-16, section 6.2.3, p. 36.
[149] 2008 COWI Report, Exhibit JE-20, section 5.2, p. 106.
[150] 2008 COWI Report, Exhibit JE-20, section 5.2, p. 106; and Commission Impact Assessment, Exhibit JE-16, section 3.2.1, p. 19.
[151] 2008 COWI Report, Exhibit JE-20, section 5.2, pp. 106-107.
[152] 2008 COWI Report, Exhibit JE-20, section 5.2, p. 107; Commission Impact Assessment, Exhibit JE-16, section 3.2.1, p. 19. *See* also 2008 COWI Report, Exhibit JE-20, section 5.2, table 5.2.5, p. 108; Commission Impact Assessment, Exhibit JE-16, section 6.2.3, table 6.2.3.5, p. 37.
[153] 2008 COWI Report, Exhibit JE-20, section 5.2, p. 107; Commission Impact Assessment, Exhibit JE-16, section 3.2.1, p. 19.
[154] 2008 COWI Report, Exhibit JE-20, section 5.2, table 5.2.5, p. 108.
[155] 2008 COWI Report, Exhibit JE-20, section 5.2, p. 107 and table 5.2.5, p. 108; Commission Impact Assessment, Exhibit JE-16, section 6.2.3, table 6.2.3.5, p. 37.

iii Footwear with seal skin

96. Footwear made from seal fur skin, such as boots or slippers, is known for being warm, water-repellent and durable. To Norway's knowledge, Norway, Canada, Estonia, and Italy, and possibly Sweden produce seal skin boots and other footwear.

c. Seal blubber

97. Blubber, which accounts for a significant percentage of the total weight of the seal, is also an important seal product.[156] Blubber is refined into oil, which has three uses: (i) further processing into health supplements for human consumption; (ii) further processing as animal feed; and (iii) "technical" oil. In this section, we discuss the process of refining blubber into oil, and the use of such refined seal oil into the main product for human consumption, i.e., omega-3 capsules.

i Refined seal oil

98. At the end of the hunt, the blubber is taken to the receiving stations, where it is sold to commercial purchasers and thereafter processed into oil.[157] This processing primarily takes place close to the receiving stations.[158]

99. The refinery process accounts for the vast majority (roughly 80 to 90 per cent) of the economic value of the final product.[159] Refined seal oil – which has been "completely cleaned for any heavy metals through an advanced distillery process"[160] – is sold among others to health and pharmaceutical companies for further processing, and sold for use as dietary supplements for human consumption, for medical purposes,[161] and for use in feed or as fuel oil.

[156] According to COWI, blubber "accounts for about 45 per cent of the total weight of the seal". 2010 COWI Report, Exhibit JE-21, section 4.2, p. 44. According to RUBIN Foundation, *Raw Material Sources of Omega 3 Oils*, Report No. 144 (25 September 2007) (original and unofficial translation) ("RUBIN Report"), Exhibit JE-23, "[a]n adult seal weighs between 65 kg and 140 kg, and the fat content is between 32% and 49%. The blubber, which comprises approximately 25% of the weight, is well suited to production of oil." RUBIN Report, Exhibit JE-23, p. 41. The range of approximations given is explained by the fact that the percentage of blubber in a seal depends on its age and what time of year the study was performed.
[157] *See* 2010 COWI Report, Exhibit JE-21, section 4.2, pp. 43-44.
[158] *See* 2010 COWI Report, Exhibit JE-21, annex 2, p. 5.
[159] 2010 COWI Report, Exhibit JE-21, section 4.2, p. 44.
[160] 2010 COWI Report, Exhibit JE-21, section 4.2, p. 44.
[161] *See, e.g.*, 2010 COWI Report, Exhibit JE-21, section 4.2, p. 45.

100. Total world production of seal oil is estimated to be 2,000 to 3,000 tonnes per year.[162] According to COWI, EU countries, such as Sweden, Denmark, Finland and Germany, "were emerging markets [for seal oil products] but have halted in recent years due to the development of the EU Regulation on trade in seal products".[163]

ii Omega-3 capsules from seal oil

101. Products deriving from seal oil include omega-3 capsules, which are used as dietary supplements because of the health benefits stemming from the consumption of three omega-3 poly-unsaturated fatty acids, namely docosapentaenoic acid (DPA), docosahexaenoic acid (DHA), and eicosapentaenoic acid (EPA).[164] The beneficial effects of consuming omega-3 fatty acids can be summarized as follows:

> Generally speaking, DHA is important for structures/functions in cell membranes while EPA has an important regulatory function in the body, in relation, for example, to blood pressure and the immune system. EPA/DHA plays a role in heart and brain functions. DPA may perhaps have some additional effects in relation to cartilage and joint functions.[165]

102. In addition to seal oil, omega-3 capsules include additives such as gelatine, purified water and glycerol.[166]

2. Expected impact of the EU Seal Regime on trade in seal products

103. In 2008, COWI and the European Commission assessed the likely impact on trade of an EU measure restricting the placing on the market of seal products.[167]

104. Overall, COWI and the EU concluded: "a total prohibition of placing on the market is assessed to have minor impacts on the EU Member States".[168] This was because sealing in

[162] 2010 COWI Report, Exhibit JE-21, section 4.2, p. 45; *see* also RUBIN Report, Exhibit JE-23, section 4.4.1, p. 41.
[163] 2010 COWI Report, Exhibit JE-21, section 4.2, p. 45. "Main markets for these products are in Asia (Korea, China, Japan), while there appeared to be interest for these products in several European markets as well (*e.g.* Sweden, Denmark, Finland and Germany) but the looming ban on seal products has more or less stunted the market there". *Id.*, annex 2, p. 6.
[164] *See e.g.* RUBIN Report, Exhibit JE-23, section 8.4, p. 84.
[165] RUBIN Report, Exhibit JE-23, p. 15.
[166] *See* para. 310 below.
[167] *See* also 2008 COWI Report, Exhibit JE-20, section 5.2, table 5.2.4, p. 107; Commission Impact Assessment, Exhibit JE-16, section 6.2.3, table 6.2.3.4, p. 36.
[168] 2008 COWI Report, Exhibit JE-20, section 5.3, p. 117 (emphasis added). COWI and the European Commission assessed the impact on the United Kingdom as "medium", the impact on Finland and Sweden as "minor", and the impact on other EU Member States as "minor". *Id.* table 5.3.1 at p. 118; *see* also Commission

Finland and Sweden is "mostly characterized as having cultural and recreational roles in the coastal communities, rather than being trade oriented".[169] Thus, only a "limited share" of seal products from Finland and Sweden is sold to other EU Member States.[170] "Furthermore, in the United Kingdom (Scotland) the hunt is targeted at the killing of seals in the vicinity of fishing, rather than for the use of the skin".[171] With respect to other EU Member States, COWI and the European Commission concluded that there would be "some impact for a few manufacturers of fur of sealskin in Denmark, Italy and Greece, i.e. with respect to the sale on the EU market, since they can still import sealskins for manufacturing and sales to non-EU countries".[172] Had the measure banned transit as well, the impact on EU Member States would have been higher.[173]

105. By contrast, COWI and the European Commission concluded that the impact of limits on the placing on the market of seal products was likely to be higher for non-EU range states, due to the larger size of the hunt and the importance of the EU market to those countries.[174] With respect to Norway, Canada, Denmark (Greenland), Namibia and Russia, COWI and the European Commission concluded as follows:

- **Norway:** COWI expected the impact on Norway to be "medium", relating mostly to tanned or dressed fur skins.[175]

- **Canada:** COWI, and the European Commission, considered that the data indicated a "Canadian dependence on the EU for its exports".[176] They assessed that the impact on Canada would be "medium", because "a large share of exports to EU is for re-export outside the EU, but the significant

Impact Assessment, Exhibit JE-16, section 6.3, table 6.3.1, p. 44. According to COWI, this assumes that trans-shipments of sealskins and other seal products, and imports of sealskins for further processing and exports continue. *See* 2008 COWI Report, Exhibit JE-20, section 5.3, p. 117.

[169] 2008 COWI Report, Exhibit JE-20, section 5.3, p. 117; Commission Impact Assessment, Exhibit JE-16, section 6.3, p. 44. COWI defines "recreational" in general as, among others, supplementing a primary activity, small scale, dispersed, opportunistic, often aiming to reduce the seal population. 2008 COWI Report, Exhibit JE-20, section 1.2, p. 8.

[170] 2008 COWI Report, Exhibit JE-20, section 5.2, pp. 113-114; Commission Impact Assessment, Exhibit JE-16, section 6.4.2, p. 42.

[171] 2008 COWI Report, Exhibit JE-20, section 5.3, p. 117-118; Commission Impact Assessment, Exhibit JE-16, section 6.3, p. 44.

[172] 2008 COWI Report, Exhibit JE-20, section 5.3, table 5.3.1, p. 118; Commission Impact Assessment, Exhibit JE-16, section 6.3, table 6.3.1, p. 44.

[173] Commission Impact Assessment, Exhibit JE-16, section 6.4, table 6.4.1, p. 46.

[174] 2008 COWI Report, Exhibit JE-20, section 5.3, p. 118; *see* also, *ibid*., section 5.3 table 5.3.2; and Commission Impact Assessment, Exhibit JE-16, section 6.3, p. 44.

[175] 2008 COWI Report, Exhibit JE-20, section 5.2 p. 110 and table 5.3.2, p. 118.

[176] 2008 COWI Report, Exhibit JE-20, section 5.2, p. 110 and table 5.2.6, p. 111; Commission Impact Assessment, Exhibit JE-16, 6.2.3, p. 38 and table 6.2.3.6, pp. 39-40.

amount that ends up in Italy via Finland will be affected to the extent the Italian produce is sold on the EU market".[177]

- **Denmark (Greenland):** The effect on Denmark (Greenland) of limits on the trade in seal products would be "medium – since a fourth of exports are designated EU markets – and so local sealing communities would be affected".[178]

- **Namibia:** Similarly, the effect on Namibia would be "medium – since a fifth of exports are designated EU markets – and so local sealing communities would be affected".[179] Greece is "by far the most important EU market for Namibia".[180]

- **Russia:** The impact on Russia would be "minor", as "few Russian seal skins are assessed to end up on the EU market."[181]

C. Overview of the EU Seal Regime

1. The legislative process

a. The European Commission's "full objective assessment"

106. In 2007 the European Commission, recognising "the high level of public concerns regarding the animal welfare aspects of seal hunting and in line with its commitment to high animal welfare standards", and responding to a request made by the European Parliament,[182] undertook to carry out a "full objective assessment of the animal welfare aspects of seal hunting".[183] On this basis, the European Commission would "report back to the European Parliament with possible legislative proposals if warranted by the situation".[184]

107. As part of its assessment, the Commission sought a scientific opinion from EFSA,[185] a study by the consultancy COWI, and carried out a "public consultation".[186]

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[177] 2008 COWI Report, Exhibit JE-20, section 5.3, table 5.3.2, p. 118.
[178] 2008 COWI Report, Exhibit JE-20, section 5.3, table 5.3.2, p. 118.
[179] 2008 COWI Report, Exhibit JE-20, section 5.3, table 5.3.2, p. 118.
[180] 2008 COWI Report, Exhibit JE-20, section 5.2, p. 112. *See also id.* table 5.2.9, p. 113; and Commission Impact Assessment, Exhibit JE-16, section 6.2.3, table 6.2.3.9, p. 41.
[181] 2008 COWI Report, Exhibit JE-20, section 5.3, table 5.3.2, p. 118.
[182] European Parliament, *Declaration on Banning Seal Products in the European Union*, P6_TA(2006)0369, September 2006, ("EU Parliament Declaration"), Exhibit JE-19.
[183] Commission Impact Assessment, Exhibit JE-16, section 2.1, p. 8.
[184] Commission Impact Assessment, Exhibit JE-16, section 2.1, p. 8.
[185] As part of the legislative process, the Commission mandated EFSA to review the animal welfare aspects of the killing and skinning of seals. EFSA reviewed: the seal species being hunted (2007 EFSA Scientific Opinion, Exhibit JE-22, sections 1.1 and 1.2); the seal hunt as conducted in the countries that practice it (2007 EFSA Scientific Opinion, Exhibit JE-22, section 1.3); by way of comparison, the practices used to kill animals in abattoirs and in the wild (2007 EFSA Scientific Opinion, Exhibit JE-22, section 2); and, the different seal killing methods used (2007 EFSA Scientific Opinion, Exhibit JE-22, section 3).

108. As summarized by the Commission, EFSA found, among its conclusions, that it was "possible to kill seals rapidly and effectively without causing them avoidable pain or distress", but that hunting practices differed widely and "in practice, effective and humane killing does not always happen".[187] COWI concluded that so as best to safeguard animal welfare, any measures relating to trade in seal products should seek to promote good practices and discourage bad practices.[188] COWI also described the results of the public consultation. According to COWI, one of the outcomes of the consultation was to lay bare a "knowledge gap" in the European Union on the hunting methods used.[189]

109. The European Commission set out in detail the findings made in an "Impact Assessment" of 23 July 2008. In its Impact Assessment, in particular, the European Commission confirmed that "it is possible for animal welfare concerns to be minimised" during the seal hunt.[190] The European Commission specifically acknowledged the conclusion of the EFSA scientific panel that "*it is possible to kill seals rapidly and effectively without causing them avoidable pain or distress*",[191] and that there is "clear evidence of the fact that seals within the varying commercial hunts may be killed in an appropriate manner".[192]

110. In its Impact Assessment, the European Union provides its own summary of the 2007 EFSA Scientific Opinion, as follows:

> EFSA concluded that "it is possible to kill seals rapidly and effectively without causing them avoidable pain or distress. However, the Panels also reported evidence that, in practice, effective and humane killing does not always happen."
>
> EFSA does not explicitly condemn the currently used methods for killing and skinning of seals. It rather establishes a number of very useful and clear criteria for assessing the acceptability of methods applied in the different seal hunts.
>
> Given the scarcity of robust, scientifically peer reviewed data (see also chapter 6.6.4), the EFSA Risk Assessment process was

[186] Commission Impact Assessment, Exhibit JE-16, section 2.1, p. 8.
[187] European Commission, *Proposal for a Regulation of the European Parliament and of the Council Concerning Trade in Seal Products*, COM/2008/0469, 2008/0160 COD (23 July 2008) (the "Proposed Regulation"), Exhibit JE-9, Explanatory Memorandum, pp. 9-10, referring to 2007 EFSA Scientific Opinion, Exhibit JE-22, p. 94.
[188] 2008 COWI Report, Exhibit JE-20, Executive Summary, p. 5 and section 7.2, p. 136, "Recommendations".
[189] 2008 COWI Report, Exhibit JE-20, Executive Summary, p. 5, section 6.1.1, p. 126 and section 6.3, p. 132.
[190] Commission Impact Assessment, Exhibit JE-16, section 3.1.4, p. 16.
[191] Commission Impact Assessment, Exhibit JE-16, section 2.3, p. 9 and section 3.1.4, p.16 (emphasis original).
[192] Commission Impact Assessment, Exhibit JE-16, section 3.1.4, p. 16.

conducted in a qualitative way. Nevertheless, the general conclusions and recommendations are considered to be rigorous enough to inform the policy-making process.

Some of the main conclusions:

- Seals are sentient mammals that can experience pain, distress, fear and other forms of suffering.

- Seals can be killed rapidly and effectively, without causing avoidable pain, distress and suffering, using a variety of methods that aim to destroy the brain function. However, there is evidence that in practice effective killing does not always happen and some animal are killed and skinned whilst conscious resulting in avoidable pain, distress and other form of suffering.

- The EFSA opinion stated that "there are only a limited number of studies published in peer-reviewed journals that can be used to evaluate, with a high degree of certainty, the efficacy of the various killing methods employed in different seal hunts around the world on a quantitative basis. This is why the risk assessment had to take a qualitative approach. Nevertheless, there are studies (*e.g.* by NGOs, industry linked groups) that highlight serious deficiencies and concerns in the hunts, but they may contain potentially unproven biases".

Some of the main recommendations:

- Seals should be killed without causing avoidable pain, distress or other form of suffering.

- This may be achieved using appropriate firearms with appropriate ammunition at appropriate distance. Alternatively, hakapiks or other forms of clubs can be used if of an appropriate design and used with adequate force and accuracy, but only on young seals.

- The killing methods should only be used in appropriate conditions, be applied adequately and respect a 3-steps procedure (stunning, monitoring of unconsciousness, bleeding) before skinning.

- Hunters should be trained and competent in the procedures they use, including killing methods, monitoring death, unconsciousness and consciousness, and in rapid bleeding and skinning.

- Independent monitoring of seal hunts is recommended, thereby meaning independent of both industry/commercial interests and NGOs.

- Hunts should be open to inspection without undue interference.[193]

[193] Commission Impact Assessment, Exhibit JE-16, section 2.3, pp. 9-10.

111. Based on EFSA's recommendations,[194] the European Commission proposed a measure that would have conditioned access to the EU market on compliance with animal welfare requirements, including requirements expressly listed in the measure itself. The measure also envisaged certification and, in certain circumstances, labelling. The European Commission noted that the costs of certification were "not expected to be significant as range states would be certified, in accordance with the legislative measure, on a country basis".[195] The European Commission found that labelling could be beneficial, too.[196] In the following section, Norway describes the measure proposed by the European Commission on the basis of the "full objective assessment" just outlined.

b. The European Commission's Proposed Regulation

112. As an outcome of its assessment of the animal welfare aspects of seal hunting, and pursuant to its exclusive powers to propose EU legislation, on 23 July 2008 the European Commission proposed the adoption of a Regulation of the European Parliament and of the Council on trade in seal products (the "Proposed Regulation").[197]

113. The Proposed Regulation allowed the importation, placing on the EU market, transit and exportation of products containing seal under three alternative sets of conditions.

114. One such set of conditions related to animal welfare. Under the Proposed Regulation, it would be possible to place on the EU market products containing seal if derived from seals hunted in a country where, or by persons to whom, adequate animal welfare requirements applied and were "effectively enforced".[198] In line with the recommendations of EFSA and COWI,[199] the European Commission explained that conditioning market access on compliance with animal welfare requirements would provide "incentives" for sealing countries to "adapt their legislation and practice" to the animal welfare standards set by the

[194] *See* Commission Impact Assessment, Exhibit JE-16, section 2.3, p. 10.
[195] Commission Impact Assessment, Exhibit JE-16, section 8.1, p. 58.
[196] Commission Impact Assessment, Exhibit JE-16, section 6.5, p. 47.
[197] Proposed Regulation, Exhibit JE-9.
[198] *See*, in particular, Proposed Regulation, Exhibit JE-9, Articles 4-7 and Annex II.
[199] 2008 COWI Report, Exhibit JE-20, Executive Summary, p. 5 and section 7.2, 136, "Recommendations"; and 2007 EFSA Scientific Opinion, Exhibit JE-22, pp. 88-95.

European Union.[200] The European Commission also specified that this approach reflected the results of the public consultation.[201]

115. Compliance with the animal welfare conditions would have to be evidenced by a certificate, and also, where necessary "to ensure the proper enforcement" of the Regulation, by a label or marking.[202] The Proposed Regulation included a list of "criteria for appraising the adequacy" of the animal welfare requirements applying to the hunt. These criteria related, among others, to: hunting tools; the steps of the hunt; the conditions under which the hunt could take place; training of hunters; monitoring of the hunt; reporting on the hunt; and sanctions for non-compliance.[203]

116. Another, alternative set of conditions related to the authors of the hunt. The Proposed Regulation envisaged that seal products could also be placed on the EU market if they "result[ed] from hunts traditionally conducted by Inuit communities and which contributed to their subsistence".[204] The Commission would adopt measures necessary to implement this set of conditions, "including evidentiary requirements relating to the proof of origin".[205]

117. Finally, the Proposed Regulation envisaged that products containing seal could be imported if the importation was "of an occasional nature" and "exclusively [...] for the personal use of the travellers or their families".[206]

c. Amendments to the Proposed Regulation

i. Overview

118. In the European Parliament, the Proposed Regulation was referred to the Committee on Internal Market and Consumer Protection (IMCO), which appointed Diana Wallis as its Rapporteur. In addition, the Committees on the Environment, Public Health and Food Safety (ENVI) and on Agriculture and Rural Development (AGRI), as "committees asked for an

[200] *See, e.g.*, Proposed Regulation, Exhibit JE-9, Explanatory Memorandum, pp. 9 and 12.
[201] Proposed Regulation, Exhibit JE-9, Explanatory Memorandum, p. 9.
[202] Proposed Regulation, Exhibit JE-9, Article 4.1(d).
[203] Proposed Regulation, Exhibit JE-9, Annex II.
[204] Proposed Regulation, Exhibit JE-9, Article 3.2.
[205] Proposed Regulation, Exhibit JE-9, Article 3.3.
[206] Proposed Regulation, Exhibit JE-9, Article 2.4.

opinion", provided opinions to IMCO (which under the Rules of Procedure of the European Parliament, was instead the "committee responsible").[207]

119. As Norway sets out more in detail below,[208] MEP Diana Wallis, Rapporteur for the committee responsible, expressed concern that the exception envisaged in the Proposed Regulation for Inuit hunting could result in "defeating the animal welfare intentions of the proposal".[209] Rapporteur Wallis explained that "a certification or labelling scheme ensuring appropriate information of the public" would be sufficient.[210]

120. However, in full contrast with the recommendations of Rapporteur Wallis, the ability to place on the market products on the basis of criteria unrelated to animal welfare was expanded, whereas the rules conditioning market access on compliance with animal welfare requirements were abandoned. Moreover, Recital 11 of the Proposed Regulation, which explained that it would be appropriate to provide for derogations from a general ban on the trade in seal products where animal welfare concerns were met, was deleted.[211]

121. Also, a "compromise" emerged from contacts among the Council, the European Parliament and the Commission, under which it would be possible to place on the market seal products from EU Member States, resulting from "limited" hunting carried out with the purpose of controlling seal populations.[212]

122. After these amendments had been tabled before the plenary of the European Parliament, the European Commission suggested further amendments to the substantive

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[207] *Rules of Procedure of the European Parliament*, promulgated by the European Parliament in its 7th Parliamentary Term (January 2012), Exhibit NOR-25, Rules 45 and 49; and European Parliament, Legislative Observatory, *Procedure file for 2008/0160(COD) – Trade in seal products*, available at http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2008/0160(COD) (last checked 11 October 2012) ("EU Parliament Legislative Observatory"), Exhibit NOR-26.
[208] *See* paras. 123-126 below.
[209] Rapporteur Wallis' Draft Explanatory Statement, in European Parliament, *Draft Report on the Proposal for a Regulation of the European Parliament and of the Council concerning Trade in Seals Products (COM(2008)0469 – C6-0295/2008 – 2008/0160(COD))*, 2008/0160(COD) (7 January 2009) ("EU Parliament Draft Report on Trade in Seal Products"), Exhibit JE-18, p. 33; and Rapporteur Wallis' Explanatory Statement, in European Parliament, *Report on the Proposal for a Regulation of the European Parliament and of the Council concerning Trade in Seals Products* (COM(2008)0469 – C6-0295/2008 – 2008/0160(COD)), A6-0118/2009 (5 March 2009) ("EU Parliament Final Report on Trade in Seal Products"), Exhibit JE-4, p. 29.
[210] Rapporteur Wallis' Draft Explanatory Statement, in EU Parliament Draft Report on Trade in Seal Products, Exhibit JE-18, pp. 33-34; and Rapporteur Wallis' Explanatory Statement, in EU Parliament Final Report on Trade in Seal Products, Exhibit JE-4, p. 29.
[211] *See* Draft European Parliament Legislative Resolution, in EU Parliament Final Report on Trade in Seal Products, Exhibit JE-4, p. 11, amendment 10; and Proposed Regulation, Exhibit JE-9, recital 11.
[212] *See* subsection II.C.1.c.vi below.

provisions and the recitals of the Preamble with a view to "improving the WTO robustness of the regulation". These "suggestions", which were accepted by the Parliament, are also discussed below.

ii. The analysis of the Rapporteur of IMCO, the responsible committee of the European Parliament

123. The committee responsible for the proposed legislation, IMCO, appointed as its Rapporteur MEP Diana Wallis. Rapporteur Wallis made a number of significant comments on the Proposed Regulation that merit note. First, she identified what she called "structural flaws of the Commission proposal". She observed that the proposal was "constructed on a well intentioned, but nevertheless conflicting set of policy goals".[213] On the one hand, the European Commission proposed "a ban on trade" in seal products for animal welfare reasons; on the other hand, the proposal also contains "a so-called 'Inuit exception' to the total ban".[214] Rapporteur Wallis noted that, "[a]s a result of these twin policy goals ... there is an underlying contradiction in the structure of the proposal".[215] She observed that the "Inuit exception" could "apply to a large majority of the trade [seal] products, thus defeating the animal welfare intentions of the proposal".[216]

124. Rapporteur Wallis also addressed the WTO-consistency of the "Inuit exception":

> ... given the relatively high contribution of products from Inuit hunting to Greenland's trade in seal products compared to other countries, *there is a strong argument that a proposal that maintains the Inuit exception is discriminatory towards other countries, in practice providing an advantage to a good portion of the hunt of seals in Greenland*.[217]

[213] Rapporteur Wallis' Draft Explanatory Statement, in EU Parliament Draft Report on Trade in Seal Products, Exhibit JE-18, p. 32; and Rapporteur Wallis' Explanatory Statement, in EU Parliament Final Report on Trade in Seal Products, Exhibit JE-4, p. 28.
[214] Rapporteur Wallis' Draft Explanatory Statement, in EU Parliament Draft Report on Trade in Seal Products, Exhibit JE-18, p. 32; and Rapporteur Wallis' Explanatory Statement, in EU Parliament Final Report on Trade in Seal Products, Exhibit JE-4, p. 28.
[215] Rapporteur Wallis' Draft Explanatory Statement, in EU Parliament Draft Report on Trade in Seal Products, Exhibit JE-18, pp. 32-33; and Rapporteur Wallis' Explanatory Statement, in EU Parliament Final Report on Trade in Seal Products, Exhibit JE-4, p. 28.
[216] Rapporteur Wallis' Draft Explanatory Statement, in EU Parliament Draft Report on Trade in Seal Products, Exhibit JE-18, p. 33; and Rapporteur Wallis' Explanatory Statement, in EU Parliament Final Report on Trade in Seal Products, Exhibit JE-4, p. 29.
[217] Rapporteur Wallis' Draft Explanatory Statement, in EU Parliament Draft Report on Trade in Seal Products, Exhibit JE-18, p. 33; and Rapporteur Wallis' Explanatory Statement, in EU Parliament Final Report on Trade in Seal Products, Exhibit JE-4, p. 29.

125. Rapporteur Wallis argued that:

> ... a certification or labelling scheme ensuring appropriate information of the public is sufficient to protect public morals and that a trade ban has not been proved necessary, given that alternative measures have not been appropriately tested or considered.[218]

126. In conclusion, Rapporteur Wallis proposed the following to the European Parliament:

> Your Rapporteur therefore considers that an appropriately and robustly constructed ***mandatory labelling scheme*** would have more chance of achieving both of Parliament's policy goals [*i.e.*, "those of animal welfare and of respecting and minimising the impact on Inuit communities"], allowing public opinion – through informed consumers – much more effectively to assist in guaranteeing high animal welfare standards, whilst equally assisting Inuit communities. Such a proposal would also demonstrate greater compliance with EU and International Trade Law.[219]

iii. Views of the Opinion Committees' Rapporteurs

127. As part of the legislative process, the European Parliament's ENVI and AGRI committees also offered an opinion on the draft legislation.

(1) ENVI's Rapporteur

128. The Rapporteur of ENVI, Frieda Brepoels, rejected the European Commission's proposal to allow trade in seal products that are certified as being derived from seals hunted in a manner that respects animal welfare. In her report, she made the following remarks:

> Seals are sentient mammals that can experience pain, distress, fear, and other forms of suffering. The methods used for seal hunts are often *considered* inhumane and cruel.[220]

129. Rapporteur Brepoels did not indicate which groups "consider" seal hunting methods to be inherently "inhumane and cruel"; she did not indicate whether this conclusion pertains to some or all seal hunting methods; nor did she indicate what evidence – scientific or

[218] Rapporteur Wallis' Draft Explanatory Statement, in EU Parliament Draft Report on Trade in Seal Products, Exhibit JE-18, pp. 33-34; and Rapporteur Wallis' Explanatory Statement, in EU Parliament Final Report on Trade in Seal Products, Exhibit JE-4, p. 29.
[219] Rapporteur Wallis' Draft Explanatory Statement, in EU Parliament Draft Report on Trade in Seal Products, Exhibit JE-18, p. 34; and Rapporteur Wallis' Explanatory Statement, in EU Parliament Final Report on Trade in Seal Products, Exhibit JE-4, p. 30.
[220] Opinion of ENVI, Short Justification, in EU Parliament Final Report on Trade in Seal Products, Exhibit JE-4, p. 32 (emphasis added).

otherwise – supports the conclusion that seal hunting methods are inherently "inhumane and cruel".

130. Rapporteur Brepoels gave the following justification for rejecting a legislative system allowing trade in seal products certified as being derived from seals hunted in a manner that respects animal welfare:

> Seal hunts occur in remote, widespread and poorly accessible areas, under extreme weather conditions and on unstable ice. Each year independent observers witness that these specific conditions form a severe obstacle to comply with the so-called three-step procedure (stunning [the seal], checking [consciousness], bleeding). The EFSA opinion confirms this. Moreover, the same unverifiable conditions make effective monitoring and enforcement by the responsible authorities virtually impossible. ...[221]

131. Rapporteur Brepoels did not indicate which specific seal hunts have been witnessed by "independent observers" nor did she refer to reports of their observations. She also did not identify which portions of the 2007 EFSA Scientific Opinion "confirm" her conclusion.

132. In conclusion, Rapporteur Brepoels proposed "a full ban on trade in seal products with a limited exception for Inuit communities".[222] The Rapporteur considered that this proposal is justified by: public morals; animal welfare; and environmental concerns. With respect to the latter issue, the Rapporteur asserted that the "total allowable catch (TAC) of today's commercial hunt is set above the sustainable limit".[223]

(2) AGRI's Rapporteur

133. AGRI's Rapporteur, Véronique Mathieu, expressed a different type of concern. According to her short justification,

> It is the pictures of the serial slaughter of thousands of animals that have brought an outcry from sections of the public and which are behind the ban introduced by some Member States.[224]

[221] Opinion of ENVI, Short Justification, in EU Parliament Final Report on Trade in Seal Products, Exhibit JE-4, p. 33.
[222] Opinion of ENVI, Short Justification, in EU Parliament Final Report on Trade in Seal Products, Exhibit JE-4, p. 33.
[223] Opinion of ENVI, Short Justification, in EU Parliament Final Report on Trade in Seal Products, Exhibit JE-4, p. 34.
[224] Opinion of AGRI, Short Justification, in EU Parliament Final Report on Trade in Seal Products, Exhibit JE-4, p. 57.

134. As a result, the Proposed Regulation "pose[d] a real problem" because of the "global nature of the ban" that it envisaged.[225] According to AGRI,

> By not applying the blanket ban solely to commercial hunting [...] the Commission proposal is, in some instances, liable to have the opposite effect to the one sought, which is to reduce animal suffering.[226]

135. This was because in some instances, seals are hunted "simply to eliminate them, since they are viewed as pests that endanger fish stocks".[227] The proposal's failure to envisage an exception for such situation would mean that there would be no commercial outlet for the seals shot for this reason, leading to

> hunters shooting seals without caring which part of the body had been hit or checking whether the animal was dead or not.[228]

136. Therefore, AGRI took the view that the Proposed Regulation should be amended to allow the placing on the market of seal products from seals whose killing contributed:

> to the regulated and controlled management of seal populations with a view to mitigating the damage occasioned to fish stocks, in accordance with a national plan for maintaining the balance of natural resources and protecting biodiversity.[229]

iv. Views of Member States in the Council of the European Union

137. Within the Council, some Member States raised similar concerns to those discussed within AGRI. Finland and Sweden explained that, in their respective countries, seals were killed to reduce damages to fisheries, in accordance with management plans.[230] Finland indicated that "about 500 seals [were] hunted yearly"[231] on this basis, and Sweden indicated

[225] Opinion of AGRI, Short Justification, in EU Parliament Final Report on Trade in Seal Products, Exhibit JE-4, p. 56.
[226] Opinion of AGRI, Short Justification, in EU Parliament Final Report on Trade in Seal Products, Exhibit JE-4, p. 57.
[227] Opinion of AGRI, Short Justification, in EU Parliament Final Report on Trade in Seal Products, Exhibit JE-4, p. 57.
[228] Opinion of AGRI, Short Justification, in EU Parliament Final Report on Trade in Seal Products, Exhibit JE-4, p. 57.
[229] Opinion of AGRI, Amendment 18, in EU Parliament Final Report on Trade in Seal Products, Exhibit JE-4, p. 66.
[230] Council of the European Union, *Member States' Comments on the Proposal for a Regulation Concerning Trade in Seal Products*, 5404/09 (19 January 2009), ("Member States' Comments on the Proposed Regulation (19 January 2009)"), Exhibit JE-10, pp. 16 and 18.
[231] Member States' Comments on the Proposed Regulation (19 January 2009), Exhibit JE-10, p. 16.

that the hunts in question were "small scale".[232] Therefore, both Member States proposed allowing small scale hunting for sustainable management purposes, although Sweden accepted that this option might be "entirely unviable in view of *e.g.* WTO rules".[233]

v. Opinion of the Legal Service of the Council of the European Union

138. On 17 March 2009, the Legal Service of the Council of the European Union ("EU Council") provided an opinion on the proposed legislation [*Redacted due to withdrawal of evidence*].[234] [235] [236]

139. [*Redacted due to withdrawal of evidence*] [237]

vi. Contacts between the Council, the European Parliament and the Commission

140. With a view to adoption of the EU Seal Regime with a single reading both in the European Parliament and in the Council, these two Institutions, as well as the Commission, held informal contacts on the final content of the measure. According to email accounts of these contacts, a compromise was tabled whereby seal products could be place on the EU market if derived either from hunts by indigenous communities, or:

> … from the *limited* hunting needed for the regulated, controlled and sustainable management of seal populations.[238]

141. According to the message that accompanied the suggestion, this would "widen[] the Inuit/indigenous exemption", and:

> satisfy those Member States who are concerned the Regulation would impact upon their policies for controlling seal populations and

[232] Member States' Comments on the Proposed Regulation (19 January 2009), Exhibit JE-10, p. 18.
[233] Member States' Comments on the Proposed Regulation (19 January 2009), Exhibit JE-10, p. 18.
[234] Legal Service of the Council of the European Union, *Opinion on the Proposal for a Regulation of the European Parliament and of the Council concerning Trade in Seal Products – Compatibility with WTO*, 7691/09 (17 March 2009) [*Redacted due to withdrawal of evidence*]
[235] [*Redacted due to withdrawal of evidence*]
[236] [*Redacted due to withdrawal of evidence*]
[237] [*Redacted due to withdrawal of evidence*]
[238] Message from Mr. Harbour, IMCO Coordinator, in email conversation "Compromise n Article 3" (2-8 April 2009), Exhibit NOR-27 (emphasis added).

> also, while legal compliance needs to be verified, products, resulting from limited hunting, could still be commercialised.[239]

142. Officials from Finland and Sweden indicated that the compromise would be acceptable.[240]

vii. Non-paper of the European Commission Services proposing further amendments to the draft legislation

143. On 17 April 2009, the European Commission put forward a "non-paper" on "WTO issues" regarding the proposed legislation and the amendments under consideration, outlined above. The Commission described the European Union's obligations under Articles III, V, and XI of the GATT 1994 and also the flexibilities afforded under Article XX of that Agreement.

144. After that description, the Commission continued:

> Improving the WTO robustness of the regulation would involve minimizing the likelihood of recourse to Article XX. This can be achieved by removing the transit and export bans (since they automatically require recourse to Article XX), and by making clear that the import ban is effectively the implementation of the internal ban on placing on the market at the time or point of importation (an internal ban will only bring about recourse to Article XX in the case in which it provides less favourable treatment to imports).[241]

viii. Amendments to the Proposed Regulation

145. Unfortunately, both the original proposal of the European Commission and the analysis of the responsible Rapporteur, Diana Wallis, were abandoned. As finally approved, the EU Seal Regime pays no regard to animal welfare (contrary to the Commission's proposal), does not take into account less restrictive and more suitable alternatives (contrary, among others, to the recommendations of Rapporteur Wallis). Indeed, the EU Seal Regime includes the two sets of requirements that the Legal Service of the Council had explained would likely violate the most-favoured nation and national treatment obligations of the

[239] Message from Mr. Harbour, IMCO Coordinator, in email conversation "Compromise on Article 3" (2-8 April 2009), Exhibit NOR-27.
[240] Messages from Mr. Ulf Björnholm Ottosson and Mr. Heikki Lehtinen in email conversation "Compromise on Article 3" (2-8 April 2009), Exhibit NOR-27.
[241] European Commission Services, *Non-Paper on the Proposed Legislation on Trade in Seals – WTO Issues* (17 April 2009), Exhibit NOR-28.

European Union, namely, the "Indigenous Communities Requirements" and the small-scale condition in the "Sustainable Resource Management Requirements".[242]

146. To recall, the European Commission proposed that products containing seal could be imported and marketed if: (1) hunted consistently with prescribed hunting methods that ensure respect for animal welfare, and accordingly certified; (2) hunted by an Inuit community; or (3) imported for personal use. Rapporteur Wallis took the view that permitting all trade in seal products but imposing a mandatory labelling scheme would be better suited to the measure's objectives.

147. The European Parliament and Council decided to allow trade in seal products under three alternative sets of Requirements, *none of which* is related to animal welfare. From the Proposed Regulation, the EU Seal Regime retains: the possibility of placing on the market products derived from seals hunted by an Indigenous community (the "Indigenous Communities Requirements"); and the possibility for travellers to acquire seal products abroad and bring them into the EU for their or their families' "personal use" (the Personal Use Requirements).

148. In addition, the EU Seal Regime allows the placing on the market of by-products of hunting "conducted for the sole purpose of the sustainable management of marine resources", but conditions their placing on the market on the twin requirements that placing them on the market is not profitable, and that the products in question are of a "nature and quantity" that do not suggest a commercial motive (the "Sustainable Resource Management Requirements").[243]

149. It bears repeating that none of the three sets of Requirements finally retained bears any relationship to animal welfare. The European Parliament offered the following justifications for the decision not to condition seal products' placing on the EU market on compliance with animal welfare requirements:

[242] *See* paras. 138 and **Error! Reference source not found.** above.
[243] Basic Seal Regulation, Exhibit JE-1, Article 3(1)(b).

- "regardless of whether some seals can be killed humanely or not, seals cannot be consistently killed humanely in the field environment in which commercial seal hunts occur";[244]

- "The killing methods recommended in EFSA's report and the draft regulation do not prescribe humane killing as any reputable veterinary authority would define it";[245]

- "Commercial seal hunts are inherently inhumane because humane killing methods cannot be effectively and consistently applied in the environment in which they operate. Moreover, seal hunts occur in remote locations, and are conducted by thousands of individuals over large, inaccessible areas, making effective monitoring of seal hunting impossible."[246]

ix. Adoption of the final version of the Regulation by the European Parliament and EU Council

150. On 5 May 2009, the European Parliament voted to approve the final version of the Regulation. On 27 July, the EU Council adopted the same text.[247]

151. At the time of its decision, the European Parliament issued a press release that included portions of the debate before the plenary session of the Parliament on 4 May 2009. Rapporteur Wallis is quoted as saying:

> Seals are very beautiful marine animals - in fact, I have realized during this process that they have great PR – but to some they are the rats of the sea. That is how they are perceived by many fisherman: an adult seal gets through an enormous amount of fish on a daily basis. Therefore, there will remain the need for seals to be hunted to ensure the sustainability of fisheries in some area.
>
> But what we have not done here is to regulate hunting. If people in any of our Member States wish to hunt, they can still continue to hunt. What they cannot do is take commercial gain from the results of this hunt. But it should be the case that the results of the hunt can be used, and I hope particularly that those parts of seals that can be used by the medical community will be able to be used.

[244] Draft European Parliament Legislative Resolution, in EU Parliament Final Report on Trade in Seal Products, Exhibit JE-4, p. 8, amendment 4.
[245] Draft European Parliament Legislative Resolution, in EU Parliament Final Report on Trade in Seal Products, Exhibit JE-4, p. 8, amendment 5.
[246] Draft European Parliament Legislative Resolution, in EU Parliament Final Report on Trade in Seal Products, Exhibit JE-4, pp. 10 and 22, amendments 10 and 28, respectively. *See* also *id.*, p. 46, amendment 21 (stating that "seal hunts occur in remote, widespread and poorly accessible areas, under extreme weather conditions and on unstable ice" and that these conditions "form a severe obstacle" to compliance with stunning and killing procedures).
[247] EU Parliament Legislative Observatory, Exhibit NOR-26.

152. The final quotation is taken from Avril Doyle MEP, and begins with the following statement:

> This has been a difficult debate, often emotional, with the heart ruling the head on many occasions.

153. Following the adoption in the European Parliament, the EU Council, according to the co-decision procedure, formally adopted the Seal Regulation on 27 July 2009 at the General Affairs Council. The Seal Regulation was adopted as an A-point with voting abstentions from Denmark, Romania and Austria. Denmark, Sweden, Finland and Estonia attached a declaration to the decision, with Denmark noting that it:

> doubts whether there is a market rationale and justification for the Regulation as adopted, noting in particular that sustainable seal hunting is possible with full respect for legitimate animal welfare concerns.[248]

2. Norway's engagement with the European Union during the legislative process

154. Norway engaged with the European Union throughout the legislative process that led to the adoption of the EU Seal Regime, at all levels. Norway also communicated repeatedly, including at the level of Ministers and the Prime Minister, the Norwegian views on the measures under consideration. In particular, as well as explaining the cultural, economic and environmental significance of the seal hunt to Norway,[249] and noting its commitment to high animal welfare standards, Norway repeatedly urged the European Union to pursue a multilateral solution to its concerns, rather than adopting unilateral measures. In a memorandum of 12 November 2008, Norway wrote:

> Norway is of the opinion that the setting of ethical standards where Norway is affected, should take place in an international forum where Norway fully participates, and not unilaterally by the EU. The EU can not, in our view, decide on its own what an ethically sound hunting method is, and thus set conditions for Norwegian national legislation. Norway is ready to negotiate internationally on acceptable standards. NAMMCO (the North Atlantic Marine

[248] Statement from Denmark in Council of the European Union, *Member States' Comments on the Proposal for a Regulation Concerning Trade in Seal Products*, 11152/09 ADD 1 (20 July 2009), Exhibit JE-11, p. 1.
[249] *See, e.g.*, Letter from Norwegian Prime Minister Jens Stoltenberg to the President of the European Commission José Manuel Barroso (23 March 2009) ("Letter from Prime Minister Stoltenberg"), Exhibit NOR-29, p. 1; and Memorandum from the Government of Norway to the European Union concerning EU proposal to ban trade in seal products (23 March 2009) ("Norway's Memorandum, 23 March 2009"), Exhibit NOR-30, p. 1.

> Mammals Commission) has already commenced work to codify best practices in several hunting nations, which may serve as a basis for an internationally acceptable standard for the hunting and killing of seals. Several EU Member States will participate in this work.[250]

155. In a letter to the President of the European Commission on 23 March 2009, Norwegian Prime Minister Jens Stoltenberg reiterated:

> Norway is fully prepared to negotiate an internationally acceptable standard for hunting seals in a forum where we participate.[251]

156. On 3 April 2009, Norwegian Minister of Foreign Affairs Jonas Gahr Støre again explained, writing to then European Commissioner for Trade Catherine Ashton:

> If international standards for hunting seals are to be developed, this should take place in an international forum where all affected parties, Norway included, are adequately represented, and not unilaterally determined by the EU.[252]

157. The European Union ignored these calls.

3. The EU Seal Regime as adopted

a. Marketing requirements

158. On 16 September 2009, the European Union adopted the Basic Seal Regulation". The Basic Seal Regulation sets out conditions for the placing on the market of products containing seal ("seal products"). Specifically, Articles 3(1) and 3(2) of the Basic Seal Regulation sets out three alternative sets of requirements that must be complied with to be able to place on the EU market products containing seal (the "Requirements"). If the Requirements are not complied with, products containing seal may not be placed on the EU market.

159. On 10 August 2010, pursuant to the Basic Seal Regulation, the European Commission adopted the Implementing Regulation.[253]

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[250] Memorandum from the Government of Norway to the European Union concerning EU proposal to ban trade in seal products (12 November 2008), Exhibit NOR-31, p. 2.
[251] Letter from Prime Minister Stoltenberg, Exhibit NOR-29, p. 2.
[252] Letter from Norwegian Minister of Foreign Affairs Jonas Gahr Støre to European Commissioner for Trade Catherine Ashton (3 April 2009), Exhibit NOR-32, p. 2.
[253] Implementing Regulation, Exhibit JE-2. The Commission adopted the Implementing Regulation pursuant to legislative powers conferred on that institution under Article 3(4) of the Basic Seal Regulation, pursuant to Article 202 of the EC Treaty. For conferrals of power on or after 1st December 2009, Article 291 of the Treaty on the functioning on the European Union has replaced, in modified form, the relevant portion (third indent) of Article 202 of the Treaty establishing the European Community, together with Article 290 of the Treaty on the

160. Before describing these Requirements in the next three subsections, Norway notes that *none of them bears any relationship to animal welfare*. The Preamble to the Basic Seal Regulation invokes animal welfare as a crucial reason underlying the measure.[254] However, the Regulation then establishes a system under which the permissible sale of seal products does *not* depend on whether a seal product *is derived from a seal that was killed humanely*. Rather, if one of the three sets of Requirements is met, the European Union permits the importation and sale of a seal product, *whether or not the product is derived from a seal that was killed humanely*. If none of the Requirements is met, the European Union does not allow the importation and sale of seal products in the European Union, *whether or not the seal product is derived from a seal that was killed humanely*. Norway also notes that the Basic Seal Regulation is without prejudice to the hunting of seals in the European Union, including the hunting for export, and imposes no animal welfare requirements in this regard, either. The rules it establishes are limited to the "placing on the market" of seal products.[255]

i. The Indigenous Communities Requirements

161. Under the first of the three sets of requirements, the EU Seal Regime permits seal products to be placed on the market if they "result from hunts traditionally conducted by the Inuit and other indigenous communities and contribute to their subsistence".[256] The Basic Seal Regulation defines the "Inuit" for purposes of these "Indigenous Communities Requirements" as:

> indigenous members of the Inuit homeland, namely those arctic and subarctic areas where, presently or traditionally, Inuit have aboriginal rights and interests, recognised by the Inuit as being members of their people and includes Inupiat, Yupik (Alaska), Inuit, Inuvialuit (Canada), Kalaallit (Greenland) and Yupik (Russia).[257]

162. The Implementing Regulation further details the Requirements in question:

- Other indigenous communities are "communities in independent countries who are regarded as indigenous on account of their descent from the populations which

functioning of the European Union. *See* Articles 290 and 291 of the Treaty on the Functioning of the European Union ("TFEU Articles 290 and 291"), Exhibit NOR-73. The Commission's implementing powers were exercised within the framework of the *Council Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission*, Official Journal of the European Union (1999) L 184/23 (28 June 1999) ("Council Decision 1999/468"), Exhibit NOR-74.

[254] *See* Basic Seal Regulation, Exhibit JE-1, Preamble, recitals 1, 4, 5, 9, 10 and 11.

[255] *See* also Basic Seal Regulation, Exhibit JE-1, Preamble, recital 15.

[256] Basic Seal Regulation, Exhibit JE-1, Article 3(1).

[257] Basic Seal Regulation, Exhibit JE-1, Article 2(4).

inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of the present State boundaries...";[258]

- To qualify for the exception, the Inuit or other indigenous community must have "a tradition of seal hunting in the community and in the geographical region";[259]
- The products of the hunt must be partly "used, consumed or processed" within the communities according to their traditions";[260] and
- The seal hunt must "contribute to the subsistence of the community".[261]

163. The marketing conditions impose no requirements to ensure that the seal hunts from which qualifying products are obtained comply with animal welfare requirements.

ii. The Sustainable Resource Management Requirements

164. Under a second set of requirements, 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",[262] provided they are not placed on the market for profit. Specifically, these "Sustainable Resource Management Requirements" require the following:

- The exporting country must have a "national or regional resource management plan which uses scientific population models of marine resources and applies the ecosystem-based approach",[263] and the hunt must comply with such a plan;[264]
- The seal products must be placed on the market on a non-profit basis;[265] and
- The seal products must be placed on the market in a "non-systematic way"[266], and not be of a "nature and quantity"[267] that indicates they are placed on the market for commercial reasons.

165. Thus, the EU Seal Regime requires that the seal hunt be "regulated by national law". However, it does not require that the national regulation in question impose even the most basic animal welfare requirements in respect of the treatment of seals during the hunt.

[258] Implementing Regulation, Exhibit JE-2, Article 2(1).
[259] Implementing Regulation, Exhibit JE-2, Article 3(1)(a).
[260] Implementing Regulation, Exhibit JE-2, Article 3(1)(b).
[261] Implementing Regulation, Exhibit JE-2, Article 3(1)(c).
[262] Basic Seal Regulation, Exhibit JE-1, Article 3(1)(b).
[263] Implementing Regulation, Exhibit JE-2, Article 5(1)(a).
[264] Implementing Regulation, Exhibit JE-2, Article 5(1)(b).
[265] Basic Seal Regulation, Exhibit JE-1, Article 3(2)(b); Implementing Regulation, Exhibit JE-2, Article 5(1)(c).
[266] Implementing Regulation, Exhibit JE-2, Article 5(1)(c).
[267] Basic Seal Regulation, Exhibit JE-1, Article 3(2)(b).

iii. The Personal Use Requirements

166. The EU Seal Regime also permits the occasional importation of seal products "for the personal use of travellers or their families"[268] – for example, in the words of the European Commission, as "hunting trophies".[269] Again, in detailing the "Personal Use Requirements", the Implementing Regulation is completely silent on animal welfare requirements, permitting the importation of seal products – including as "trophies" – even if they were hunted in an inhumane manner.[270]

b. Certification system

167. To enable market access pursuant to the marketing requirements just described, the EU Seal Regime envisages a certification system. For any seal product to be placed on the market, except for products imported under the Personal Use Requirements, it must be accompanied by a document certifying compliance with the conditions of the Indigenous Communities or the Sustainable Resource Management Requirements.[271] If the product is resold, any further invoice must include the number of the certification document.[272]

168. Only "recognised bodies"[273] may issue the requisite certification. The EU Seal regime does not itself establish recognized bodies, only setting out the conditions for approval of such bodies. To become a recognized body, an entity must submit a request to the European Commission, providing documentary evidence that it satisfies a number of requirements set out in the Implementing Regulation.[274] These requirements include: having "the capacity" to ascertain that the conditions in the Indigenous Communities or Sustainable Resource Management Requirements are met;[275] having the ability to monitor compliance with such requirements;[276] and operating at national or regional level.[277] Recognized bodies

[268] Basic Seal Regulation, Exhibit JE-1, Article 3(2)(a).
[269] European Commission Services, *Non-Paper on Possible Elements for a Commission Implementing Regulation*, COM-TSP 1/2 (15 January 2010), Exhibit NOR-33, Article 4(3).
[270] *See* Implementing Regulation, Exhibit JE-2, Article 4.
[271] Implementing Regulation, Exhibit JE-2, Articles 3(2) and 5(2).
[272] Implementing Regulation, Exhibit JE-2, Article 7(4).
[273] Implementing Regulation, Exhibit JE-2, Articles 6 and 7.
[274] Implementing Regulation, Exhibit JE-2, Articles 6(1) and 6(2).
[275] Implementing Regulation, Exhibit JE-2, Article 6(1)(b).
[276] Implementing Regulation, Exhibit JE-2, Article 6(1)(e).
[277] Implementing Regulation, Exhibit JE-2, Article 6(1)(h).

must periodically submit to the European Commission audit reports produced by an independent third party.[278]

169. As of 16 June 2011, the European Commission had recognized no such body. Rather, it was "in the process of analysing requests received by entities that would like to be included in a list of recognised bodies".[279] As of the date of filing this submission, Norway is not aware of the recognition of any entity for purposes of certification requirements.[280]

170. To oversee the certification system and the issuing of certification by recognized bodies, each Member State must designate a competent authority.[281] The list of such competent authorities was published on 5 September 2012.[282]

D. Animal Welfare Aspects of the Killing of Animals

171. As mentioned above, in establishing restrictions on the trade in seal products, the European Union invokes "animal welfare" as a fundamental objective, as well as consumer concerns regarding that seals are not killed in a humane manner respecting animal welfare.[283] In light of these stated objectives, Norway considers it important to describe the animal welfare considerations associated with the killing of animals. In this section, on the basis of veterinary science, Norway first outlines the steps that must be taken to ensure the humane killing of animals. Next, Norway describes the killing methods used in sealing, including an assessment of these methods from an animal welfare perspective. Finally, and for comparative purposes, Norway describes the stunning and killing methods typically used in the slaughterhouse and terrestrial wild hunting.

1. The principle of humane killing

172. The EFSA panel defines "humane killing" as "the act of killing an animal that reduces as much as possible unnecessary pain, distress and suffering i.e. that causes no avoidable

[278] Implementing Regulation, Exhibit JE-2, Article 6(3).
[279] European Commission, Answer to European Parliament Question E-004313/2011 on the "Enforcement of Regulation (EC) no 1007/2009 on Trade in Seal Products" (16 June 2011), Exhibit NOR-34.
[280] *See* para. 928 below.
[281] Implementing Regulation, Exhibit JE-2, Article 9.
[282] European Union web site, *Nominated Competent Authorities in accordance with Art. 9.1 of the Commission Regulation (EU) 737/2010*, available at http://ec.europa.eu/environment/biodiversity/animal_welfare/seals/pdf/comp_authorities.pdf (last checked 4 November 2012), Exhibit NOR-35.
[283] Basic Seal Regulation, Exhibit JE-1, Preamble, recitals 1, 4, 5, 9, 10, and 11. Indeed, animal welfare is described as an "overarching objective" of the EU Seal Regime. (*See* paras. 523, 800 and 894 below).

pain, distress, fear or other suffering."[284] Similarly, other veterinary experts consider that the basic principle of humane killing is that an animal should not feel unnecessary pain, fear or distress at the time of its death,[285] which should be "as painless as possible".[286]

173. Veterinary scientists define "pain" as "the feeling (perception) that arises when impulses from special sensory organs, known as pain receptors, reach the cerebral cortex of the brain".[287] An animal will not perceive pain "[i]f the impulses from the pain receptors are prevented from reaching the cerebral cortex of the brain by blocking the nerve paths or because the cerebral cortex is out of function".[288] This is the case, in particular, when the animal has been rendered unconscious, *i.e.*, "stunned".[289]

174. Veterinary expert Professor Siri Kristine Knudsen,[290] who has written extensively on the process of death and dying in animals, refers to that stunning has been defined as "any process which, when applied to an animal, causes immediate loss of consciousness that lasts until death".[291]

175. From an animal welfare perspective, stunning methods should "always be designed to terminate or block the functioning of the cerebral cortex as soon as possible".[292] In order to achieve that objective, experts consider that "the ideal [stunning] weapon from an animal welfare point of view should render the animal instantly unconscious and insensible to pain".[293] Professor Knudsen explains that this state of instantaneous unconsciousness, "during industrialized slaughter, is achieved by a variety of methods, including physical impact to the head, the use of gases, oxygen deprivation, or electrical current".[294]

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[284] 2007 EFSA Scientific Opinion, Exhibit JE-22, p. 117, citing Appendix B.
[285] Knudsen Statement, Exhibit NOR-5, para. 11. *See* also Danielsson Statement, Exhibit NOR-4, para. 13.
[286] E. O. Øen, *The Norwegian Sealing and the Concept of 'Humane Hunting'*, Meeting on Seals and Sealing, Brussels, Belgium (7 September 2006) ("Øen, "Norwegian Sealing""), Exhibit NOR-36, p. 1.
[287] Øen, "Norwegian Sealing", Exhibit NOR-36, p. 1.
[288] Øen, "Norwegian Sealing", Exhibit NOR-36, p. 1.
[289] S. Knudsen, "The Dying Animal: A Perspective from Veterinary Medicine", in A. Kellehear (ed.), *The Study of Dying: From Autonomy to Transformation*, (Cambridge University Press 2009) ("Knudsen, "The Dying Animal""), Exhibit NOR-37, p. 34, citing Council of the European Union, *Directive No. 93/119/EC on the Protection of Animals at the Time of Slaughter or Killing*, Official Journal of the European Communities (1993) L 340/21 (22 December 1993) ("Council Directive on Protection of Animals"), Exhibit JE-7.
[290] *See* para. 38 above.
[291] Knudsen Statement, Exhibit NOR-5, para. 16.
[292] Øen, "Norwegian Sealing", Exhibit NOR-36, p. 1.
[293] NAMMCO Expert Group, *Report on the Meeting on Best Practices in the Hunting and Killing of Seals* (24-26 February 2009), ("2009 NAMMCO Report"), Exhibit JE-24, p. 9.
[294] Knudsen Statement, Exhibit NOR-5, para. 17.

176. As a second step following stunning, bleeding out is required to ensure that the animal is killed. As Professor Knudsen explains in her expert statement, after stunning, "it is crucial that the animal is bled rapidly after stunning to ensure irreversibility and death before carcass processing (scalding, skinning, etc.)".[295] "Bleeding out is achieved by severing the major blood vessels supplying oxygenated blood to the brain resulting in brain dysfunction and ultimately death".[296] Mr. Danielsson, confirms that animals must only be bled out once unconscious, to ensure that they do not feel any pain.[297]

177. Humane killing thus involves, *first*, "bring[ing] the animal as quickly as possible into a state of unconsciousness and insensitivity to pain. As a second step, the method should lead fairly quickly to the death of the animal before it has regained consciousness."[298]

178. As discussed in greater detail below,[299] this process of stunning and bleeding is applied in the Norwegian seal hunt, and in the slaughter of farmed animals in the European Union and Norway.[300] The purpose of stunning is to ensure that the animal feels no pain when killed through bleeding out;[301] and "[t]he process of bleeding out is to ensure that death is an inevitable outcome in an animal that has not been killed outright [by stunning]".[302]

179. By contrast, this process is typically *not* applied in hunts of wild animals other than seals, including in the European Union, with the result that animals may feel pain during the process of bleeding out.[303] In some countries, including in the European Union, seal hunting

[295] Knudsen Statement, Exhibit NOR-5, para. 17.
[296] Knudsen Statement, Exhibit NOR-5, para. 18.
[297] Danielsson Statement, Exhibit NOR-4, para. 13; *See* also Moustgaard Statement, Exhibit NOR-6, paras. 10-11 and 21.
[298] Øen, "Norwegian Sealing", Exhibit NOR-36, p. 1.
[299] *See* section II.E.1 below.
[300] *See* 2007 EFSA Scientific Opinion, Exhibit JE-22, section 2.1, p. 36 (noting that stunning before slaughter is a statutory requirement in the EU and Norway). "The killing of farmed animals usually consists of a two-step process: stunning, which is intended to cause an immediate loss of consciousness lasting until death; and secondly, bleeding, which kills the animals by removing the blood supply to the brain and heart": *see id.* section 5.1, p. 68, citing the EFSA Panel on Animal Health and Welfare, *Scientific Opinion on a request from the Commission related to welfare aspects of the main systems of stunning and killing the main commercial species of animals*, The EFSA Journal (2004) 45, pp. 1-29 (the "2004 EFSA Scientific Opinion", Exhibit NOR-38). *See also* Danielsson Statement, Exhibit NOR-4, para. 13; Knudsen Statement, Exhibit NOR-5, para. 15; Øen, "Norwegian Sealing", Exhibit NOR-36, p. 1.
[301] Danielsson Statement, Exhibit NOR-4, para. 13; Moustgaard Statement, Exhibit NOR-6, paras. 22-27 (regarding, specifically, the Norwegian seal hunt).
[302] 2007 EFSA Scientific Opinion, Exhibit JE-22, section 5.1, p. 78 (noting that "it is always the intention to destroy the brain with firearms or with physical methods (*e.g.* hakapik or club)"). *See* also Danielsson Statement, Exhibit NOR-4, para. 27.
[303] Danielsson Statement, Exhibit NOR-4, para. 16; Knudsen Statement, Exhibit NOR-5, para. 19.

itself is not required to follow the stunning prior to bleeding process necessary to ensure respect for animal welfare.[304]

180. Another important consideration from an animal welfare perspective "is the stress that the animal undergoes prior to the actual killing".[305] This depends, *inter alia*, on the extent to which animals become aware of human intrusion or the killing of other animals. As will be discussed below, this is "a particular concern in operations where the killing occurs at a centralized point like in slaughterhouse operations",[306] but considerably less so where animals are killed "without noticing that they are subjected to hunting".[307]

2. Sealing methods used worldwide

181. As discussed above in section II.A, the killing of seals has traditionally taken place (and continues to take place) in various parts of the world for different reasons – whether for subsistence, cultural reasons, sustainable management of marine resources, or commercial purposes – and using a variety of weapons and killing methods. The use of a particular weapon or killing method depends on a multitude of factors including: the species and size of the animal, its hunting habitat, environmental conditions, cultural traditions, and the importance given in each jurisdiction to animal welfare.[308]

182. Depending on the region where sealing takes place, firearms, hand held harpoons, hakapiks, clubs, nets, and traps are used, alone or in combination, to hunt seals. Some of these methods (*e.g.*, firearms and hakapiks) are used to stun seals before bleeding them out, while others (*e.g.*, netting and trapping) are used to kill seals without necessarily stunning them first. In some circumstances, Canadian Inuit use hand held harpoons with a line connected to the harpoon in order to hook and secure the seal when hunting on the ice at the breathing holes; they then club or shoot the seal.[309]

183. This section will address firearms, hakapiks, clubs, netting and trapping, as well as the process of bleeding out. With respect to each, we will describe, first, the purpose and effect

[304] For example, neither Finland nor Sweden require that seals be bled out. *See* 2008 COWI Report, Exhibit JE-20, sections 3.2.6 and 3.7.6, table 3.2.5 entitled "Assessment Summary Sheet, Finland" and table 3.7.2 entitled "Assessment Summary Sheet, Sweden".
[305] Øen, "Norwegian Sealing", Exhibit NOR-36, p. 5.
[306] Øen, "Norwegian Sealing", Exhibit NOR-36, p. 5.
[307] Øen, "Norwegian Sealing", Exhibit NOR-36, p. 5.
[308] 2009 NAMMCO Report, Exhibit JE-24, p. 9. *See* also 2007 EFSA Scientific Opinion, Exhibit JE-22, section 1.3.1.1, pp. 24 and 25.
[309] *See* 2007 EFSA Scientific Opinion, Exhibit JE-22, section 1.3.1.1 p. 26

of the hunting method, including a discussion of whether it is intended as a stunning or a killing method. Next, we will provide a brief assessment of each hunting method in light of the animal welfare considerations highlighted above.

184. Before proceeding, Norway notes that in several hunts, and in particular the Norwegian seal hunt, certain hunting methods are banned on the grounds that they do not ensure animal welfare.

a. Firearms

185. Firearms are the method most commonly used to stun seals, and they are highly effective for that purpose. The countries that use firearms – Canada, Finland, Denmark (Greenland), Iceland, Namibia, Norway, Russia, Sweden, the United Kingdom and the United States – have different requirements regarding the specific weapons and ammunition that are authorized during the hunt,[310] and these specifications are often based on animal welfare considerations, as is the case for Norway.[311]

186. A rifle shot is intended to immediately stun seals and is considered to be "an effective weapon from a humane perspective" for this purpose, provided that the type of rifle and ammunition are appropriate, and the marksman proficient.[312] The advantage of a rifle shot is that it causes sufficient brain damage to the animals to effectively stun the animal.[313]

187. To render seals immediately unconscious, hunters using firearms shoot the animal in the head, using bullets that can either expand or fragment.[314] Soft-pointed expanding bullets "mushroom on impact with the head" to destroy the brain, while fragmenting bullets "break apart instantly on impact" accompanied by a transfer of kinetic energy to the seal that destroys the animal's brain.[315]

[310] *See* 2007 EFSA Scientific Opinion, Exhibit JE-22, table 2, p. 24 (summarizing the methods used to kill seals and their geographic location) and section 1.3.9.1, p. 34; and 2009 NAMMCO Report, Exhibit JE-24, pp. 15-16.
[311] *See, e.g.,* Conduct Regulation, Exhibit NOR-15, sections 5 and 7.
[312] 2007 EFSA Scientific Opinion, Exhibit JE-22, section 3.3.8, p. 45. *See* also Moustgaard Statement, Exhibit NOR-6, para. 14.
[313] 2009 NAMMCO Report, Exhibit JE-24, p. 16; Moustgaard Statement, Exhibit NOR-6, para. 16. Veterinary expert with 15-years experience as a seal hunt inspector, Anne Moustgaard, notes that "the effect of a proper shot is that the seal is brain dead, even if the seal is only considered dead after exsanguination". *Ibid.*
[314] 2007 EFSA Scientific Opinion, Exhibit JE-22, section 3.3.2, p. 43.
[315] 2007 EFSA Scientific Opinion, Exhibit JE-22, section 3.3.2, p. 43.

188. Due to the lack of elasticity of brain tissue, "missile wounds to the skull and brain are often grossly destructive".[316] Specifically, the power of the ammunition used destroys the seal's brain and causes secondary damage to the brain tissue from the splintering of cranium bones.[317] In addition, a projectile that hits the upper cervical spine or upper part of the neck, rather than the brain, also "cause[s] a devastating injury" to "vital areas of the central nervous system" or to the spinal cord, resulting in instantaneous unconsciousness.[318]

189. Experts have concluded that "[a] shot to the head or upper neck of a young seal with ammunition of appropriate power should cause immediate death because of its impact power and the large ensuing wound".[319]

190. Other factors are also relevant to the use of firearms from an animal welfare perspective. In particular, the use of modern optical sights enhances the accuracy of the weapons used,[320] and allows seals to be shot "essentially without disturbance, distress or awareness of any threats".[321]

191. In his expert report, Mr. Danielsson describes the levels of magnification and the effect of such modern optical sights, based on his extensive experience in monitoring the Norwegian seal hunt. He explains:

> When shooting from the main boat [during the Norwegian hunt], the distance of the rifle shot is usually around 30-40 meters, although it may range from about 10 to 70 meters. The hunter is effectively very close to the animal when shooting, as in my experience, telescopic lenses set at magnification levels of 2 to 4 are used.[322]

192. Mr. Danielsson also notes that, in addition to the accuracy of such weapons, they further contribute to "the complete absence of stress to the seals, up to and including the moment when they are stunned".[323] He specifies that the "hunters typically go unnoticed to

[316] VKM Report, Exhibit JE-31, section 4, p. 29.
[317] 2007 EFSA Scientific Opinion, Exhibit JE-22, section 3.3.2, p. 43.
[318] 2007 EFSA Scientific Opinion, Exhibit JE-22, section 3.3.2, p. 43. *See* also VKM Report, Exhibit JE-31, p. 32.
[319] 2007 EFSA Scientific Opinion, Exhibit JE-22, section 3.3.3, p. 43.
[320] *See* 2007 EFSA Scientific Opinion, Exhibit JE-22, section 3.3.3, p. 44. *See* also Moustgaard Statement, Exhibit NOR-6, para. 15.
[321] VKM Report, Exhibit JE-31, section 4, p. 32. *See also* Øen, "Norwegian Sealing", Exhibit NOR-36, pp. 5-6.
[322] Danielsson Statement, Exhibit NOR-4, para. 29.
[323] Danielsson Statement, Exhibit NOR-4, para. 53.

the seals"[324] and that the "hunters must approach slowly and carefully and silencers are often used on the rifles, in order not to disturb the seals".[325]

193. The 2007 EFSA Scientific Opinion similarly concludes that, "[m]odern optical sights, possibly combined with rangefinder are very accurate weapons at shooting distances relevant for seal hunting, and shots fired at the brain will usually be grossly destructive with severe bleeding and tissue damage".[326]

b. Hakapiks / slagkroks

194. The hakapik consists of a metal ferrule attached to a long wooden shaft.[327] On one end of the ferrule is a blunt projection, and on the other end is a slightly bent spike.[328] The purpose of the hakapik is to render seals immediately unconscious by a sudden and massive impact to the brain.[329]

195. The hakapik can be used as a first and/or secondary (follow up) stunning method. Under Norwegian legislation, the blunt projection of the hakapik may be used as the primary stunning method for weaned seals under one year old, although these seals are most commonly shot with a rifle. The blow with the blunt end of the hakapik is immediately followed up with a mandatory blow with the spike of the hakapik to ensure that the unconsciousness persists until the seal is dead. This second stunning method is intended to rule out any possibility of continuing consciousness.[330] Seals over one year old are stunned with a rifle shot to the brain. However, for the same reasons as above the use of the spike end of the hakapik is mandatory also for these seals. This is discussed further in section II.E below. The provisions of Norwegian legislation requiring immediate use of the spike of the hakapik reflect that this is a faster and safer approach to ensure unconsciousness, and to ensure that the unconsciousness persists, than that of testing the blink reflex. First, should the seal not have been properly stunned by the first blow or the shot, testing the blink reflex

[324] Danielsson Statement, Exhibit NOR-4, para. 33.
[325] Danielsson Statement, Exhibit NOR-4, para. 33. Silencers are also used "for the protection of the hearing of hunters, inspectors and crew". *Ibid*.
[326] 2007 EFSA Scientific Opinion, Exhibit JE-22, section 3.3.3, p. 44.
[327] 2007 EFSA Scientific Opinion, Exhibit JE-22, section 3.1.1, p. 37. *See* Conduct Regulation, Exhibit NOR-15, section 5(1).
[328] 2007 EFSA Scientific Opinion, Exhibit JE-22, section 3.1.1, p. 37.
[329] 2007 EFSA Scientific Opinion, Exhibit JE-22, section 3.1.2, p. 38.
[330] VKM Report, Exhibit JE-31, section 4, p. 34; 2007 EFSA Scientific Opinion, Exhibit JE-22, section 3.1.2, p. 38; Conduct Regulation, Exhibit NOR-15, section 7; Danielsson Statement, Exhibit NOR-4, para. 22 and 24; Moustgaard Statement, Exhibit NOR-6, para. 21.

would simply prolong the seal's suffering, while the second blow can be administered almost instantly.[331] Secondly, proper administration and the interpretation of possible reactions using the blink reflex test is sometimes problematic and may require a degree of veterinary knowledge and training that hunters may not have. With such factors in mind, the steps required under Norwegian legislation "provide a series of fail-safes that ensure that the animals do not suffer unnecessarily".[332]

196. When using the hakapik as the first stunning method, hunters hit the seal's head with the blunt end of the hakapik, "striking the bones covering the cerebral hemispheres (i.e. the parietal, frontal and occipital bones, collectively known as the calvarium) behind the eyes of the seal with the intention of causing multiple fractures and collapse (crushing) of the skull and destroying the brain".[333] A strike with the spike of the hakapik thereafter, as is required in Norway,[334] is intended to ensure unconsciousness beyond any doubt, by impacting the brain stem and causing irreversible damage.[335]

197. Hakapiks are considered to be highly effective for stunning and killing seals under one year old, because younger seals have weaker skulls than adult seals.[336] Veterinary experts consider them to be an acceptable and appropriate stunning method for younger seals from an animal welfare perspective, since "the hakapik is sufficient to achieve immediate unconsciousness of a younger seal"[337] Mr. Danielsson states that the hakapik "is accurate and has a high energy impact",[338] the rapidity of the stunning process "ensures that there is very little chance that a seal will only be wounded rather than unconscious".[339] Moreover, hakapiks cause little stress to young seals that are stunned in this way, as the seals are neither touched nor moved by humans prior to stunning, and "the animal[s] seem[] to appear unaware of what is happening to other nearby seals" and "show little apprehension of humans".[340]

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[331] *See* Knudsen Statement, Exhibit NOR-5, para. 23.
[332] Moustgaard Statement, Exhibit NOR-6, para. 9.
[333] 2007 EFSA Scientific Opinion, Exhibit JE-22, section 3.1.2, p. 38.
[334] Conduct Regulation, Exhibit NOR-15, section 7(4).
[335] *See* 2007 EFSA Scientific Opinion, Exhibit JE-22, section 3.1.2, p. 38.
[336] VKM Report, Exhibit JE-31, section 10, p. 45. *See* also Moustgaard Statement, Exhibit NOR-6, para. 23 and Danielsson Statement, Exhibit NOR-4, para. 25.
[337] Danielsson Statement, Exhibit NOR-4, para. 25.
[338] Danielsson Statement, Exhibit NOR-4, para. 48.
[339] Danielsson Statement, Exhibit NOR-4, para. 48.
[340] Øen, "Norwegian Sealing", Exhibit NOR-36, pp. 5-6; *see also* 2007 EFSA Scientific Opinion, Exhibit JE-22, section 3.1.4, p. 39; Danielsson Statment, Exhibit NOR-4, paras. 33 and 53.

198. As mentioned in paragraph 195 above, Norwegian legislation also requires the use of the hakapik as a second stunning method for adult seals that have been shot. Mr. Danielsson explains that, as a second stunning method, the use of a hakapik "ensures beyond any doubt that the animals are unconscious before they are bled out by cutting their brachial arteries and associated veins."[341]

199. The slagkrok is a modified version of the Norwegian hakapik that, like the hakapik, is considered by scientific experts to be an effective killing method.[342] In Norway, its use is only allowed on weaned seals under one year old and, as with the hakapik, "two blows are mandatory [in Norway], both directed to the skull over the brain".[343] This submission refers to them collectively as the hakapik.

c. Clubs

200. Clubs are primarily used as a stunning weapon in the Namibian hunt of Cape fur seals. Like the hakapik, they are used to "cause the collapse of the calvarium and the destruction of the brain leading to unconsciousness and death".[344] However, clubs are less effective in causing immediate unconsciousness: "the club does not have a projection which can penetrate the skull".[345] Moreover, certain types of clubs require "extra momentum" to be effective, and this "may further compromise accuracy".[346] In addition, clubs are currently used on moving seals, which poses a further problem in terms of effectiveness, which can be addressed, at times, only through additional strikes.[347]

[341] Danielsson Statement, Exhibit NOR-4, para. 50. Veterinary expert Anne Moustgaard considers that "recourse to the hakapik as a second stunning method is indispensible from an animal welfare perspective. By mandating the use of the hakapik as a second stunning method, the Norwegian regulations provide the best fail-safe that ensures that the animal is unconscious and, therefore, unable to feel any pain when being bled out". Moustgaard Statement, Exhibit NOR-6, para. 21.
[342] The slagkrok is "an iron club, 50 cm long, with a sharp spike opposite the club. It weighs a minimum of 1kg, of which at least 250g is accounted for by the head next to the spike." VKM Report, Exhibit JE-31, section 4, p. 34; *see also* 2007 EFSA Scientific Opinion, Exhibit JE-22, section 3.1.1, p. 38.
[343] VKM Report, Exhibit JE-31, section 4, p. 34.
[344] 2007 EFSA Scientific Opinion, Exhibit JE-22, section 3.2.2, p. 41.
[345] 2007 EFSA Scientific Opinion, Exhibit JE-22, section 3.2.1, p. 41.
[346] 2007 EFSA Scientific Opinion, Exhibit JE-22, section 3.2.4.1, pp. 41-42.
[347] 2007 EFSA Scientific Opinion, Exhibit JE-22, section 3.2.3.1, p. 41.

d. Netting and trapping underwater

201. Netting and trapping is a hunting method commonly used by Inuit and other indigenous hunters.[348] For animal welfare reasons, this killing method is specifically prohibited in Norway[349] and in the Canadian commercial seal hunt.[350]

202. Different types of nets and traps are used to hold seals underwater – killing them through oxygen deprivation and drowning – including: (i) nets placed in open water, (ii) nets laid across fractures in the ice, (iii) nets hanging beneath seal holes on the ice, and (iv) traps consisting of "partially submerged mesh boxes with a trap door at the top which remains at the surface", and through which seals fall into the water.[351]

203. As described in the 2007 EFSA Scientific Opinion, the "basic purpose of netting is to restrain the seal in a submerged position long enough for it to exhaust its oxygen supply and to die from asphyxiation".[352] Unlike other killing methods, "[b]rain destruction is not the intention" of netting and, because the seal is not effectively stunned as part of the process, "the welfare of animals may be negatively affected before [the seal] becom[es] unconscious".[353]

204. As a diving mammal, seals have certain physiological adaptations that allow them to spend prolonged periods of time underwater, namely: (i) "an ability to store substantial amounts of oxygen in a large blood volume with a high content of the O_2-binding hemoglobin (Hb), and in skeletal muscles that contain large concentrations of O_2-binding myoglobin (Mb)"; (ii) "an ability to economize O_2 stores, thereby making them last longer"; and (iii) an "enhanced tissue hypoxia tolerance at the cellular level".[354] These diving adaptations affect how seals are killed by netting, as the 2007 EFSA Scientific Opinion describes.[355]

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[348] *See* 2009 NAMMCO Report, Exhibit JE-24, p. 17; and 2007 EFSA Scientific Opinion, Exhibit JE-22, section 3.4.1, p. 46. *See also id.*, sections 1.3.3.1 and 1.3.3.2, p. 29, describing the netting of seals in Greenland.
[349] Conduct Regulation, Exhibit NOR-15, section 11(a); 2008 COWI Report, Exhibit JE-20, section 3.5.3 p. 66, table 3.5.4 p. 70.
[350] *See* 2008 COWI Report, Exhibit JE-20, section 3.1.2, p. 28 (noting that Canada only permits netting by Inuit hunters, above 54°N); *see also* 2007 EFSA Scientific Opinion, Exhibit JE-22, section 1.3.1.2, p. 28.
[351] 2007 EFSA Scientific Opinion, Exhibit JE-22, section 3.4.1, p. 46.
[352] 2007 EFSA Scientific Opinion, Exhibit JE-22, section 3.4.2, p. 46.
[353] 2007 EFSA Scientific Opinion, Exhibit JE-22, section 5.1.1, p. 68.
[354] 2009 NAMMCO Report, Exhibit JE-24, p. 10.
[355] 2007 EFSA Scientific Opinion, Exhibit JE-22, sections 3.4.2-3.4.8, pp. 46-48.

205. The 2007 EFSA Scientific Opinion explains that, because of these diving adaptations, "the process leading to death will last tens of minutes, perhaps even more than an hour in extreme cases".[356] EFSA concludes that "these adaptations tend to extend the time from entrapment until death and therefore potentially also the time over which stress, pain or suffering could be experienced."[357] EFSA also reports that, because seals "make quite sophisticated behavioural choices regarding when during the dive to return to the surface",[358]

> It is likely that the denial of normal behavioural choices during diving will cause stress. *In the face of declining tissue oxygen concentrations* (or increasing carbon dioxide concentrations) *and approaching asphyxiation* (and/or drowning), *initial stress is likely to lead to distress and suffering*.[359]

A study involving underwater observation found that "trapped seals eventually struggled violently".[360]

206. EFSA further explains that "[m]ost netting of seals involves the use of tangle nets", and it is "reasonably sure that entanglement will cause protracted distress and suffering extending over many minutes and, possibly, tens of minutes".[361]

207. With respect to netting, the 2007 EFSA Scientific Opinion therefore concludes that the disadvantages of this killing method are decisive, specifically noting:

> It would appear that this mode of death *holds no advantages* for diving animals such as seals from an animal welfare perspective ... *Death by suffocation of seals trapped in nets underwater is clearly protracted, and suffering likely to be prolonged*, although the exact period of stress will vary but has not been specifically studied.[362]

208. The 2007 EFSA Scientific Opinion concluded that "because of the time taken for seals to die underwater, and because seals are conscious throughout this period ... '[n]etting is

[356] 2007 EFSA Scientific Opinion, Exhibit JE-22, section 3.4.2, p. 46.
[357] 2007 EFSA Scientific Opinion, Exhibit JE-22, section 3.4.2, p. 46.
[358] 2007 EFSA Scientific Opinion, Exhibit JE-22, section 3.4.2, p. 47.
[359] 2007 EFSA Scientific Opinion, Exhibit JE-22, section 3.4.2, p. 47 (emphasis added).
[360] 2007 EFSA Scientific Opinion, Exhibit JE-22, section 3.4.2, p. 46.
[361] 2007 EFSA Scientific Opinion, Exhibit JE-22, section 3.4.2, p. 47.
[362] 2007 EFSA Scientific Opinion, Exhibit JE-22, sections 3.4.3-3.4.4, p. 47 (emphasis added).

a *very inhumane way of taking seals*'"[363] and "is *not an appropriate killing method* and so its use should be avoided".[364]

e. Bleeding out

209. The 2007 EFSA Scientific Opinion notes that, "a very important component of an efficient and humane killing process" is the requirement that animals be bled-out "as quickly as possible after they have been stunned by a blow or a shot".[365] To recall,[366] bleeding out of seals involves cutting the brachial arteries, which rapidly terminates the flow of blood to the brain.[367] Bleeding out is a mandatory component of the Norwegian seal hunt, whereas it is not required, *e.g.*, in Sweden or Finland.[368]

3. Comparison of the stunning and killing methods used in slaughterhouses and other hunts

210. The evidence suggests that a properly regulated seal hunt ensures better animal welfare than the killing of animals in a typical slaughterhouse or in the hunt of other wild game in the European Union.

211. Norway also notes that the scale of the killing of farm animals in the EU is much larger than the seal hunt: "Every year nearly 360 millions pigs, sheep, goats and cattle as well as more than 4 billions of poultry are killed in EU slaughterhouses".[369]

a. Assessment of the methods used in slaughterhouses

212. In the European Union (and Norway), slaughterhouses are legally required, for reasons of animal welfare, to apply a process of stunning followed by the bleeding out of the animal.[370]

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[363] 2007 EFSA Scientific Opinion, Exhibit JE-22, section 3.4.8, p. 48 (emphasis added).
[364] 2007 EFSA Scientific Opinion, Exhibit JE-22, Conclusions and Recommendations, section 3.4.2, p. 89 (emphasis added).
[365] 2007 EFSA Scientific Opinion, Exhibit JE-22, section 3.6.1, p. 49.
[366] *See* paragraphs 176 to 178.
[367] *See, e.g.*, Moustgaard Statement, Exhibit NOR-6, para. 24, and Knudsen Statement, Exhibit NOR-5, para. 24.
[368] 2008 COWI Report, Exhibit JE-20, section 3.2.6, table 3.2.5 and 3.7.6, table 3.7.2. In Sweden, "there are no specific legal requirements as to the chronology of the killing process": 2008 COWI Report, Exhibit JE-20, section 3.7.3, p. 83.
[369] European Commission, *Summary of Impact Assessment Report for Council Regulation on the Protection of Animals at the Time of Killing*, SEC(2008) 2425 (18 September 2008), Exhibit NOR-39, p. 2.
[370] Council Directive on Protection of Animals, Exhibit JE-7. This Directive is given effect in Norway through implementing regulations. *See also* 2007 EFSA Scientific Opinion, Exhibit JE-22, section 2.1, p. 36 (noting that stunning before slaughter is a statutory requirement in the EU and Norway); Danielsson Statement, Exhibit

213. Council Directive 93/119/EC on the protection of animals at the time of slaughter "applies to the movement, lairaging, restraint, stunning, slaughter and killing of animals bred and kept for the production of meat, skin, fur or other products and to methods of killing animals for the purpose of disease control."[371] It requires that the animals "be spared any avoidable excitement, pain or suffering during movement, lairaging, restraint, stunning, slaughter or killing".[372] As regards the killing process itself, the Directive requires that animals brought into slaughterhouses for slaughter be "stunned before slaughter or killed instantaneously ... and bled" in accordance with provisions set forth in the Directive.[373]

214. In a 2004 report on the Welfare Aspects of Animal Stunning and Killing Methods (the "2004 EFSA Scientific Report"), an EFSA panel describes the main stunning and killing methods used in commercial slaughterhouses in Europe, and sets forth recommendations to ensure that animal welfare is respected.[374] The report sets forth the criteria for complying with the regulations on humane slaughter and notes that stunning and killing methods should "induce immediate (*e.g.* < 1 sec) and unequivocal loss of consciousness and sensibility".[375] "When loss of []consciousness is not immediate, the induction of unconsciousness should be non-aversive and should not cause anxiety, pain, distress, or suffering in conscious animals".[376] The 2004 EFSA Scientific Report continues:

> Humane slaughter regulations require that the duration of unconsciousness induced by a stunning method should be distinctively (appreciably and unequivocally) longer than the sum of the time interval between the end of stun and sticking and the time it takes for blood loss to cause death ... Sticking should therefore be performed quickly after the stun and, in this process, the major blood vessels supplying oxygenated blood to the brain must be severed to ensure rapid onset of death.[377]

NOR-4, para. 13; Knudsen Statement, Exhibit NOR-5, para. 26; Øen, "Norwegian Sealing", Exhibit NOR-36, pp. 1-2.

[371] Council Directive on Protection of Animals, Exhibit JE-7, Article 1.

[372] Council Directive on Protection of Animals, Exhibit JE-7, Article 3.

[373] Council Directive on Protection of Animals, Exhibit JE-7, Article 5.

[374] *See generally* EFSA Panel on Animal Health and Welfare, *Scientific Report on a request from the Commission related to welfare aspects of animal stunning and killing methods*, Question No. EFSA-Q-2003-093, AHAW/04-027 (15 June 2004) ("2004 EFSA Scientific Report"), Exhibit NOR-40.

[375] *See* 2004 EFSA Scientific Report, Exhibit NOR-40, section 5.6, p. 26.

[376] *See* 2004 EFSA Scientific Report, Exhibit NOR-40, section 5.6, p. 27.

[377] *See* 2004 EFSA Scientific Report, Exhibit NOR-40, section 5.6, p. 27.

215. In the slaughterhouse context, different methods are used to stun different animals, including electricity, carbon dioxide, and the captive bolt gun.[378] In her expert statement, veterinarian Professor Siri Knudsen provides a detailed discussion of the stunning techniques used in the slaughterhouse context and highlights the problems that have been observed in connection with their use.[379] She explains that some stunning methods (*e.g.*, carbon dioxide and electricity) do not cause permanent loss of consciousness and run the risk that the stunned animals may regain consciousness, if they are not bled out sufficiently quickly.[380] Other methods (*e.g.*, the captive bolt gun) only cause irreversible unconsciousness to the extent they are used properly, and evidence shows that mis-stuns occur relatively frequently.[381]

216. For example, studies on the use of the penetrating captive bolt gun on cattle show that mis-stuns occur relatively frequently, with cattle regaining consciousness within one to two minutes.[382] Investigations into the slaughterhouse practice have shown that four per cent of cattle required a second shot, due to mis-stuns caused by insufficient head restraint or improper position of the operator.[383] As Professor. Knudsen explains, "[i]f the site of stunning is more than 4-6 centimetres from the ideal position, the stunning efficiency is reduced by 60 per cent".[384]

217. Similarly, studies on the use of the non-penetrating captive bolt gun on cattle have reported that "20-30 per cent of the animals needed re-stunning".[385] Among the

[378] *See generally* 2004 EFSA Scientific Report, Exhibit NOR-40. Among others, the 2004 EFSA Scientific Report discusses the disadvantages of these methods. Regarding mechanical stunning, EFSA concludes that "[m]issed firings are frequently caused by bad maintenance or improper use of the gun, and result in poor welfare of the animals". *Id.*, section 6.2.4, p. 49. With respect to electrical stunning, EFSA notes that (i) "[d]uration of unconsciousness can be short after head-only stunning"; (ii) "restraint of the animal is needed to facilitate proper application of the electrodes, which can be distressing"; and (iii) the use of "inadequate electrical parameters and/or inappropriate electrode placement would cause pain and distress". *Id.*, section 6.3.6, p. 54. With respect to carbon dioxide, EFSA states that the induction of unconsciousness using this method "appears to be aversive and distressing to animals". *Id.*, section 6.4.4, p. 57.
[379] Knudsen Statement, Exhibit NOR-5, paras. 29-34.
[380] Knudsen Statement, Exhibit NOR-5, para. 28.
[381] Knudsen, "The Dying Animal", Exhibit NOR-37, p. 37.
[382] 2004 EFSA Scientific Report, Exhibit NOR-40, section 7.1.1, p. 61; *see also* Knudsen, "The Dying Animal", Exhibit NOR-37, p. 37.
[383] 2004 EFSA Scientific Report, Exhibit NOR-40, section 7.1.1.4, p. 62.
[384] Knudsen, "The Dying Animal", Exhibit NOR-37, p. 37.
[385] Knudsen, "The Dying Animal", Exhibit NOR-37, p. 36; *see also* 2004 EFSA Scientific Report, Exhibit NOR-40, section 7.1.2, p. 63.

disadvantages of this method is the short time it takes for animals to regain consciousness.[386] The 2004 EFSA Scientific Report reports that "[t]he duration of unconsciousness is relatively short", and recommends that animals be bled out through chest sticking within twelve seconds.[387]

218. Whether pigs regain consciousness after exposure to high concentrations of carbon dioxide depends on the concentrations used and the duration of exposure.[388] Studies have shown that "after exposure to 80 per cent CO_2 for 72 seconds, 8 per cent of the pigs showed a positive corneal reflex, 9 per cent reacted to painful stimuli, and EEG recordings indicated latent consciousness".[389] Although increased concentrations and exposure time may improve the slaughter from an animal welfare perspective, "the acceptability of this method on welfare grounds will likely still be controversial because unconsciousness is not induced immediately and the animals may have to endure respiratory distress for a certain period of time (15-30 seconds in 80 per cent CO_2) prior to the loss of brain responsiveness".[390] Moreover, EFSA has itself noted that "gas mixtures do not induce immediate loss of consciousness", such that "the aversiveness of various gas mixtures and the respiratory distress occurring during the induction phase are important considerations with regard to the welfare of animals".[391]

219. With respect to electrical stunning of chickens, the 2004 EFSA Scientific Opinion reports that "live and conscious poultry can be shackled prior to stunning"; the "pain associated with pre-stun electrical shock is severe"; and the "high proportion of current applied in water bath stunners flowing through the carcass, rather than the brain, does not ensure bird welfare".[392]

220. Moreover, according to the European Commission, there is abuse of the possibility to derogate for religious reasons from the requirement to stun animals prior to slaughter, with

[386] 2004 EFSA Scientific Report, Exhibit NOR-40, section 7.1.2.4, p. 64. The 2004 EFSA Scientific Report notes that "[t]here are no animal welfare advantages compared to penetrating captive bolt stunning". *Ibid.*, section 7.1.2.3, p. 64.
[387] 2004 EFSA Scientific Report, Exhibit NOR-40, section 7.1.2.4, p. 64.
[388] 2004 EFSA Scientific Report, Exhibit NOR-40, section 9.4.1, p. 106.
[389] Knudsen, "The Dying Animal", Exhibit NOR-37, p. 38.
[390] Knudsen, "The Dying Animal", Exhibit NOR-37, p. 38.
[391] 2004 EFSA Scientific Report, Exhibit NOR-40, section 5.8.3, p. 36.
[392] 2004 EFSA Scientific Report, Exhibit NOR-40, section 5, pp. 20-21 and section 10.3.4, p. 135.

"certain slaughterhouse operators excessively us[ing] the derogation from stunning to streamline their production process."[393]

221. Regardless of the stunning method used, bleeding out is required in all European countries,[394] and is achieved "by the severing of the major blood vessels supplying oxygenated blood to the brain",[395] again with slightly different methods for different animals.[396] As Professor Knudsen explains, "[i]n the case of cattle and sheep, this is done by cutting the common carotid arteries and the external jugular veins located in the throat/neck. Poultry are either neck-cut or decapitated. Pigs are usually bled by chest sticking with incision of the major blood vessels that arise from the heart."[397] However, the process is not without error. For example, the 2004 EFSA Scientific Opinion notes that, with respect to poultry, "[c]ertain commercial neck cutting practices (*e.g.* cutting the vertebral artery at the back of the head) do not achieve rapid bleed out and death", and that "[t]he possibility of live birds entering scald tanks cannot be excluded".[398]

222. Thus, both with regard to stunning and bleeding out, there is every indication that "the slaughterhouse process is not without error",[399] with animals caused unnecessary suffering.

223. In addition to animal welfare problems posed by ineffective stunning and bleeding out, the slaughterhouse process often involves distress and other forms of suffering prior to the slaughter itself. This is due, in particular, to the transport and handling of animals prior to the slaughter.[400] "Transport to the slaughterhouse is a stress-inducing situation in pigs and cattle that may lead to subclinical changes, clinical manifestations of poor health, and to death. The level of transport-related stress in animals is affected by several factors",

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[393] European Commission, *Impact Assessment accompanying the Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the European Union Strategy for the Protection and Welfare of Animals 2012-2015*, COM (2012) 6 final, SEC(2012) 56 final (19 January 2012), (the "2012 Animal Welfare Assessment"), Exhibit JE-17, section 2.3.1, pp. 15-16.
[394] Council Directive on Protection of Animals, Exhibit JE-7, Article 5. *See also* Danielsson Statement, Exhibit NOR-4, para. 15; Knudsen Statement, Exhibit NOR-5, para. 27; 2007 EFSA Scientific Opinion, Exhibit JE-22, section 2.1, p. 36.
[395] Knudsen Statement, Exhibit NOR-5, para. 27.
[396] Knudsen Statement, Exhibit NOR-5, para. 27: describing the different bleeding out methods used with respect to poultry, pigs, cattle and sheep. *See also* Knudsen, "The Dying Animal", Exhibit NOR-37, p. 35.
[397] Knudsen Statement, Exhibit NOR-5, para. 27; Knudsen, "The Dying Animal", Exhibit NOR-37, p. 35.
[398] 2004 EFSA Scientific Report, Exhibit NOR-40, section 10.3.4, p. 135; *see also ibid.* section 10.3, p. 132 (discussing the scenarios under which live birds can enter scald tanks, including through poor neck cuts).
[399] Danielsson Statement, Exhibit NOR-4, para. 57; *see also* Knudsen Statement, Exhibit NOR-5, paras. 28 and 29-36: describing the stunning process in relation to farmed animals such as poultry, pigs, and cattle, including the risk that they are mis-stunned by electricity, carbon dioxide, and captive bolt guns.
[400] *See* 2009 NAMMCO Report, Exhibit JE-24, p. 16; Danielsson Statement, Exhibit NOR-4, para. 58; and Knudsen Statement, Exhibit NOR-5, para. 48.

including loading and unloading, stocking densities, transport distance and style of driving.[401] In a comprehensive assessment of animal welfare in the European Union, the European Commission has recently observed that:

- Transport between production sites, or from a production site to slaughter, can last several days;[402]
- During transport, "[a]nimals have little space to move. When drivers stop to rest and sleep, animals will often stay in the truck without the ability to rest";[403] and,
- "Access to water is limited, due to lack of space. Feed is rarely provided to animals during transport. Furthermore, the trucks seldom have straw or other bedding to absorb faeces and urine."[404]

224. In contrast, Mr. Danielsson observes that in the Norwegian seal hunt, "the conditions surrounding the hunt itself also ensure the complete absence of stress to the seals, up to and including the moment when they are stunned".[405]

225. As regards farmed animals, animal welfare concerns arise also before transport to slaughter – in some cases, they characterise the entire life of the farmed animal. In its recent Animal Welfare Assessment, the European Commission has found that, for example:

- Pig castration, which is permitted in the European Union, is widely used by farmers to improve the taste of the meat, and "80% of male piglets are in the EU castrated without anaesthesia";[406]
- "Female pigs (sows) used for breeding will often be kept for almost all their life in individual stalls where they do not have the freedom to move", so much so that "[b]ecause of lack of exercise, old breeding sows will have difficulties to move in

[401] M. Malena et al., "Comparison of Mortality Rates in Different Categories of Pigs and Cattle during Transport for Slaughter", *Acta Veterinaria Brno* (2007), Vol. 76, Exhibit NOR-41, p. S109. As observed by Dr. Egil Ole Øen, "[a]nimals for slaughter are subjected to a long and stressful process which can last for up to several days with long periods of transport often with deprivation of food and water, use of electric sticks, loading and reloading, temporary housings in unfamiliar surroundings, being handled and restrained before being rendered unconscious, caus[ing] considerable stress and also pain". Øen, "Norwegian Sealing", Exhibit NOR-36, p. 2. *See* also 2007 EFSA Scientific Opinion, Exhibit JE-22, section 2.1, p. 35: "During the gathering, transport, driving and lairaging of animals there will be an ***inevitable*** element of distress occurring" (emphasis added).
[402] European Commission, 2012 Animal Welfare Assessment, Exhibit JE-17, section 2.3.1, p. 15; *see* also, *ibid*., section 2.3.2, p. 19.
[403] European Commission, 2012 Animal Welfare Assessment, Exhibit JE-17, section 2.3.1, p. 15.
[404] European Commission, 2012 Animal Welfare Assessment, Exhibit JE-17, section 2.3.1, p. 15.
[405] Danielsson Statement, Exhibit NOR-4, para. 53 (noting that, when approached by the hunters, the seals are merely lying on the ice floes and are unaware of the hunters' presence).
[406] European Commission, 2012 Animal Welfare Assessment, Exhibit JE-17, section 2.3.1, p.14 and section 2.3.2, p. 17

the trucks that transport them to slaughter", and "will be sometimes dragged before slaughter";[407]

- "Beak trimming is allowed in the EU if it is performed on chicks younger than 10 days-old. However, beak trimming is as painful for young chicken as for older ones."[408]

226. Summarizing the state of affairs, the European Commission, as recently as January this year, has stated, focusing primarily on farmed animals, that "[a]nimal welfare is still at risk across EU Member States.'"[409] In addition to "some gaps in the current EU legislation",[410] the European Commission has found that enforcement is a major problem.[411]

227. In light of, among other concerns, the errors in the stunning and killing process, as well as the serious animal welfare problems presented by the transport of animals to the slaughterhouse, Mr. Danielsson considers that, compared to the "extremely regulated Norwegian seal hunt", "more animal welfare concerns exist in a typical European Union slaughterhouse".[412]

b. Assessment of the methods used in terrestrial game hunts

228. Unlike the Norwegian seal hunt and the slaughterhouse context, the techniques for terrestrial game hunting when using rifles typically involve a single-step killing method, "in which the animal usually dies from bleeding out, without first being rendered unconscious through stunning".[413]

229. In this context, wild game hunters aim for the animal's chest or thorax area, "in order to damage vital organs (heart, lungs) and large blood vessels".[414] Hitting this central area of the animal "causes a shock effect from impact and massive bleeding from the heart and

[407] European Commission, 2012 Animal Welfare Assessment, Exhibit JE-17, section 2.3.1, pp. 14-15.
[408] European Commission, 2012 Animal Welfare Assessment, Exhibit JE-17, section 2.3.2, p. 18.
[409] European Commission, 2012 Animal Welfare Assessment, Exhibit JE-17, section 2.3.1, p. 14.
[410] European Commission, 2012 Animal Welfare Assessment, Exhibit JE-17, section 2.3.2, p. 19.
[411] European Commission, 2012 Animal Welfare Assessment, Exhibit JE-17, *e.g.* section 2.3.1, p. 16 ("Key conclusions…: More enforcement is needed…"), section 2.3.2, p. 17 ("in spite of … legislation, animal welfare problems remain widespread. A main reason for this is that Member States often do not take the appropriate measures to enforce the legislation"), and section 2.3.2, p. 18 (with regard to transport, "Member States do not take sufficient measures to enforce the EU legislation and there is an economic pressure on operators not to comply with the rules. … There are … few official controls and a very low likelihood of being fined for infringements").
[412] Danielsson Statement, Exhibit NOR-4, paras. 56-58.
[413] Knudsen Statement, Exhibit NOR-5, para. 45. *See also* Danielsson Statement, Exhibit NOR-4, paras. 16 and 60; and Øen, "Norwegian Sealing", Exhibit NOR-36, p. 2.
[414] Knudsen Statement, Exhibit NOR-5, para. 37. *See also* Øen, "Norwegian Sealing", Exhibit NOR-36, p. 2.

central blood vessels. The intended result is that the animal dies in short time by shock or by bleeding out or by a combination of both".[415] This means that the hunted animal can be "conscious when dying by bleeding out".[416]

230. In light of the fact that "the two-step process of ensuring that animals are unconscious when bled is not a standard procedure",[417] the terrestrial game hunt, too, gives rise to "more animal welfare concerns" than in a regulated seal hunt, such as the one conducted in Norway.[418]

E. Animal Welfare Is a Cornerstone of Norwegian Sealing Regulations and Practices

231. Animal welfare is a cornerstone of the Norwegian legislation on the seal hunt. The Animal Welfare Act requires that animals "be treated well and be protected from danger of unnecessary stress and strains".[419] It further requires that the welfare of animals be respected in their "killing ... and handling in connection with the killing".[420]

232. These requirements apply to the seal hunt, and various provisions set out specific requirements to be complied with in order to ensure that the seal hunt conforms with the requirement to ensure animal welfare. In particular, the Conduct Regulation provides:

> During the seal hunt, the hunters must show the greatest possible consideration and use hunting methods that prevent animals from suffering unnecessarily.[421]

233. The same regulation states that:

> Animals shall be killed in such a way that they do not suffer unnecessarily.[422]

[415] Danielsson Statement, Exhibit NOR-4, para. 16.
[416] Danielsson Statement, Exhibit NOR-4, para. 11. *See also* Knudsen Statement, Exhibit NOR-5, para. 37
[417] Danielsson Statement, Exhibit NOR-4, para. 60.
[418] *See, e.g.*, Danielsson Statement, Exhibit NOR-4, para. 56.
[419] *Animal Welfare Act*, promulgated by the Norwegian Parliament as Act of 19 June 2009 No. 97, available at http://www.regjeringen.no/en/doc/laws/Acts/animal-welfare-act.html?id=571188 (last checked 12 October 2012) ("Norwegian Animal Welfare Act"), Exhibit NOR-42, section 3.
[420] Norwegian Animal Welfare Act, Exhibit NOR-42, section 12(1).
[421] Conduct Regulation, Exhibit NOR-15, section 1.
[422] Conduct Regulation, Exhibit NOR-15, section 7(1).

234. For this purpose, the Conduct Regulation "gives general and detailed provisions regarding the practice and methods of seal hunting of ice-breeding seals".[423] As explained in the VKM Report:

> The intentions and precautionary principle found in the Animal Welfare Act are implemented in the Regulation's main rule for the hunt (§1). The regulation gives detailed requirements for hunters (including courses, theoretical and practical tests) and requirements and technical specifications for weapons, ammunition, the hakapik and the slagkrok. Provisions on specific hunting restrictions and banned hunting methods are given, and several detailed provisions on killing methods and hunting procedures are also included.[424]

235. Below, Norway describes, in turn, three of the sets of requirements it lays down to ensure that animal welfare is respected during the seal hunt, namely: (i) the requirement effectively to stun the seal before bleeding out; (ii) mandatory qualifications and training for the hunt participants; and (iii) mandatory presence of a trained inspector throughout the hunt.

1. The Norwegian seal hunt mandates effective stunning prior to bleeding out to ensure humane killing

236. Consistent with the requirements of humane killing discussed in section II.D.1 above, Norwegian legislation requires seals to be rendered unconscious before they can be bled out.[425] To recall, this is the same requirement that is applied to the slaughter of farmed animals in the European Union, as well as Norway, and its purpose is to ensure that the animal is stunned rapidly and feels no pain when bled out.[426]

237. Norwegian legislation requires the use of a second stunning method to rule out any possibility, however minimal, that a seal might be conscious when bled out.[427] This is why the Norwegian seal hunt is often referred to as having, in fact, a *three*-step process for killing,

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[423] VKM Report, Exhibit JE-31, section 9, p. 44. The regulation implements the key principle of the Animal Welfare Act, provides detailed requirements for hunters, as well as requirements and technical specifications for weapons and ammunition, and sets out detailed provisions on killing methods and hunting procedures. *Ibid.*
[424] VKM Report, Exhibit JE-31, section 9, p. 44.
[425] *See* Conduct Regulation, Exhibit NOR-15, section 7; Knudsen, "The Dying Animal", Exhibit NOR-37, p. 34; Knudsen Statement, Exhibit NOR-5, paras. 22-24.
[426] Norwegian Animal Welfare Act, Exhibit NOR-42, section 9, second paragraph; Danielsson Statement, Exhibit NOR-4, paras. 22 *ff*; Knudsen Statement, Exhibit NOR-5, paras. 20 *ff*; Moustgaard Statement, Exhibit NOR-6, paras. 3 and 9 *ff* ; 2007 EFSA Scientific Opinion, Exhibit JE-22, section 2.1, p. 36; Øen, "Norwegian Sealing", Exhibit NOR-36, p. 1.
[427] *See* Conduct Regulation, Exhibit NOR-15, section 7(2)-(3); *see also* para. 195 above.

rather than just a two-step process.[428] Indeed, Norwegian sealers – who receive annual testing on the use of the authorized arms and ammunition needed to stun seals[429] – consider that:

> according to the hunting regulations, *the seal must be killed three times*. The first time is through a rifle shot, the second time through a strike by the hakapik, and the third through bleeding out.[430]

238. Swedish veterinary expert and experienced inspector of the Norwegian seal hunt, Jan Danielsson,[431] explains that the elements of the Norwegian seal hunt – *i.e.*, the use of firearms as a first stunning method for adult seals, the use of a hakapik as a first stunning method for younger seals and as the second stunning method for all seals, and the bleeding out of all stunned animals – ensure animal welfare compliance.[432] We describe this sequence below in greater detail.

239. The Norwegian regulations concerning seal hunting methods and animal welfare "are discussed with veterinary authorities and special consultants before they are enacted, and the Directorate of Fisheries employs inspectors to be permanently present on board every sealing vessel during the entire season in order to ensure compliance" with the regulations.[433]

a. Firearm or hakapik as a first stunning method

240. Turning to the specifics of the regulations themselves, the Norwegian regulations allow the hunting solely of weaned (*i.e.*, not so-called "whitecoats") and adult seals.[434] The required first stunning method to be used in the killing process for these seals depends on the age of the animal.[435]

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[428] *See* 2009 NAMMCO Report, Exhibit JE-24, p. 18; Kvernmo Statement, Exhibit NOR-7, para. 20; Moustgaard Statement, Exhibit NOR-6, para. 9; Knudsen Statement, Exhibit NOR-5, paras. 22; Landmark Statement, Exhibit NOR-8, para. 38.
[429] *See* Conduct Regulation, Exhibit NOR-15, section 3; VKM Report, Exhibit JE-31, section 4, p. 26; Kvernmo Statement, Exhibit NOR-7, para. 5; Moustgaard Statement, Exhibit NOR-6, para. 6.
[430] Kvernmo Statement, Exhibit NOR-7, para. 20 (emphasis added).
[431] *See* para. 38 above.
[432] Danielsson Statement, Exhibit NOR-4, paras. 61-63. *See* also Moustgaard Statement, Exhibit NOR-6, paras. 13-24.
[433] VKM Report, Exhibit JE-31, section 6, pp. 40-41; the 2012 Management and Participation Regulation, Exhibit NOR-13, section 10. *See* also Landmark Statement, Exhibit NOR-8, para 34.
[434] The Management and Participation Regulation, Exhibit NOR-13, section 6. *See* also Landmark Statement, Exhibit NOR-8, para. 32.
[435] *See* Conduct Regulation, Exhibit NOR-15, section 4, cf. section 2. *See* also Landmark Statement, Exhibit NOR-8, paras. 38-46.

241. For adult seals, the Norwegian regulations require that, to "render[] the animal irreversibly unconscious",[436] hunters first stun the seals with a rifle shot.[437] Seals lose sensibility instantaneously because, as Mr. Danielsson observes, "the brain is effectively destroyed".[438] Detailed requirements regarding weapons and ammunitions are set out, for animal welfare reasons, in the Conduct Regulation, in order to ensure that the animals are killed as rapidly and efficiently as possible in order to ensure animal welfare.[439]

242. The shot must be made by a firearm with a rifled barrel, using expanding bullets.[440] The rifles are inspected and approved by a gunsmith prior to commencement of the hunt.[441] They are equipped with expanding bullets that are designed to be "maximally effective".[442] In Norway, use of hakapiks is not allowed as a first method for adult seals,[443] due to the relative strength of their skulls compared to younger seals.[444]

243. For weaned seals under one year old, the Norwegian regulations provide that a hakapik may be used as the first stunning method, as an alternative to a rifle.[445] The regulations specify that, when using the hakapik as an initial stunning method, the blunt end of the tool must be used first,[446] as this "deliver[s] a high energy impact to the seal's head, which renders the animal unconscious by causing concussion and fracturing the animal's skull".[447] As noted in the next sub-section, the sharp end of the hakapik is used immediately thereafter.[448] Hunters are prohibited from striking with a hakapik anywhere but on the

[436] Danielsson Statement, Exhibit NOR-4, para. 23. *See* also Knudsen Statement, Exhibit NOR-5, para. 22; Moustgaard Statement, Exhibit NOR-6, para. 10.
[437] *See* VKM Report, Exhibit JE-31, section 4, pp. 26-27; 2009 NAMMCO Report, Exhibit JE-24, p. 18; Danielsson Statement, Exhibit NOR-4, paras. 23 and 41 *ff*; Knudsen Statement, Exhibit NOR-5, para. 22; Moustgaard Statement, Exhibit NOR-6, para. 10; Conduct Regulation, Exhibit NOR-15, sections 4 and 7.
[438] Danielsson Statement, Exhibit NOR-4, p. 23. *See* also Moustgaard Statement, Exhibit NOR-6, para. 10; and Knudsen Statement, Exhibit NOR-5, para 22.
[439] Landmark Statement, Exhibit NOR-8, para. 44.
[440] Conduct Regulation, Exhibit NOR-15, section 4; Danielsson Statement, Exhibit NOR-4, paras. 41-42; Landmark Statement, Exhibit NOR-8, paras. 3944 and 47.
[441] Conduct Regulation, Exhibit NOR-15, section 4.
[442] Danielsson Statement, Exhibit NOR-4, para. 42.
[443] *See* 2009 NAMMCO Report, Exhibit JE-24, p. 18; VKM Report, Exhibit JE-31, section 4, p. 26; Conduct Regulation, Exhibit NOR-15, section 11(c)-(d), cf. section 7(2).
[444] Danielsson Statement, Exhibit NOR-4, para. 23-25.
[445] *See* VKM Report, Exhibit JE-31, section 4, p. 27; 2009 NAMMCO Report, Exhibit JE-24, p. 18; Conduct Regulation, Exhibit NOR-15, section 7(2).
[446] *See* 2009 NAMMCO Report, Exhibit JE-24, p. 18; Conduct Regulation, Exhibit NOR-15, section 7(4).
[447] Danielsson Statement, Exhibit NOR-4, para. 25, Moustgaard Statement, Exhibit NOR-6, paras. 10-11.
[448] *See* 2009 NAMMCO Report, Exhibit JE-24, p. 18; VKM Report, Exhibit JE-31, section 4, p. 27.

skull.[449] The regulations further detail the design requirements with respect to each of these weapons[450] and require that hunters be trained on their use.[451]

b. Use of a second stunning method is mandatory for all seals

244. Next, after the seal has been stunned with a first stunning method – whether a rifle shot, or a strike with the blunt end of the hakapik in the case of weaned seals under one year old – the Norwegian regulations further require performance of a second stunning method, on all seals.[452] Specifically, each seal initially stunned must also be struck in the brain with the sharp end of the hakapik, "to penetrate the calvarium and permanently damage the central parts of the brain and the brainstem".[453]

245. According to veterinary experts, this causes "physical destruction" of the brain,[454] and ensures that the animal is brain dead, and completely and irreversibly unconscious before being bled out.[455] To avoid the possibility of error, however minimal, "this step is followed in each case, even if, for instance, the seal is already plainly dead as a result of a rifle shot or the hakapik".[456]

246. The administration of the hakapik as a second stunning method takes place on the ice as quickly as possible after the first stunning of the seal. Exceptionally, and in limited circumstances, after the seal has been shot, and only provided that there is no doubt that the seal is dead as a result of the rifle shot, the hakapik may be administered on the boat if the

[449] Danielsson Statement, Exhibit NOR-4, para. 26; Conduct Regulation, Exhibit NOR-15, sections 7(4) and 11(e).
[450] The Norwegian regulations detail the required length of the wooden shaft and the weight of the metal ferrule, and further specify that the ferrule must have both a blunt projection and a spike that must be kept sharp at all times. Conduct Regulation, Exhibit NOR-15, section 5(1). The regulation also specifies the length and weight requirements for slagkroks. *Id.* at section 5(2). To ensure that they achieve irreversible loss of consciousness, the design of hakapiks and slagkroks and the materials used are determined in accordance with the decision of the Sealing Advisory Board Committee. *Ibid.*
[451] Conduct Regulation, Exhibit NOR-15, section 3. *See* also Moustgaard Statement, Exhibit NOR-6, paras. 6 and 15.
[452] *See* Conduct Regulation, Exhibit NOR-15, section 7. Similarly, the VKM Report, Exhibit JE-31, notes that "[a]ll seals are routinely required to be struck in the brain with the spike of a hakapik before they are bled". VKM Report, Exhibit JE-31, section 4, p. 27. *See* also Moustgaard Statement, Exhibit NOR-6, paras. 10-11 and Landmark Statement, Exhibit NOR-8, paras. 38-46.
[453] Danielsson Statement, Exhibit NOR-4, para. 24. *See* also Moustgaard Statement, Exhibit NOR-6, para. 10.
[454] Knudsen Statement, Exhibit NOR-5, para. 23.
[455] VKM Report, Exhibit JE-31, section 4, p. 27; Danielsson Statement, Exhibit NOR-4, para. 27. *See* also Knudsen Statement, Exhibit NOR-5, para. 23.
[456] Danielsson Statement, Exhibit NOR-4, para. 27.

conditions make it unadvisable to walk on the ice. In such cases, the seal is taken on board with a hook, and immediately after, the hakapik is administered and the seal is bled out.[457]

c. Bleeding out is required for all seals

247. After the hakapik has been administered as a second stunning method, the unconscious seal is bled out[458] "in order to cause severe blood loss and rapid drop in blood pressure, and consequently disruption of the blood supply to the brain".[459] This is done by turning the seal onto its back, cutting from the underside of the jaw to the end of the breastbone, and then cutting the brachial arteries and associated veins, located under the seal's flippers.[460] Bleeding out is carried out in all cases in Norway, "regardless of whether the first (or second step) has caused death".[461] The NAMMCO Expert Group "recognises that bleeding out is a precautionary measure to ensure death in all animals".[462]

2. Mandatory qualifications and training of hunt participants

248. Sealing in Norway involves the participation of a captain, marksmen, and jumpers (collectively, "the hunters"), each with its own role, training requirements, and responsibilities. The captain is responsible for locating the seals, manoeuvring the ship under the particular ice and weather conditions, and monitoring the crew to ensure that they comply with the Norwegian hunting provisions.[463] Marksmen are tasked with rendering the seal unconscious through the use of a firearm, while jumpers are tasked with jumping onto the ice to administer the hakapik, bleed out the seal, and bring it back on board the boat.[464] In Norway, each hunter is responsible for compliance with the hunting provisions and is subject to criminal sanctions for breach thereof.[465]

[457] Danielsson Statement, Exhibit NOR-4, para 28.
[458] 2009 NAMMCO Report, Exhibit JE-24, p. 18; VKM Report, Exhibit JE-31, section 4, p. 27; Conduct Regulation, Exhibit NOR-15, section 7.
[459] Knudsen Statement, Exhibit NOR-5, para. 24; *see* also Moustgaard Statement, Exhibit NOR-6, para. 24; VKM Report, Exhibit JE-31, section 10, p. 46 (noting that the panel concludes that "current bleeding practice results in rapid blood loss and is an effective method for exsanguinations in the field"). *See* also Landmark Statement, Exhibit NOR-8, para. 41.
[460] Conduct Regulation, Exhibit NOR-15, section 7(6); VKM Report, Exhibit JE-31, section 4, p. 27; Danielsson Statement, Exhibit NOR-4, para. 51; Knudsen Statement, Exhibit NOR-5, para. 24; Moustgaard Statement, Exhibit NOR-6, para 12.
[461] Knudsen Statement, Exhibit NOR-5, para. 24.
[462] 2009 NAMMCO Report, Exhibit JE-24, p. 18.
[463] Kvernmo Statement, Exhibit NOR-7, para. 19; *see also* Conduct Regulation, Exhibit NOR-15, section 14.
[464] *See* Danielsson Statement, Exhibit NOR-4, paras.29-31; Kvernmo Statement, Exhibit NOR-7, paras. 21-22.
[465] Conduct Regulation, Exhibit NOR-15, sections 14 and 15.

249. For each of the hunt participants, the Norwegian legislation sets out specific training and testing requirements. Captains must attend courses held by the Directorate of Fisheries every year in which they intend to participate in the hunt.[466] Marksmen must pass a shooting proficiency test prior to every seal hunting season, with the same weapon and type of ammunition they will use during the hunt.[467] Anyone intending to participate in the seal hunt must pass a test on the use of the hakapik,[468] and participate, on a biannual basis, in training courses prescribed by the Directorate of Fisheries.[469]

250. The mandatory courses held by the Directorate of Fisheries provide training on all aspects of the hunt, including animal welfare considerations.[470] Specifically, during these courses:

> ... the hunters are provided with a handbook of relevant laws and regulations, together with instructions on hunting procedures, weapons regulations, and regulations on the stunning, killing and bleeding of the seals. During the course, professional and technical personnel lecture on laws and regulations, and anatomy and physiology relevant to understanding the behaviour of seals, and the killing and bleeding of seals. The hunters are also taught how to use the different tools correctly, the maintenance of the tools and how to take care of the products from the hunt. Those taking part in the course must pass a written exam in order to receive an annual license.[471]

251. Scientific experts have emphasized the "fundamental importance of information, education and training for seal hunters and inspectors to carry out the hunt in an appropriate manner with respect to animal welfare,"[472] and have concluded that Norway's "[c]urrent practice, which requires training programs for sealers prior to the hunt, contributes to correct performance" of the hunt.[473]

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[466] *See*, *e.g.* the 2012 Management and Participation Regulation, Exhibit NOR-13, section 3(1)(c).
[467] Conduct Regulation, Exhibit NOR-15, section 3(2).
[468] Conduct Regulation, Exhibit NOR-15, section 3, para. 3(3).
[469] *See* Conduct Regulation, Exhibit NOR-15, section 3(1), *cf*. the 2012 Management and Participation Regulation, Exhibit NOR-13, section 3(1)(c); 2007 EFSA Scientific Opinion, Exhibit JE-22, section 1.3.2.1, p. 27.
[470] VKM Report, Exhibit JE-31, section 7, pp. 41-42; Danielsson Statement, Exhibit NOR-4, paras. 17-20; Kvernmo Statement, Exhibit NOR-7, paras. 7 and 10; Moustgaard Statement, Exhibit NOR-6, paras. 4-8; *see* also Landmark Statement, Exhibit NOR-8, paras. 53-58
[471] VKM Report, Exhibit JE-31, section 7, pp. 41-42.
[472] 2009 NAMMCO Report, Exhibit JE-24, p. 19.
[473] VKM Report, Exhibit JE-31, Summary, p. 3; Danielsson Statement, Exhibit NOR-4, para. 46 (regarding testing of marksmen).

3. Permanent presence of an inspector

252. In addition, in order to ensure enforcement of the rules regulating the seal hunt, the Norwegian Directorate of Fisheries requires the permanent presence on each vessel of a seal hunt inspector as a condition for allowing the vessel to take part in the hunt.[474] The inspector is responsible for ensuring that animal welfare rules are complied with throughout the hunt.[475] The inspector is publicly employed and reports directly to the Directorate of Fisheries. His or her presence is a crucial element in enforcing the seal hunting regulations at the time that the seal hunt is conducted.

253. In addition to being qualified veterinarians,[476] inspectors must follow the mandatory training course held by the Directorate of Fisheries prior to the start of the hunt for all hunt participants, and the mandatory course that is only for inspectors.[477] They are responsible for verifying that the members of the crew have passed the required tests, obtained the proper hunting licenses, and participated in the mandatory training programmes.[478]

254. During the hunt itself, the inspector constantly monitors the hunting process to ensure that animal welfare is safeguarded.[479] As Mr. Danielsson explains, the inspectors are "typically positioned on the deck at the front of the ship", which, in his view, "provides the best vantage point for following the hunt and at the same time being in contact with the hunters. An inspector may also choose to follow the hunt from the top of the ship's mast in the crow's nest, follow the hunters in the small boats, on the ice or from the command deck, as necessary".[480] The inspectors are "constantly on the lookout for circumstances indicating that animal welfare might be prejudiced", and to this end, they "analyze a range of factors, including the location of the seals on ice, the shooting distance, the accuracy of the shooting, the time lapse between hitting and bleeding, and the time it takes to bring the seals back to the boat for further handling".[481] If they consider that a hunter's conduct is inappropriate, inspectors can instruct the hunter to correct it. The inspector also has the authority to report

[474] *See* 2012 Management and Participation Regulation, Exhibit NOR-13, section 10; and Landmark Statement, Exhibit NOR-8, paras. 34 and 50. *See* also, 2007 EFSA Scientific Opinion, Exhibit JE-22, section 1.3.2.2, p. 28.
[475] Danielsson Statement, Exhibit NOR-4, paras. 35 *ff*; Moustgaard Statement, Exhibit NOR-6, para. 25.
[476] 2007 EFSA Scientific Opinion, Exhibit JE-22, section 6, p. 74; Moustgaard Statement, Exhibit NOR-6, para. 25.
[477] Danielsson Statement, Exhibit NOR-4, para. 18; Moustgaard Statement, Exhibit NOR-6, paras. 4 and 25.
[478] *See e.g.* 2012 Management and Participation Regulation, Exhibit NOR-13, section 3. *See* also Landmark Statement, Exhibit NOR-8, para. 51.
[479] Danielsson Statement, Exhibit NOR-4, para. 36; Moustgaard Statement, Exhibit NOR-6, para. 26.
[480] Danielson Statement, Exhibit NOR-4, para. 37. *See* also Moustgaard Statement, Exhibit NOR-6, para. 26.
[481] Danielsson Statement, Exhibit NOR-4, para. 35.

the matter immediately to the Directorate of Fisheries, as needed, and has the authority to stop the hunt.[482] At the conclusion of the hunt, the inspectors submit a report to the Directorate of Fisheries that "includes questions about the location and participants of the hunt, the certifications of the hunters, the weapons and ammunition used during the hunt, the conduct of the inspection, and compliance with the Norwegian regulations".[483] As already indicated, the captain and crew are subject to sanctions, administrative and criminal, in case of non-compliance with the rules.[484]

255. With respect to Norway's regulations, the VKM Report concluded that "the presence of official inspectors surveying the seal hunt in the field, and who provide the Authorities with annual reports, contributes significantly to best practice".[485] The presence of a trained inspector during the hunt is "to ensure that animal welfare is respected and to enable immediate intervention if something should go wrong".[486]

256. There is every indication that, *vis-à-vis* the level of veterinary control involved, the Norwegian seal hunt achieves higher standards than either the slaughterhouse or wild game hunt contexts. As observed by a veterinary expert who has participated as an inspector in the seal hunt and slaughterhouse contexts:

> ... [w]hile the slaughterhouse is also veterinarian inspected, veterinarian control in a seal hunt is ... much tighter because the sealing inspector typically oversees treatment of a much smaller number of animals than an inspector in a typical livestock slaughterhouse. In addition, seal hunting takes place in the open, which enables the inspector to follow all aspects of the hunt, whereas a slaughterhouse is sub-divided into different areas ... that cannot be easily monitored.[487]

257. There is also more control in the Norwegian seal hunt than in other wild game hunts, which "involve no inspectors and no reporting requirements".[488]

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[482] VKM Report, Exhibit JE-31, section 6, p. 41; Danielsson Statement, Exhibit NOR-4, para. 39. *See* also Moustgaard Statement, Exhibit NOR-6, paras. 26-27.
[483] Danielsson Statement, Exhibit NOR-4, para. 55. *See* also Moustgaard Statement, Exhibit NOR-6, para. 30.
[484] Conduct Regulation, Exhibit NOR-15, section 15; Danielsson Statement, Exhibit NOR-4, para. 39.
[485] VKM Report, Exhibit JE-31, Recommendations, p.3.
[486] Danielsson Statement, Exhibit NOR-4, para. 54.
[487] Danielsson Statement, Exhibit NOR-4, para. 49.
[488] Danielsson Statement, Exhibit NOR-4, para. 60. *See* also Moustgaard Statement, Exhibit NOR-6, para. 26.

F. The Norwegian Regulation of the Seal Hunt Is Part of Norway's Sustainable Management of Marine Resources and Pursues the Viability of the Coastal Districts

1. Sustainable management of marine resources

258. A major tenet of the Norwegian legislation on sealing, like Norway's regulation of living marine resources in general, is their sustainable management and use in order to safeguard renewable resources for future generations. Pursuant to the Norwegian Constitution:

> Every person has a right to […] a natural environment whose productivity and diversity are maintained. Natural resources should be managed on the basis of comprehensive long-term considerations whereby this right will be safeguarded for future generations as well.[489]

259. The management of marine mammals is an integrated part of Norway's legislative and policy framework for the management of living marine resources. Norway has long traditions of harvesting from the sea, and manages sea areas six times the size of its mainland, including some of the most productive fishing grounds in the world. The main Acts relating to the management of marine resources, including marine mammals, are:

- The Act of 6 June 2008 No. 37 on the Management of Wild Living Marine Resources (the Marine Resources Act); and
- The Act of 26 March 1999 No. 15 relating to the Right to Participate in Fishing and Hunting (the Participation Act).

260. The purpose of the Marine Resources Act is to ensure sustainable and economically profitable management of wild living marine resources and of the genetic material derived from them. The Act requires that importance be given to the precautionary principle and an ecosystem approach that takes into account habitats and biodiversity.

261. The management of commercial stocks requires knowledge of their size and other characteristics, as well as knowledge of the ecosystems of which the stocks are a part. Management decisions need to be based on the best available scientific advice, and in

[489] *Constitution of the Kingdom of Norway* (17 May 1814), available at http://www.stortinget.no/en/In-English/About-the-Storting/The-Constitution/The-Constitution/ (last checked 12 October 2012) ("Norwegian Constitution"), Exhibit NOR-43, Article 110(b).

the absence of scientific consensus, the precautionary principle applies.[490] Multispecies management includes taking into account the interactions between species, such as the role of seals in the food web.

262. The purpose of the Participation Act is "to ensure a rational and sustainable use of the marine resources"[491] by adjusting the harvesting capacity of the fishing fleet to the biological resource basis, that is, ensuring that the capacity of the Norwegian fishing fleet to harvest from the sea does not exceed a limit which would pose a threat to the carrying capacity of the ecosystems supporting the harvest of wild living marine resources. Regulating access to participation also increases the profitability of the fishing fleet, thereby contributing to economic growth.

263. The management of marine mammals is an integral part of the Norwegian legislation described above.[492] Specific requirements are further detailed in regulations regarding the seal hunt, such as the 2012 Management and Participation Regulation, which lays down "provisions on hunting areas, quotas and hunting periods, [...] reporting, control and inspection."[493]

264. The 2010 COWI Report assesses whether Norway would meet the set of requirements that, for ease of reference, we refer to collectively as "Sustainable Resource Management Requirements".[494] The report acknowledges that Norwegian quotas

> … are determined *based on scientific advice* from the International Council for the Exploration of the Seas (ICES), the Northwest Atlantic Fisheries Organization (NAFO) and the Institute of Marine Research in Norway. *These recommendations are used as a basis for drawing up a multi-species management regime,* which takes into account, inter alia, how the harvesting of seals will affect other species.[495]

265. Because "the effect of seals on other species is taken into account when deciding the TAC", COWI considers that "*this indicates that the management system is building on eco-*

[490] *See* Norwegian Marine Resources Act, Exhibit NOR-44, section 7.
[491] VKM Report, Exhibit JE-31, Appendix I, p. 58 (which refers to the Participation Act as the "Fishing and Hunting Participation Act"), section 1(a).
[492] Landmark Statement, Exhibit NOR-8, paras. 1-5.
[493] VKM Report, Exhibit JE-31, section 9, p. 44 (which refers to the Regulation Relating to the Regulatory Measures, as the "Adjustment Regulation").
[494] *See* 2010 COWI Report, Exhibit JE-21, annex 4, p. 3.
[495] 2010 COWI Report, Exhibit JE-21, annex 4, p. 3 (emphasis added).

management principles."[496] COWI notes further that, "[t]he fact that the quotas are determined based on eco-system management principles indicates that products sold from the hunt concern by-product."[497]

266. COWI adds that despite this, Norwegian seal products would be unlikely to qualify under the other tenets of the Sustainable Resource Management Requirements, because they are placed on the market "systematically".[498]

2. Viability of the coastal districts

267. Historically, access to important fishing grounds have laid the economic foundation for many important settlements along the Norwegian coast. The "Marine Resources Act", states: "The purpose of this Act is to ensure […] and to promote employment and settlement in coastal communities."[499] Thus, one of the purposes of the Act governing Norway's management of living marine resources is to promote economically viable coastal communities. Both the Marine Resources Act and the Participation Act and related Norwegian legislation include provisions promoting employment and settlement in coastal communities, thereby ensuring that wealth creation benefits communities along the Norwegian coast.

268. In this vein, Norwegian legislation recognizes and takes into account the function of seal hunting as contributing to the sustainability of the settlements and workplaces in the coastal districts. Various provisions are included to make sure that the harvesting of the marine resources benefits the coastal population.

III. THE EU SEAL REGIME IS INCONSISTENT WITH ARTICLES I:1 AND III:4 OF THE GATT 1994

A. Introduction

269. The EU Seal Regime allows access to the EU market to seal products that meet the conditions of the Indigenous Communities Requirements,[500] and to seal products that meet the conditions of the Sustainable Resource Management Requirements.[501] If a seal product

[496] 2010 COWI Report, Exhibit JE-21, annex 4, p. 3 (emphasis added).
[497] 2010 COWI Report, Exhibit JE-21, annex 4, p. 3.
[498] 2010 COWI Report, Exhibit JE-21, annex 4, p. 4.
[499] Norwegian Marine Resources Act, Exhibit NOR-44, Section 1.
[500] Basic Seal Regulation, Exhibit JE-1, Article 3(1). For discussion *see* paras. 161-163 above.
[501] Basic Seal Regulation, Exhibit JE-1, Article 3(2)(b). For discussion *see* paras. 164-165 above.

does not meet these conditions, as a rule it may not be placed on the EU market. Through the Indigenous Communities and Sustainable Resource Management Requirements, the European Union discriminates in favour of seal products from certain countries, and from the European Union, over products that originate in other WTO Members, including Norway.

270. As set out in paragraphs 337 to 343 below, under the Indigenous Communities Requirements, seal products may only be placed on the EU market if they have been hunted by indigenous communities living in one of a closed list of territories from time immemorial, descending from the populations which inhabited the territory in question at the time of conquest or colonisation or the establishment of present State boundaries, and only if the products of the hunt are partly used in the territory in question. The conditions, therefore, establish explicit links between importation and the territory of production.

271. The territories with relevant indigenous communities that may benefit from market access are, based on the words of the measure and their necessary implications, Canada, the European Union, Denmark (Greenland),[502] Norway, Russia, and the United States (Alaska), to the exclusion of all other countries. In terms of their expected operation, the Indigenous Communities Requirements will operate to the predominant benefit of Denmark (Greenland).

272. Under the Sustainable Resource Management Requirements, seal products hunted for sustainable management purposes may only be placed on the EU market if, among other conditions, the products in question are placed on the market in a "non-systematic way",[503] and not for profit.[504] Virtually all seal products originating in the European Union are likely to be eligible for access to the EU market under the Sustainable Resource Management Requirements. This contrasts with the position for the overwhelming majority of seal products from Norway, which may not be imported and placed on the EU market.

273. Through the discrimination embodied in the Indigenous Communities and Sustainable Resource Management Requirements, the European Union violates its obligation to provide most-favored nation ("MFN") treatment to products from all WTO Members, and to provide

[502] The status of Greenland as a self-governing part of Denmark, but separate from the European Union, is discussed above in the factual section, paras. 71-72. For the reasons given there, because Greenland is a part of Denmark, which is a WTO Member, we refer to Greenland as "Denmark (Greenland)".
[503] Implementing Regulation, Exhibit JE-2, Article 5(1)(c); and Basic Seal Regulation, Exhibit JE-1, Article 3(2)(b).
[504] Implementing Regulation, Exhibit JE-2, Article 2(2); and Basic Seal Regulation, Exhibit JE-1, Article 3(2)(b).

national treatment to imported products, as required respectively by Articles I:1 and III:4 of the GATT 1994. Specifically, through the Indigenous Communities Requirements, the European Union provides more favourable treatment to seal products *from one of its Associated Countries and Territories* than to seal products from other sources; and through the Sustainable Resource Management Requirements, it provides more favourable treatment to seal products *from the European Union* than to imported seal products.

274. Seal products conforming to the Indigenous Communities or Sustainable Resource Management Requirements may include a wide range of goods, from seal skins to omega-3 oil capsules obtained from seals hunted by these communities. Seal products that do not conform to these Requirements may include exactly the same wide range of goods. In section III.B below, we demonstrate that seal products conforming with the Indigenous Communities Requirements are "like" non-conforming products for purposes of Article I:1 of the GATT 1994, and that seal products that do not conform with the Sustainable Resource Management Requirements are "like" conforming products for purposes of Article Article III:4 of the GATT 1994.

275. Having demonstrated that the products at issue are like, in sections III.C and III.D, respectively, we turn to substantiate the other prongs of our most-favoured nation and national treatment claims. In the context of an "as such" challenge against the EU Seal Regime, Norway focuses on "the *design, structure, and expected operation* of the measure".[505] Specifically, in section III.C, we consider the EU Seal Regime against the additional requirements of Article I:1 of the GATT 1994. We conclude that, through its design, structure and expected operation, the Regime involves *de facto* discrimination by providing market access advantages to Denmark (Greenland), while denying those same advantages to other WTO Members, including Norway. Finally, in section III.D, we consider the application of Article III:4 of the GATT 1994 to the EU Seal Regime. We conclude that the measure discriminates, through the design, structure and the expected operation of the Sustainable Resource Management Requirements, in favour of EU seal products over like products of other WTO Members, including Norway.

[505] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 130. The requirement was initially identified in the context of analyzing a claim under Article III:4 of the GATT 1994, but has subsequently been affirmed as of relevance generally for the examination of *de facto* discrimination: *see* Appellate Body Report, *US – COOL*, para. 269.

B. The Seal Products for Which the EU Seal Regime Denies Market Access are "Like" the Seal Products that the EU Seal Regime Allows on the Market

276. Norway makes claims under Articles I:1 and III:4 of the GATT 1994 in relation to discriminatory aspects of the EU Seal Regime. A central element of the analysis under both Article I:1 and Article III:4 is the establishment of "likeness". The precise contours of the term "like product" vary depending on the provision at issue. Nonetheless, "likeness" under both Article I:1 and Article III:4 is approached using a common analytical framework. Accordingly, before turning to the respective additional requirements of these provisions, Norway first shows in this section that seal products permitted to be placed on the market are, for purposes of both these provisions, "like" seal products that may not be placed on the EU market.

1. The definition of "like products" in Articles I:1 and III:4 of the GATT 1994

277. Article I:1 of the GATT 1994 reads, in relevant part:

> With respect to […] all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any WTO Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the *like* product originating in or destined for the territories of all other WTO Members. (emphasis added)

278. Article III:4 of the GATT 1994 provides:

> The products of the territory of any WTO Member imported into the territory of any other WTO Member shall be accorded treatment no less favourable than that accorded to *like* products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. [...] (emphasis added)

279. The obligations in each of these provisions relate to the treatment of products from certain WTO Members as compared to the treatment afforded to "like" products from other WTO Members or of domestic origin. The determination whether different products are

"like" is, "fundamentally, a determination about the nature and extent of a competitive relationship between the products".[506]

280. When a measure discriminates as a matter of law between products on the grounds of their origin, it may be presumed that such discrimination affects "like products". According to the panel in *Colombia – Ports of Entry*, this is because, in such a case:

> The distinction between products, which determines [the different treatment] is not based on the products *per se*, but rather on the territory from which the product arrives.[507]

281. However, when a challenged measure is alleged to discriminate as a matter of fact among products of different origins, the complainant must make a *prima facie* case that the products subject to discriminatory treatment are "like", such that they are in a relationship of actual or potential competition.[508]

282. The precise substantive contours of the term "like products" vary depending on the provision at issue.[509] However, a number of criteria have been developed that have been considered useful as "tools"[510] for applying this phrase in several provisions laying down most favoured nation and national treatment obligations.[511]

283. Three of these criteria, which were originally laid down by the Working Party on *Border Tax Adjustments*, are: (i) the products' end-uses in a given market; (ii) consumers' tastes and habits, "which change from country to country"; and (iii) the products' "properties, nature and quality".[512] A fourth criterion relates to the relevant regulatory treatment of the

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[506] Appellate Body Report, *EC – Asbestos*, para. 99; Appellate Body Report, *Philippines – Distilled Spirits*, footnote 211 to para. 119.
[507] *See* Panel Report, *Colombia – Ports of Entry*, para. 7.355 (underlining added); and Panel Report, *Indonesia – Autos*, para. 14.113 where the panel stated, in conducting an analysis of fiscal discrimination under Article III:2 of the GATT 1994, that an "origin-based distinction in respect of internal taxes suffices in itself to violate Article III:2, without the need to demonstrate the existence of actually traded 'like products' because, in that case, an imported motor vehicle alike in all aspects relevant to a likeness determination would be taxed at a higher rate simply because of its origin."
[508] The relevance of *potential* competition was addressed by the Appellate Body in *Korea – Alcoholic Beverages*: *see* Appellate Body Report, *Korea – Alcoholic Beverages*, para 124.
[509] *See, e.g.*, Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 21 where the Appellate Body stated that "likeness" is a "relative concept" whose width "must be determined by the particular provision in which the term 'like' is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply"; *see also* Appellate Body Report, *EC – Asbestos*, para. 88.
[510] Appellate Body Report, *EC – Asbestos*, para. 102.
[511] *See, e.g.*, Appellate Body Reports, *Japan – Alcoholic Beverages II*, pp. 20-23; *EC – Asbestos*, paras. 101-102; and Panel Report, *US – Tuna II (Mexico)*, para. 7.240.
[512] GATT Working Party Report, *Border Tax Adjustments*, L/3464 (2 December 1970), Exhibit NOR-45, para. 18. *See also, e.g.*, Appellate Body Report, *EC – Asbestos*, para. 101.

product, in particular the products' classification in the *Harmonised System of Tariff Classification* (HS).[513]

284. Using these criteria as "a framework for analyzing the 'likeness' of particular products",[514] "likeness" is determined on a case by case basis, based on all relevant evidence:

> These criteria […] are neither a treaty-mandated nor a closed list of criteria that will determine the legal characterization of products. More important, the adoption of a particular framework to aid in the examination of evidence does not dissolve the duty or the need to examine, in each case, *all* of the pertinent evidence.[515]

285. The type of evidence to be examined will "depend upon the particular products and the legal provisions at issue".[516] When all the relevant evidence has been examined, a determination on "likeness" must be reached based on "that evidence, as a whole".[517]

2. Seal products are "like" whether or not they meet the Indigenous Communities or Sustainable Resource Management Requirements

286. Norway claims that the EU Seal Regime "as such" violates Articles I:1 and III:4 of the GATT 1994. In this section, Norway shows that seal products are "like", whether or not they meet the terms of the Indigenous Communities or Sustainable Resource Management Requirements.

287. To recall, seal products are products that contain seal inputs. The factors through which the EU distinguishes between product that is permitted to be placed on the market, and product that is not, are related neither to the properties of the seal inputs, nor to the properties of the downstream seal products. Specifically, the regulatory distinction drawn by the European Union is based on several factors unrelated to the seal inputs and seal products. *First*, in relation to the Indigenous Communities Requirements, the factors include, in summary form: (1) the indigenous character of the community to which the hunters belong; (2) the fact that hunting takes place in a particular region where that community has a seal hunting tradition; and (3) the fact that the products of the hunt are at least partly used locally

[513] *See, e.g.,* Appellate Body Report, *Japan – Alcoholic Beverages II*, DSR 1996:I, pp. 21-22; and Appellate Body Report, *EC – Asbestos*, para. 101. *See also, e.g.*, Appellate Body Report, *EC – Poultry*, para. 100.
[514] Appellate Body Report, *EC – Asbestos*, para. 102.
[515] Appellate Body Report, *EC – Asbestos*, para. 102.
[516] Appellate Body Report, *EC – Asbestos*, para. 103.
[517] Appellate Body Report, *EC – Asbestos*, para. 103.

in the community. *Secondly*, in relation to the Sustainable Resource Management Requirements, the factors include, in summary form: (1) the purpose of the hunt, which must consist, exclusively, in the sustainable management of marine resources; (2) the placing on the market of the products of the hunt "in a non-systematic way";[518] and (3) the placing on the market of the seal products at a price no higher than the costs borne by the hunter, reduced by any subsidy received.

288. In this section, in relation to both the Indigenous Communities and Sustainable Resource Management Requirements, Norway shows that conforming seal products are "like" non-conforming seal products.

a. Neither the Indigenous Communities Requirements nor the Sustainable Resource Management Requirements distinguish between conforming and non-conforming seal products based on the characteristics of the seals or seal inputs

289. The regulatory distinctions drawn by the European Union are not premised on the characteristics of the seals from which conforming seal products are derived. The measure does not, for example, provide that seal products must be derived from certain types or species of seal. Rather, conforming seal products may be derived from *any* seal and *any* seal species.

290. In addition, the regulatory distinction drawn by the European Union is not based on the characteristics of the *seal inputs* used to produce conforming seal products. Seal inputs may be, for example, raw or tanned seal fur skin, raw or refined seal oil, or seal meat. Under both the Indigenous Communities and Sustainable Resource Management Requirements, the characteristics of these intermediate seal products make no difference whatsoever to whether either the intermediate seal product itself, or a further processed seal product produced with that intermediate product, conforms to those requirements.

291. It is noteworthy that conforming and non-conforming products all possess the defining regulatory criterion that the European Union has chosen under the EU Seal Regime, namely that the product is a "seal product" because it is derived or obtained from a seal.[519] The fact that the European Union has adopted a single measure to regulate when an imported product may or may not contain seal inputs, and thereby be a "seal product", is regulatory

[518] Implementing Regulation, Exhibit JE-2, Article 5(1)(c).
[519] Article 2(2) of the Basic Seal Regulation, Exhibit JE-1.

treatment that tends to confirm seal products are "like", and would be in a competitive relationship, but for the impact of the measure. Specifically, the Basic Seal Regulation applies to *all* "seal products", defined as:

> all products, either processed or unprocessed, derived or obtained from seals, including meat, oil, blubber, organs, raw fur skins and fur skins, tanned or dressed, including fur skins assembled in plates, crosses and similar forms, and articles made from fur skins.[520]

292. This definition includes seal products derived from any seal, whether or not hunted by an indigenous community or as part of a sustainable resource management plan.

293. In sum, under both the Indigenous Communities and Sustainable Resource Management Requirements, conforming and non-conforming seal products all contain seal, *i.e.*, they bear the identical product characteristic that the EU has chosen to regulate.

b. Conforming seal products are "like" non-conforming seal products

294. The regulatory distinction that the European Union draws between conforming indigenous and non-conforming *seal products* is also unrelated to the seal products themselves.

295. Whilst noting that "likeness" is a "relative concept" whose width "must be determined by the particular provision" at issue,[521] Norway submits that seal products conforming to either the Indigenous Communities or Sustainable Resource Management Requirements, and those that do not conform to the same requirements, are more than sufficiently similar and competitive to be considered "like" for purposes of both Articles I:1 and III:4 of the GATT 1994. Specifically, each type of conforming seal product is "like" the same type of non-conforming seal product. In this section, Norway elaborates on this point by reference to: physical properties, nature and quality; end uses; consumers' tastes and habits; and tariff classification.

[520] Basic Seal Regulation Exhibit JE-1, Article 2(2).
[521] Appellate Body Report, *Japan – Alcoholic Beverages II*, DSR 1996:1, p. 114.

296. As the European Union has recognized, the EU Seal Regime potentially affects a very large number of products.[522] For practical reasons, Norway has selected examples for purposes of this submission, which by no means exhaust the universe of seal products affected by the Regulation. Examples of seal products include:

- Raw or refined seal oil;
- Omega-3 capsules containing seal oil;
- Raw or tanned seal fur skin;
- Boots with seal fur skin;
- Slippers with seal fur skin; and
- Seal meat.

297. Norway briefly describes each of these products, showing that they are "like" whether or not derived from seals hunted by indigenous people consistent with the Indigenous Communities Requirements and whether or not they are derived from seals hunted and marketed consistent with the Sustainable Resource Management Requirements.

i. Seal oil

298. Seal oil presents itself as raw or refined oil, depending on its stage of production. Norway considers each in turn.

(1) Raw seal oil

299. In terms of physical properties, raw seal oil is derived from the blubber of seals,[523] and is principally composed of three omega-3 poly-unsaturated fatty acids (omega-3 oils), namely DPA, DHA, and EPA.[524] These chemical characteristics – which are also the reason for the value of seal oil to human health[525] – are identical irrespective of whether the product

[522] The Commission's "indicative" list of "those CN codes with the greatest likelihood of covering products subject to the prohibition in Council Regulation (EC) No 1007/2009" runs over eight pages. Moreover, the Commission notes that "[p]roducts covered by a far larger number of CN codes are potentially affected by Council Regulation (EC) No 1007/2009". European Commission, *Technical Guidance Note Setting out an Indicative List of the Codes of the Combined Nomenclature that May Cover Prohibited Seal Products*, Official Journal of the European Union (2010) C 356/02 (29 December 2010) ("Technical Guidance Note"), Exhibit JE-3, pp. 44-51.

[523] Blubber comprises about 25 per cent of the weight of a seal. RUBIN Report, Exhibit JE-23, p. 41.

[524] *See, e.g.*, RUBIN Report, Exhibit JE-23, p. 84. Seal oil also contains omega-6 oils.

[525] The use of refined seal oil in food (as a food supplement) is motivated by the beneficial health effects conferred by the consumption of omega-3 fatty acids. These beneficial effects are extensive, but may be

meets the conditions of the Indigenous Communities or Sustainable Resource Management Requirements. In either case, raw seal oil also contains impurities that make it unsuitable for human or animal consumption in its crude form.[526]

300. In terms of end-uses, raw seal oil is primarily destined for further processing into refined oil in order to be made fit for human or animal consumption. In other words, raw seal oil is essentially an intermediate product used as an input to produce downstream products. Plainly, the end-uses of raw seal oil do not change depending on factors such as the origin of the seal hunter, or whether the oil is marketed in line with the conditions of the Sustainable Resource Management Requirements.

301. As regards consumers' tastes and habits, the Appellate Body stated that, when conducting an analysis of this "likeness" criterion with respect to an input product, the relevant consumer is the *manufacturer* that incorporates the input into another product.[527] As evidenced by the statement from Fortuna Oils AS presented in Exhibit NOR-46, producers of refined seal oil do not differentiate between raw seal oil on the basis of whether the raw oil is derived from a seal hunted by an indigenous community, or whether the oil is marketed in line with the conditions of the Sustainable Resource Management Requirements.[528]

302. Both conforming and non-conforming raw oil fall under the same tariff classification, namely HS subheading 150430.[529] Again, the tariff classification of raw seal oil does not change depending on whether the raw oil is derived from a seal hunted by an indigenous community, or whether the oil is marketed in line with the conditions of the Sustainable Resource Management Requirements.

(2) Refined seal oil

303. Refined seal oil is processed from raw seal oil. The refining process removes or attenuates the undesirable physical properties of the oil – notably its impurities, odour, and

summarised as follows: "Generally speaking, DHA is important for structures/functions in cell membranes while EPA has an important regulatory function in the body, in relation, for example, to blood pressure and the immune system. EPA/DHA plays a role in heart and brain functions. DPA may perhaps have some additional effects in relation to cartilage and joint functions". RUBIN Report, Exhibit JE-23, p. 15.

[526] RUBIN Report, Exhibit JE-23, p. 76.

[527] *See* Appellate Body Report, *EC – Asbestos*, para. 122.

[528] Statement of Ms. Linn Elice Kanestrøm on behalf of Fortuna Oils AS (31 October 2012) ("Fortuna Statement"), Exhibit NOR-46.

[529] Harmonized System, heading 1504, *Fats and oils and their fractions, of fish or marine mammals, whether or not refined, but not chemically modified* (extracted 14 October 2012), ("HS heading 1504"), Exhibit JE-33.

taste – in order to make it suitable for human or animal consumption. The refining process is identical, irrespective of whether the seals from which the oil is derived were hunted by an indigenous community or comply with the conditions of the Sustainable Resource Management Requirements. As a result, the properties of refined seal oil that conforms to the Indigenous Communities and Sustainable Resource Management Requirements are identical to those of non-conforming refined seal oil.

304. In its fluid form, refined seal oil is used as a finished product for the following purposes: as a dietary supplement for human consumption;[530] for medical purposes;[531] and as feed or fuel oil. Alternatively, refined seal oil can be an intermediate product used as an input in the production of omega-3 capsules, which are considered below. The ability of refined seal oil to serve these different uses is not changed by factors such as the origin of the hunter or whether the oil is marketed in line with the conditions of the Sustainable Resource Management Requirements.

305. With respect to consumers' tastes and habits, the relevant consumers to be taken into account vary depending on whether refined seal oil is marketed as a finished consumer good (*e.g.*, as a food or dietary supplement) or as an intermediate product to serve as an input for a downstream seal product (*e.g.*, in the production of omega-3 capsules). We consider each in turn.

306. With respect to refined seal oil marketed as a *finished consumer good*, Norway notes that, in the EU market prior to the EU Seal Regime, no distinction was made between those seal products derived from seals hunted by indigenous communities or hunted for sustainable resource management purposes, and those that were not. As we have noted, in sourcing raw seal oil from which to process refined seal oil, manufacturers did not distinguish between seal oils based on either the indigenous origin of the hunter of the seal or on factors such as whether they are derived from products of sustainable management hunting. The statement of Fortuna, presented in Exhibit NOR-46, testifies that the company's decision-making with regard to what raw seal oil to buy "will depend largely on which considerations our customers find important". Fortuna markets refined oil in bulk, encapsulated oil in bulk and encapsulated oil delivered in consumer packaging. Its customers are downstream users,

[530] RUBIN Report, Exhibit JE-23, pp. 18 and 80.
[531] RUBIN Report, Exhibit JE-23, p. 18.

including manufacturers and retailers.[532] Fortuna confirms that the "primary interest" of their customers when purchasing "is the quality of the products". This meant distinctions drawn by the Indigenous Communities and Sustainable Resource Management Requirements "had no impact in the marketplace. What mattered was the quality of the products, in particular the freshness and the nutritional value of the products".[533]

307. With respect to refined seal oil sold as an *intermediate product* for encapsulation, the statement of Fortuna Oils AS shows that manufacturers and retailers of omega-3 capsules have never differentiated between products containing refined seal oil on the basis of whether the oil was derived from a seal caught by an indigenous community, or on the basis of whether it was derived from sustainable management hunting and marketed non-systematically and on a non-commercial basis.[534] In other words, in terms of tastes and habits, consumers treated the products as perfectly substitutable prior to the introduction of the EU Seal Regime.

308. Finally, as for tariff classification, both conforming and non-conforming refined seal oil are classified in HS subheading 150430.[535] When refined seal oil is further processed to produce chemically modified oil products (*e.g.*, by adding an aroma), the tariff classification may change. However, the tariff classification does not depend on factors such as the origin of the hunter, or the purpose of the hunt, but on the physical characteristics of the oil products, such as the addition of an aroma.

309. Thus, a review of the evidence related to "likeness", taken as a whole, leads to the conclusion that seal oil – raw or refined – that conforms to the Indigenous Communities or Sustainable Resource Management Requirements is "like" seal oil – raw or refined – that does not conform to those Requirements.

ii. Omega-3 capsules containing seal oil

310. In terms of physical properties, the principal content of omega-3 seal oil capsules is refined seal oil, which is rich in chemicals that confer the health benefits (DPA, DHA and

[532] Fortuna Statement, Exhibit NOR-46, para. 3.
[533] Fortuna Statement, Exhibit NOR-46, paras. 8-12.
[534] Fortuna Statement, Exhibit NOR-46, paras. 7-12.
[535] HS heading 1504, Exhibit JE-33.

EPA). The capsules also contain additives, such as gelatine, purified water and glycerol.[536] The seal oil is encapsulated for human consumption, typically in gelatine capsules, among other reasons to avoid the taste of the liquid oil.[537] The physical properties of omega-3 seal oil capsules do not change in any way depending on the regulatory conditions in the Indigenous Communities or Sustainable Resource Management Requirements, such as the origin of the hunter, the sustainable resource management purpose of the hunt, or the non-systematic marketing of the seal product.

311. The end use of omega-3 oil capsules is as a food or medical supplement, because of the health benefits briefly touched upon above.[538] The origin of the hunter, the purpose of the hunt, the non-systematic marketing of the seal product, and the other regulatory conditions in the Indigenous Communities and Sustainable Resource Management Requirements, have no bearing on these health benefits or the end use made of the capsules.

312. The statement from Fortuna Oils AS, one of the main manufacturers and wholesalers of omega-3 capsules, presented in Exhibit NOR-46, shows that, in terms of tastes and preferences, retailers and consumers do not have regard to considerations such as those reflected in the Indigenous Communities and Sustainable Resource Management Requirements and do not distinguish between omega-3 capsules on the basis of such considerations.[539] Rather, key concerns for Fortuna, reflecting the "primary interest" of downstream customers in the quality of the products, is the "freshness" of the oil.[540] To recall, in sourcing raw seal oil from which to process refined seal oil used to produce capsules, manufacturers did not distinguish between seal oils based on the indigenous origin of the hunter of the seal or whether the oil was marketed in line with the conditions of the Sustainable Resource Management Requirements.

313. Norway also notes that producers of omega-3 oil capsules that could have laid claim to "sustainable management" harvesting, made no reference to such criterion in their

[536] *See, e.g.,* the composition of capsules of Arctic Omega-3. Arctic Omega-3 web site, *Arctic Omega-3 Seal Oil from Norway*, available at http://www.norwegiansealoil.com/ (last checked 15 October 2012) ("Arctic Omega-3 web site"), Exhibit NOR-47.
[537] RUBIN Report, Exhibit JE-23, p. 80. *See* also the images of omega-3 seal oil capsules on the Arctic Omega-3 web site, Exhibit NOR-47.
[538] *See* above, note 525.
[539] Fortuna Statement, Exhibit NOR-46, paras. 9-11.
[540] Fortuna Statement, Exhibit NOR-46, paras. 8-9.

packaging, confirming that they held no expectation that such a claim would make any difference in the mind of the consumers.[541]

314. This lack of differentiation reflects consumers' indifference, prior to adoption of the EU measure, with respect to the indigenous or sustainable resource management origin of the oil used in omega-3 capsules, and shows that conforming and non-conforming products are regarded as interchangeable.

315. The tariff classification of the omega-3 oil capsules depends on whether and how the seal oil has been chemically modified.[542] Once again, this classification has nothing whatsoever to do with factors such as the origin of the seal hunter, the purpose for which the hunt was conducted, or the non-systematic marketing of seal product incorporated into the omega-3 capsule.

316. In light of the evidence highlighted above, taken as a whole, omega-3 capsules conforming to the Indigenous Communities or the Sustainable Resource Management Requirements are "like" those that do not conform to those requirements.

iii. Seal fur skin

317. In terms of physical properties, seal fur skin is physically resistant and durable. The fur is characterized by short hairs, which are tough rather than soft.[543] Further physical characteristics vary depending on whether fur skin presents itself as raw or tanned. Because they are subject to bacterial decay, raw fur skins are unfit for direct use by consumers. By contrast, tanned fur skins are durable and resistant to decomposition, and can be used by consumers. In addition to their natural colour, seal fur skins are commonly dyed in a variety of colours in order to meet market demands. Again, the factors reflected in the regulatory

[541] *See* the pictures of packaging of omega-3 oil capsules for the Norwegian, Finnish and Swedish markets in Exhibit NOR-49.
[542] The relevant HS headings are 1504, 1516, 1517 and 2106, respectively. *E.g.*, if the seal oil is not chemically modified, the capsules are classified under HS subheading 150430. HS heading 1504, Exhibit JE-33; Harmonized System, heading 1516, *Animal or vegetable fats and oils and their fractions, partly or wholly hydrogenated, inter-esterified, re-esterified or eladinised, whether or not refined, but not further prepared* (extracted 4 November 2012), ("HS heading 1516"), Exhibit JE-34. Harmonized System, heading 1517, *Margarine; edible mixture or preparations of animal or vegetable fats or oils or of fractions of different fats or oils of this chapter, other than edible fats or oils or their fractions of heading 1516* (extracted 4 November 2012), ("HS heading 1517"), Exhibit JE-35. Harmonized System, heading 2106, *Food preparations not elsewhere specified or included* (extracted 7 August 2012), ("HS heading 2106"), Exhibit JE-36.
[543] For pictures of seal fur skins, *see, e.g.*, North Atlantic Fur Group Canada web site, *Seal skins*, available at http://www.nafgcanada.com/NAFG_Canada/Products/Pages/Seal_skins.html (last checked 4 November 2012), ("North Atlantic Fur Group website"), Exhibit JE-43.

conditions of the Indigenous Communities and Sustainable Resource Management Requirements – such as the origin of the hunter, the sustainable resource management purpose of the hunt, and the non-systematic marketing of the seal product – have no bearing on these properties.

318. As regards end uses, raw fur skins are an intermediate product that serve as a basic input product typically destined for tanning. Tanned fur skins are also an intermediate input product used to manufacture articles of clothing,[544] such as boots, and clothing accessories, such hats and the sporrans that adorn kilts.[545] These end uses do not alter depending on compliance with the conditions embodied in the Indigenous Communities or Sustainable Resource Management Requirements.[546]

319. From the perspective of consumers' tastes and habits, the evidence shows that, prior to the introduction of the EU Seal Regime, tanners and manufacturers of clothing or accessories made from seal fur skin did not distinguish between fur skins that would meet the conditions of the Indigenous Communities or Sustainable Resource Management Requirements, on the one hand, and fur skins that would not, on the other.[547] Rather, purchasing decisions were based on factors such as quality, stability in supply, accessibility (logistics), and price.[548]

320. As we also outline below, in relation to seal skin footwear, the fact that downstream consumers attribute weight to the quality of the skin embodied in the final product means that upstream manufacturers made purchasing decisions in relation to skins "mainly conditioned on the *quality* of the seal skin", without regard to factors such as those relevant for the Indigenous Communities and Sustainable Resource Management Requirements.[549]

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[544] *See*, *e.g.*, 2008 COWI Report, Exhibit JE-20, pp. 106 – 107.
[545] For example, Scottish sporrans are typically lined with seal fur. Scott & Son web site, *Stag Head Semi Dress Sporran*, available at http://www.scotweb.co.uk/mens-wear/sporrans-and-kilt-accessories/ (last checked 20 June 2010), Exhibit NOR-50; and Z. Keown, "Seal skin ban halts sale of traditional sporrans", *Deadline News*, Sunday 12 September 2010, available at http://www.deadlinenews.co.uk/?p=18605 (last checked 14 October 2012), Exhibit NOR-51.
[546] On the use of conforming indigenous seal fur skins for articles of clothing and clothing accessories, *see*, *e.g.*, P. Mason, "Business Sealskin fashion to boost Canada's fur trade", *BBC News*, 11 May 2004, available at http://news.bbc.co.uk/2/hi/business/3682191.stm (last checked 14 October 2012), Exhibit NOR-52.
[547] Statement of Mr. Anders Arnesen on behalf of GC Rieber Skinn AS (31 October 2012) ("Rieber Statement"), Exhibit NOR-53, para. 10.
[548] Rieber Statement, Exhibit NOR-53, para. 8.
[549] Statement of Mr. Helge Reigstad on behalf of Topaz Arctic Shoes AS (30 October 2012) ("Topaz Statement"), Exhibit NOR-54, para. 9.

321. With respect to tariff classification, seal fur skins are classified under HS subheading 430180 for whole, raw seal fur skins,[550] and under HS subheading 430219 for whole, tanned seal fur skins.[551] These classifications do not vary depending on the origin of the hunter, the sustainable resource management purpose of the hunt, the non-systematic marketing of the seal product, or on other conditions set forth in the Indigenous Communities and Sustainable Resource Management Requirements.

322. In conclusion, seal fur skins that conform to the Indigenous Communities or Sustainable Resource Management Requirements are "like" those that do not.

iv. Boots with seal skin

323. In terms of physical properties, boots with an upper of seal skin, whether or not derived from indigenous or sustainable management hunting, are warm, water-repellent, and durable; and they are used as footwear, particularly for cold and wet weather.

324. As to consumers' tastes and habits, the statement from Topaz Arctic Shoes AS, a manufacturer of boots containing seal skin, presented in Exhibit NOR-54, confirms that, prior to the introduction of the EU Seal Regime, EU consumers treated all seal skin boots as interchangeable, irrespective of the indigenous origin of the hunter that killed the seal from which the seal skin was derived, and irrespective of whether the hunt was conducted for sustainable resource management purposes. Indeed, the statement of footwear manufacturer Topaz indicates that consumers of seal footwear attributed greatest weight to the quality of the skin in the final product when making their purchases. Factors relating to the origin of the hunter, the location of the hunt, and whether the seal skin was marketed in line with the conditions of the Sustainable Resource Management Requirements were "not important considerations".[552]

[550] Harmonized System, heading 4301, *Raw furskins (including heads, tails, paws and other pieces or cuttings, suitable for furriers' use), other than raw hides and skins of heading 4101, 4102 or 4103* (extracted 7 August 2012), ("HS heading 4301"), Exhibit JE-37. This tariff classification of raw, whole seal fur skins is reflected in the 2007 and 2012 versions of the HS. Prior to 2007, raw, whole seal fur skins were classified under HS subheading 430170. Like the current HS classification, HS subheading 430170 drew no distinction based on the conditions described in the Indigenous Communities or Sustainable Resource Management Requirements.
[551] Harmonized System, heading 4302, *Tanned or dressed furskins (including heads, tails, paws and other pieces or cuttings), unassembled, or assembled (without the addition of other materials) other than those of heading 4303* (extracted 7 August 2012), ("HS heading 4302") Exhibit JE-38.
[552] Topaz Statement, Exhibit NOR-54, para. 10.

325. This meant that, in sourcing seal skins from which to produce boots, manufacturers did not distinguish between seal skins based on the indigenous origin of the hunter of the seal, or on the sustainable resource management purpose of the hunt, prior to the introduction of the EU Seal Regime. Instead, their decision in relation to purchasing skins was "mainly conditioned on the *quality* of the seal skin", since this was the key factor governing the purchasing behaviour of downstream consumers.[553]

326. Like their physical properties and end uses, their tariff classification depends not on whether the seal skin boot complies with the factors embodied in the Indigenous Communities or Sustainable Resource Management Requirements. Rather, the classification of boots depends on the material of their uppers and outer soles. Thus, boots with seal skin may be classified under HS heading 6403, 6404 or 6405 depending on whether their uppers are, respectively, of leather, textile materials or fur skin, and their further subdivision among subheadings depends on the material of the outer soles.[554] These classifications do not vary depending on the origin of the hunter or whether the seal skin was marketed in line with the conditions of the Sustainable Resource Management Requirements.

327. Hence, conforming and non-conforming seal skin boots are "like".

v. Slippers with seal skin

328. Seal skin slippers have the properties of being warm and durable.[555] They are used as footwear indoors, typically in cold locations. Neither the properties nor the uses of seal skin slippers varies depending on whether or not the seal from which they are derived was hunted by a member of an indigenous community or whether the seal skin was marketed in line with the conditions of the Sustainable Resource Management Requirements.

329. As to consumers' tastes and habits, the statement of Topaz, a manufacturer of seal slippers containing seal skin, presented in Exhibit NOR-54, shows that the EU consumers do not have regard to whether or not the seal skin was derived from indigenous or sustainable

[553] Topaz Statement, Exhibit NOR-54. para. 9.
[554] Harmonized System, heading 6403, *Footwear with outer soles of rubber, plastics, leather or composition leather and uppers of leather* (extracted 1 November 2012) ("HS heading 6403"), Exhibit NOR-55; Harmonized System, heading 6404, *Footwear with outer soles of rubber, plastics, leather or composition leather and uppers of textile materials* (extracted 1 November 2012) ("HS heading 6404"), Exhibit NOR-56; Harmonized System, heading 6405, *Other footwear* (extracted 1 November 2012) ("HS heading 6405"), Exhibit NOR-57; and Technical Guidance Note, Exhibit JE-3, p. 50.
[555] Examples are the slippers for children produced by Ellens Pelsstudio, available at http://www.pelsstudio.no/public.aspx?pageid=30980 (last checked 14 October 2012), Exhibit NOR-58.

management hunting, on the one hand, or not, on the other. Seal slippers that would conform with the Indigenous Communities and Sustainable Resource Management Requirements, on the one hand, and non-conforming seal slippers, on the other, are viewed as interchangeable, with purchasing behaviour governed instead by considerations such as the quality of the skin used to make the slippers.[556] Accordingly, prior to introduction of the EU Seal Regime, in sourcing seal skins from which to produce slippers, manufacturers did not distinguish between seal skins based on the indigenous origin of the hunter of the seal, the purpose of the hunt, or the other distinctions introduced by the European Union. Instead, they prioritized quality.

330. The tariff classification of seal skin slippers does not depend on factors such as the identity of the hunters or on factors such as whether the products of the hunt were marketed systematically. Instead, it depends *solely* on the material of the uppers and outer soles. Typically, both the outer sole and the upper of seal skin slippers are made of seal fur skin, and therefore the slippers fall under HS subheading 640590.[557] At the same time, depending on the material of the uppers and outer soles, relevant HS headings may also be 6403 and 6404.[558]

331. Therefore, the relevant evidence demonstrates that conforming seal slippers and non-conforming seal slippers are "like".

vi. Seal meat

332. As explained in a Seal Cookbook funded by the European Union, in terms of physical properties, seal meat is "dark with a thick muscle structure and sweetish, iron-like taste and fragrance".[559] The meat is "very lean lean and without interspersed fat between the muscles", as "the fat is collected as a layer of blubber underneath the skin and abdomen, and is therefore easy to cut away".[560] It has "top" nutritional value, containing "high protein and trace elements such as iron, zinc, copper, calcium and vitamins A, C and D, but few saturated fats, and carbohydrates".[561] Moreover, "[d]espite the fact that the meat is lean, the proportion

[556] Topaz Statement, Exhibit NOR-54. paras. 9-13.
[557] HS heading 6405, Exhibit NOR-57.
[558] HS headings 6403 and 6404, Exhibits NOR-55 and NOR-56; Technical Guidance Note, Exhibit JE-3, p. 50.
[559] Anita Storm (ed.), *Säl Hylje Sel*, (Zircon Media AB, 2006) ("EU-funded Seal Cookbook"), Exhibit NOR-59, pp. 17 and 18.
[560] EU-funded Seal Cookbook, Exhibit NOR-59, pp. 17 and 18.
[561] EU-funded Seal Cookbook, Exhibit NOR-59, pp. 17 and 18.

of useful unsaturated fatty acids, omega 3, is high. The content of selenium and vitamin B12 is also high. The composition of the seal meat with protein, fat, vitamins and trace elements is therefore medically more favourable than that of land mammals."[562]

333. The primary end-uses of seal meat are human and animal consumption.[563] With respect to consumers' tastes and habits, no distinction is made between meat harvested by indigenous communities and other seal meat, or between meat complying with the Sustainable Resource Management Requirements and other meat, as also evidenced by the EU-funded Seal Cookbook, which makes no distinction on these bases.[564] Finally, the tariff classification of seal meat is HS subheadings 020840 and 021092,[565] which is not affected by considerations reflected in the Indigenous Communities or Sustainable Resource Management Requirements.

c. Conclusion on "likeness"

334. In summary, notwithstanding the regulatory distinctions drawn by the European Union under the Indigenous Communities and Sustainable Resource Management Requirements, seal products that conform with these Requirements, and those that do not, are "like products" under Articles I:1 and III:4 of the GATT 1994. For any given class of product (*e.g.*, seal oil; omega-3 capsules containing seal oil; seal fur skin; seal skin boots and slippers; or seal meat), the seal products in question share precisely the same physical properties, end uses, and tariff classification. As to consumers' tastes and habits, the statements from manufacturers show that prior to introduction of the EU Seal Regime, consumers regarded the products at issue as perfectly substitutable.

335. Therefore, for any given class of product (*e.g.*, seal oil; omega-3 capsules containing seal oil; seal fur skin; seal skin boots and slippers; or seal meat), seal products that meet the conditions established under the Indigenous People and Sustainable Resource Management Requirements are "like" seal products that do not meet those conditions.

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[562] EU-funded Seal Cookbook, Exhibit NOR-59, pp. 17 and 18.
[563] The use as food is evidenced, *inter alia*, by the EU-funded Seal Cookbook, Exhibit NOR-59. *See also, e.g.*, 2009 Management and Utilization of Seals in Greenland, Exhibit JE-25, p. 1.
[564] *See* EU-funded Seal Cookbook, Exhibit NOR-59, *e.g.* at pp. 17-18, 38 and 75.
[565] Harmonized System, heading 0208, *Other meat and edible meat offal, fresh, chilled or frozen* (extracted 7 August 2012), Exhibit NOR-60; Harmonized System, heading 0210, *Meat and edible meat offal, salted, in brine, dried or smoked; edible flours and meals of meat or meat offal* (extracted 7 August 2012), Exhibit NOR-61.

336. Having established that seal products conforming with the Indigenous Communities or Sustainable Resource Management Requirements, on the one hand, and non-conforming seal products, on the other, are "like", we now turn, in the next section, to the substantive requirements of Article I:1 of the GATT 1994, which addresses discrimination between product originating in one country and like product originating in any WTO Member. In particular, we demonstrate that through the Indigenous Communities Requirements, the EU Seal Regime violates Article I:1. In the following section, we will demonstrate that through the Sustainable Resource Management Requirements, the EU Seal Regime also violates Article III:4.

C. Through the Indigenous Communities Requirements, the EU Seal Regime Violates Article I:1 of the GATT 1994

1. Overview of Facts

337. Under the EU Seal Regime, seal products may only be placed on the market where they meet certain conditions. Thus, Article 3(1) of the Basic Seal Regulation provides, in relevant part, as follows:

> The placing on the market of seal products shall be allowed only where the seal products result from hunts traditionally conducted by Inuit and other indigenous communities …[566]

Product that does not meet these requirements, may not, as a matter of principle, be placed on the EU market.

338. Article 2(4) of the Basic Seal Regulation defines the term "Inuit" in the following manner:

> 'Inuit' means indigenous members of the Inuit homeland, namely those arctic and subarctic areas where, presently or traditionally, Inuit have aboriginal rights and interests, recognised by Inuit as being members of their people and includes Inupiat, Yupik (Alaska), Inuit, Inuvialuit (Canada), Kalaallit (Greenland) and Yupik (Russia)".

339. As this definition indicates, the Inuit are indigenous peoples that have lived in the Arctic region "from time immemorial", in land that "stretches from Greenland to Canada, Alaska and the coastal regions of Chukotka, Russia".[567]

[566] Basic Seal Regulation Exhibit JE-1, Article 3(1).

340. With respect to the term "other indigenous communities", the Implementing Regulation provides the following definition:

> … 'other indigenous communities' means communities in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions[568]

341. Article 3(1) of the Implementing Regulation further provides that seal products qualify for the Indigenous Communities Requirements solely if:

> … they originate from seal hunts which satisfy all of the following conditions:
>
> (a) seal hunts conducted by Inuit or other indigenous communities which have a tradition of seal hunting *in the community and in the geographical region*;
>
> (b) seal hunts the products of which are at least partly used, consumed or processed within the communities according to their traditions;
>
> (c) seal hunts which contribute to the subsistence of the community.[569]

342. As Norway explains below, pursuant to the express wording of the Indigenous Communities Requirements, the European Union has established a scheme that affords market access solely to seal products that originate in a *limited group of countries*.

343. Specifically, to qualify under these Requirements, the seal product must originate in one of a limited number of countries inhabited by an indigenous community that meets the terms of the Requirements. For instance, to qualify for importation under the Indigenous Communities Requirements, an omega-3 capsule containing seal oil can only be imported into the European Union if that seal oil is derived from *seal blubber originating in a limited*

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[567] *Circumpolar Inuit Declaration on Sovereignty in the Arctic*, developed by the Inuit Circumpolar Council in Tromsø, Norway, on 28 April 2009, Exhibit NOR-62, Articles 1.1-1.8.
[568] Implementing Regulation, Exhibit JE-2, Article 2(1).
[569] Implementing Regulation, Exhibit JE-2, Article 3(1). To secure market access, Article 3(2) of the Implementing Regulation adds that a seal product must be accompanied by a certificate attesting that the product originates from a seal hunt that meets these cumulative conditions.

group of countries. Similarly, to qualify under these Requirements, a seal skin boot must be produced using *seal fur skin originating in a limited group of countries*. As demonstrated in section III.B above, qualifying indigenous seal products are like non-qualifying seal products.

2. Overview of the requirements of Article I:1

344. Article I:1 of the GATT 1994 provides:

> With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any [Member] to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other [Members].

345. Article I:1 lays down a non-discrimination principle of fundamental importance to the multilateral trading system. The Appellate Body has observed that "[i]t is well settled that the MFN principle embodied in Article I:1 is a 'cornerstone of the GATT' and 'one of the pillars of the WTO trading system'".[570]

346. Article I:1 applies broadly. According to the Appellate Body:

> The words of Article I:1 refer not to *some* advantages granted "with respect to" the subjects that fall within the defined scope of the Article, but to "*any advantage*"; not to *some* products, but to "*any product*"; and not to like products from *some* other Members, but to like products originating in or destined for "*all other*" Members.[571]

347. Article I:1 articulates a legal standard with several elements,[572] in particular: (1) there must be an "advantage, favour, privilege or immunity" of the type covered by Article I:1 granted to "any product" originating in any country; (2) if so, the advantage must be granted immediately and unconditionally to (3) like products originating in all other WTO Members.

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[570] Appellate Body Report, *EC – Tariff Preferences*, para. 101.
[571] Appellate Body Report, *Canada – Autos*, para. 79.
[572] *See, e.g.*, Panel Report, *Indonesia – Autos*, para. 14.138; and Panel Report, *EU – Footwear*, para. 7.99.

348. We examine the first two of these elements in turn under the headings below. We note that we have analysed the issue of "likeness" in section III.B, and have concluded that seal products in the form of: raw or refined seal oil; raw or tanned seal fur skins; omega-3 capsules containing seal oil; seal skin boots and slippers; or seal meat, that conform to the Indigenous Communities Requirements are in each case "like" the comparable product (raw or refined seal oil; raw or tanned seal fur skins; omega-3 capsules containing seal oil; seal skin boots and slippers; or seal meat, respectively) that do not.

3. "Advantage" of the type covered by Article I:1 accorded to "any product"

a. "Advantage"

349. Article I:1 covers advantages, favours, privileges and immunities granted with respect to:

> customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to *all matters referred to in paragraphs 2 and 4 of Article III*.

350. A measure provides an "advantage" when it creates "more favourable competitive opportunities" for goods of certain origins.[573] An example would be the benefit of a preferential applied tariff rate. However, the types of "advantage" covered by Article I:1 extend well beyond customs duty rates. Thus, under the terms of Article I:1 of the GATT 1994, the "advantages" extend to all "rules" connected with importation. This has been understood to relate to a wide range of such rules. For instance, a GATT panel whose report was adopted ruled that the automatic back-dating of revocation of a trade remedy measure constituted an "advantage" of the type covered by Article I:1.[574]

351. By the express terms of Article I:1, the "advantages" covered by the provision also expressly include "all matters referred to" in Article III:4 of the GATT 1994. The panel in *EC – Bananas III* held that "[t]he matters referred to in Article III:4 are 'laws, regulations and

[573] Panel Report, *EC – Bananas III (Guatemala and Honduras)*, para. 7.239. *See also, e.g.*, Panel Report, *Colombia – Ports of Entry*, para. 7.341.
[574] GATT Panel Report, *US – Non-Rubber Footwear*, para. 6.9, cited with approval in Appellate Body Report, *EC – Bananas III*, para. 206.

requirements affecting [the] internal sale, offering for sale, purchase, transportation, distribution or use [of a product]'".[575] On this basis, that panel held that rules on the allocation of import licenses among "operators", constituted advantages within the meaning of Article I:1, because they dealt with "matters referred to in" Article III:4.[576] More recently, the panel in *US – Tuna II (Mexico)* found that the granting of access to a "dolphin-safe" labelling regime constituted an "advantage".[577]

b. "Any product originating in or destined for any other country"

352. Article I:1 applies, as the Appellate Body has emphasized, "... not to *some* products, but to "*any product*".[578] There are, therefore, no limitations on the types of products entitled to MFN treatment. Hence, Article I:1 applies to both *finished products* destined for sale to the final consumer and *intermediate products* destined for sale to a manufacturer for use in producing a further processed product. Hence, an importing Member cannot distort international trade by affording more favourable competitive conditions to finished or intermediate products from particular countries.

353. An importing Member could, for example, permit products of a specific type (*e.g.*, cars) to be sold in its market solely if they originate in a particular group of countries. Such a measure confers a competitive advantage on products from the favoured countries, by conferring the opportunity of market access in the importing Member. In such a case, Article I:1 requires that the same market access advantage be accorded immediately and unconditionally by the importing Member to a like product originating in any WTO Member.

354. Similarly, an importing Member could permit products of a specific type (*e.g.*, cars) to be sold in its market solely if they are produced using intermediate products (*e.g.*, steel) that originate in a particular group of countries. Such a measure confers a competitive advantage on intermediate products from the favoured countries, by conferring the opportunity of being incorporated into further processed product that enjoy market access in

[575] Panel Report, *EC – Bananas III (Guatemala and Honduras)*, para. 7.194. *See* also Panel Report, *EC – Commercial Vessels*, para. 7.83.
[576] Panel Report, *EC – Bananas III (Guatemala and Honduras)*, paras. 7.194 – 7.195 and 7.251 – 7.256.
[577] Panel Report, *US – Tuna II (Mexico)*, para. 7.291. The panel in that case was not addressing, directly, an issue of "advantage" under Article I:1 of the GATT 1994, but instead was considering the existence of an "advantage" in light of the "commonality between … the non-discrimination obligations embodied in Article III:4 and Article I:1 of the GATT 1994" as well as Article 2.1 of the *TBT Agreement*: *see* Panel Report, *US – Tuna II (Mexico)*, para 7.275. This reasoning of the panel was not appealed: *see* Appellate Body Report, *US – Tuna II (Mexico)*, para. 233.
[578] Appellate Body Report, *Canada – Autos*, para. 79.

the importing Member. In that case also, Article I:1 requires that the same advantage be accorded immediately and unconditionally by the importing Member to intermediate products originating in any WTO Member.

355. In both cases, Article I:1 serves to prohibit MFN discrimination that distorts the choice of products in the marketplace on the basis of origin, for example through a measure requiring that imported products either originate in certain countries or that they incorporate intermediate products that originate in those countries.

4. Accorded immediately and unconditionally to the like products from all other Members

356. Article I:1 requires that any advantages covered by this provision be "accorded immediately and unconditionally to the like product originating in ... the territories of all other [Members]". Thus, if an advantage is conferred on products from some countries, the next issue is whether that advantage is extended "immediately and unconditionally" to like products from all WTO Members.

357. The term "immediately" has a readily understood temporal connotation and means there can be no delay in the extension of the advantage. The adverb "unconditionally" has been interpreted to mean: "not limited by or subject to any conditions";[579] and not "conditional on any criteria that is not related to the imported product itself".[580] Article I:1 is concerned, in particular, with discrimination between products based on origin. The requirement of an "unconditional" extension of an "advantage", therefore, prohibits conditions limiting the extension of the advantage based on the origin of products.

358. In addition, "unconditionally" has also been interpreted to provide that "the extension of th[e] advantage may not be made subject to conditions with respect to the *situation* or *conduct*" of the exporting countries.[581] The panel in *Canada – Autos* explained this requirement in the light of the purpose of Article I:1, which is "to ensure unconditional MFN treatment",[582] thereby contrasting circumstances in which "advantages" are only extended

[579] Panel Report, *EC – Tariff Preferences*, para. 7.59 (emphasis added).
[580] Panel Report, *Indonesia – Autos*, para. 14.143. In that case, the exemption from import duties and sales taxes was made dependent on whether or not the importer had an agreement with the exporter which essentially meant that the exporter participated in Indonesia's national car programme.
[581] Panel Report, *Canada – Autos*, para. 10.23. This aspect of the report was not appealed: *see* Appellate Body Report, *Canada – Autos*, para. 76.
[582] Panel Report, *Canada – Autos*, para. 10.23.

when a country possesses a certain characteristic, or takes a certain action, such as making a reciprocal exchange of trade advantage. On this basis, it is not permissible under Article I:1 to condition access to an "advantage" on the existence of a tradition of producing certain goods in the country or of belonging to a certain people that has long resided in the country (a "situation"), or on factors such as compliance with a traditional means of production or partial use of the product in the country of production ("conduct"). This would fail to accord the advantage "unconditionally" to like product of an exporting country, since extension of the advantage is made subject to a condition "with respect to the situation or conduct" of the exporting country.

5. Article I:1 applies to *de jure* and *de facto* MFN discrimination

359. In addressing origin-based discrimination, the provisions of Article I:1 of the GATT 1994 are comparable to other provisions dealing with origin-based discrimination, such as Article III of GATT 1994 and Article 2.1 of the *TBT Agreement*.[583] As with other WTO discrimination provisions, it is well settled that Article I:1 prohibits discrimination both in law and in fact:

> … the words of Article I:1 do not restrict its scope only to cases in which the failure to accord an "advantage" to like products appears on the face of the measure, or can be demonstrated on the basis of the words of the measure. Neither the words "*de jure*" or "*de facto*" appear in Article I:1. Nevertheless, we observe that Article I:1 does not cover only "in law", or *de jure*, discrimination. As several GATT panel reports confirmed, Article I:1 covers also "in fact", or *de facto*, discrimination.[584]

360. A *de jure* violation of Article I:1 may be discerned not only on the face of a measure,[585] but also from the necessary implication of the words used. In *Canada – Autos*, for instance, the Appellate Body considered how a *de jure* requirement should be demonstrated. In that case, which involved a question of export contingency analyzed under

[583] *See e.g.*, Panel Report, *US – Tuna II (Mexico)*, para. 7.275, discussed above note 577.
[584] Appellate Body Report, *Canada – Autos*, para. 78, referring in particular to the adopted GATT Panel Reports in *Spain – Unroasted Coffee* and *Japan –SPF Dimension Lumber*. *See also* Appellate Body Report, *EC – Bananas III*, para. 223 (in the context of the MFN obligation in Article II of the GATS).
[585] For example, in *Colombia – Ports of Entry*, certain simplified customs procedures were available to all Members, except for Panama, thereby *de jure* violating Article I:1 of the GATT 1994. Panel Report, *Colombia – Ports of Entry*, paras. 7.362-7.367. Similarly, in *EC – Bananas III*, certain administrative requirements for importing bananas into the European Communities, and for the allocation of export certificates, provided an advantage to defined sets of countries, without that advantage being extended to imports from all Members, also *de jure* violating Article I:1. Appellate Body Report, *EC – Bananas III*, paras. 206-207.

Article 3 of the *SCM Agreement*, the Appellate Body recalled that *de jure* conditions may be demonstrated on the basis of "the words of the relevant legislation, regulation or other legal instrument". The Appellate Body added that:

> … a subsidy is also properly held to be *de jure* export contingent where the condition to export is clearly, though implicitly, in the instrument comprising the measure. Thus, for a subsidy to be *de jure* export contingent, the underlying legal instrument does not always have to provide *expressis verbis* that the subsidy is available only upon fulfillment of the condition of export performance. Such conditionality can also be derived by necessary implication from the words actually used in the measure.[586]

361. This approach to determining the *de jure* character of a measure was followed by the panel in *US – FSC (Article 21.5 - EC)* in examining claims of discrimination under Article III:4 of the GATT 1994,[587] and, in Norway's view, the same analytical approach applies in determining the existence of *de jure* discrimination under Article I:1 of the GATT 1994.

362. Establishing *de facto* discrimination implies an analysis of whether a measure operates in practice to give rise to discriminatory effects. In considering a claim of *de facto* discrimination, a panel will consider the implications of the words used in assessing the design and structure of the measure. However, even a facially origin-neutral measure may result in *de facto* discrimination, where its expected operation favours the products of one origin over that of another. Thus, in *Canada – Autos*, for example, a measure challenged under Article I:1 of the GATT 1994 afforded customs advantages to certain imported vehicles. On its face, the measure did not limit this advantage to a particular subset of WTO Members. However, the conditions attaching to the advantage were satisfied predominantly by two WTO Members, but not other Members exporting like vehicles to Canada.[588] In these circumstances, the Appellate Body held that the challenged measure was *de facto* inconsistent with the MFN requirement in Article I:1 of the GATT 1994.[589]

[586] Appellate Body Report, *Canada – Autos*, para. 100.
[587] Panel Report, *US – FSC (Article 21.5 – EC)*, para. 8.159.
[588] Appellate Body Report, *Canada – Autos*, para. 76: "some, but not all, motor vehicles imported from certain Members are accorded the import duty exemption, while some, but not all, like motor vehicles imported from certain other Members are not".
[589] Appellate Body Report, *Canada – Autos*, paras. 81 and 85-86.

363. The Appellate Body drew on jurisprudence under both Article III:4 of the GATT 1994 and Article 2.1 of the *TBT Agreement* in summarizing, in *US – COOL*, the considerations relevant for a panel when considering claims of *de facto* discrimination:

> In such a case, the panel must take into consideration "the totality of facts and circumstances before it", and assess any "implications" for competitive conditions "discernible from the design, structure, and expected operation of the measure". Such an examination must take account of all the relevant features of the market, which may include the particular characteristics of the industry at issue, the relative market shares in a given industry, consumer preferences, and historical trade patterns.[590]

364. Norway submits that the same analytical approach applies in determining the existence of *de facto* discrimination under Article I:1 of the GATT 1994. In line with this approach, a panel needs to have regard to the design and structure of the measure itself. In addition, it may look beyond the express terms of the measure itself to see how it can be expected to operate in the market. Thus, a panel must assess any implications for competitive conditions that may be discerned from the "design, structure and expected operation" of the measure.

6. Through the Indigenous Communities Requirements, the EU Seal Regime violates Article I:1 of the GATT 1994

365. We turn now to demonstrate that, pursuant to the Indigenous Communities Requirements, the EU Seal Regime grants market access advantages to seal products that either originate in a limited group of countries or that incorporate intermediate seal products that originate in those countries, without affording those advantages to seal products (finished or intermediate) originating in all WTO Members. By conferring an advantage on seal products of some countries and denying that advantage to seal products of other WTO Members, the EU Seal Regime violates Article I:1 of the GATT 1994.

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

a. The Indigenous Communities Requirements confer "advantages" within the meaning of Article I:1

366. To recall, the MFN requirement in Article I:1 applies to *any* advantage, favour, privilege or immunity granted with respect (*inter alia*) to: rules connected with importation; as well as all laws, regulations and requirements affecting internal sale, offering for sale, purchase, or use of a product.[591] An advantage is something that "creates more favourable competitive opportunities" for certain goods.[592]

367. According to its wording, the EU Seal Regime "establishes harmonised rules concerning the placing on the market of seal products".[593] In particular, it sets out conditions, notably the Indigenous Communities Requirements, with which compliance is mandatory in order to place a seal product on the market.[594] In principle, seal products that do not comply with the relevant requirements *cannot* be imported or placed on the market.

368. The EU Seal Regime confers "advantages" covered by Article I:1 in respect of two categories of seal products that meet the conditions of the Indigenous Communities Requirements: (i) finished seal products destined for sale to the final consumer; and (ii) intermediate seal products destined for use as inputs to produce further processed seal products.

i. Finished seal products

369. *First*, in connection with conforming indigenous finished seal products – such as refined seal oil, omega-3 capsules containing seal oil, seal skin boots or slippers, and seal meat – the EU Seal Regime creates an opportunity for the products to be placed on the EU market. Hence, an importer that purchases a conforming indigenous finished seal product enjoys a right to import and sell the product on the EU market.

370. The EU Seal Regime thereby confers a significant "advantage" on conforming finished seal products, by transforming the competitive conditions they enjoy when compared with non-conforming products. Specifically, an importer's choice of a conforming finished seal product over a non-conforming one is not only favoured, but required, in order to be able

[591] *See* Section III.C.3 above.
[592] Panel Report, *EC – Bananas III (Guatemala and Honduras)*, para. 7.239. *See* also, *e.g.*, Panel Report, *Colombia – Ports of Entry*, para. 7.341.
[593] Basic Seal Regulation, Exhibit JE-1, Article 1.
[594] Basic Seal Regulation, Exhibit JE-1, Article 3.

to place the finished product on the EU market. In contrast, an importer's choice of a non-conforming finished seal product results, in principle, in a denial of market access for the product. The EU Seal Regime, therefore, patently "creates more favourable competitive opportunities" for conforming finished seal products.

371. This advantage is covered by Article I:1 in two respects: (a) the EU Seal Regime establishes "rules … in connection with importation" in the sense of Article I:1, because conforming finished seal products may be imported, whereas non-conforming products cannot; and (b) the EU Seal Regime affects the "internal sale", "offering for sale", and "purchase" of seal products, because conforming finished seal products may be placed on the EU market for purchase and sale, whereas non-conforming products cannot. In this way, the EU Seal Regime affects "matters referred to in paragraph … 4 of Article III". Hence, the advantages accorded by the EU Seal Regime in connection with the importation, internal sale, offering for sale, and purchase, of conforming finished seal products are covered by Article I:1.

ii. Intermediate seal products

372. *Second*, in connection with conforming indigenous intermediate seal products – such as raw or tanned seal fur skins, raw or refined seal oil, or seal meat – the EU Seal Regime creates an opportunity for the products to be incorporated into a further processed seal product that may, in turn, be placed on the EU market. Hence, a manufacturer's decision to use a conforming indigenous intermediate seal product creates a right for the further processed seal product produced with that input to be imported and sold on the EU market.

373. The EU Seal Regime thereby confers a significant "advantage" on conforming intermediate seal products, by transforming the competitive conditions they enjoy when compared with non-conforming intermediate seal products. Specifically, a manufacturer's choice of a conforming intermediate seal product over a non-conforming one is not only favoured, but *required*, in order to be able to sell the further processed seal product in the EU market. In contrast, a manufacturer's choice of a non-conforming intermediate seal product results, in principle, in a denial of market access for the further processed product. The EU Seal Regime, therefore, patently "creates more favourable competitive opportunities" for conforming intermediate seal products.

374. This market access advantage is covered by Article I:1 in three respects: (a) the EU Seal Regime establishes "rules … in connection with importation" in the sense of Article I:1, because conforming intermediate seal products may be imported for further processing for placing on the market in the European Union, whereas non-conforming products cannot; (b) the EU Seal Regime affects the "internal sale", "offering for sale", and "purchase" of intermediate seal products (and, therefore, "matters referred to in paragraph … 4 of Article III"), because conforming intermediate seal products may be sold in the European Union for further processing there, whereas non-conforming products cannot; and (c) the EU Seal Regime affects the "use" of intermediate seal products (also a "matter[] referred to in paragraph … 4 of Article III"), because conforming intermediate seal products may be used – whether within or outside of the European Union – to produce further processed seal products that may then be sold in the European Union, whereas non-conforming products cannot.

375. Hence, the advantages accorded by the EU Seal Regime in connection with the importation, internal sale, offering for sale, purchase, and use of conforming intermediate seal products are covered by Article I:1.

b. The EU Seal Regime fails to extend these advantages immediately and unconditionally to the like product from all Members by discriminating on grounds of origin

376. Under the Indigenous Communities Requirements, the EU Seal Regime grants market access advantages to seal products (finished or intermediate) originating in a *limited number of countries identified on a closed list*. In sum, based on the design and structure of the EU Seal Regime, the qualifying territories that confer EU market access on a seal product are necessarily *a defined, limited, and closed group*. In terms of the "expected operation" of the Indigenous Communities Requirements, the advantage of market access opportunities is extended predominantly to only *one* co*untry* from this limited group.

i. The design and structure of the Indigenous Communities Requirements limits advantages to seal products from a limited group of countries

377. As with an assessment of the *de jure* character of a measure, an assessment of the design and structure of a measure may be based on the express meaning of the words used or on the necessary implications of those words. The words used and their necessary implications are the most revealing objective manifestation of the design and structure of the

measure. In respect of both its express wording, and the necessary implication of the words used, the EU Seal Regime restricts market access advantages to a limited and closed group of countries under the Indigenous Communities Requirements.[595] The design and structure of the measure thus reveal discrimination, contrary to Article I:1 of the GATT 1994.

378. *First*, with respect to Inuit communities, the Basic Seal Regulation *expressly names*[596] certain Members (or territories within Members) as qualifying under this aspect of the Indigenous Communities Requirements, namely: "Canada", Denmark ("Greenland"), "Russia", and the United States ("Alaska").[597] Thus, *according to the words used*, goods originating in these Members expressly qualify for market access opportunities under the requirements.

379. *Second*, for "other indigenous communities", the words used in the EU Seal Regime define, by necessary implication, a limited, additional group of Members whose goods also qualify for market access opportunities under the Indigenous Communities Requirements. This group is defined and closed because an indigenous community must have inhabited the territory of the Member in question "at the time of conquest or colonisation or the establishment of present State boundaries"; the community must have retained certain public institutions; and it must have a seal hunting tradition in the geographic region.

380. Based on these criteria, and confirmed by an assessment conducted by COWI on behalf of the European Union, the additional qualifying Members under this aspect of the Indigenous Communities Requirements are limited to: the European Union (Sweden, and possibly Finland)[598] and Norway.[599] As we detail immediately below, given the strict

[595] Norway notes in this connection that the facts set forth in this section in support of Norway's claim that the EU Seal Regime *de facto* discriminates contrary to Article I:1 of the GATT 1994 would also support a finding by the Panel that the EU Seal Regime is indeed *de jure* inconsistent with Article I:1 of the GATT 1994, since it necessarily limits the extension of a relevant "advantage" to a defined and closed group of countries.
[596] Basic Seal Regulation, Exhibit JE-1, Article 2(4).
[597] Basic Seal Regulation, Exhibit JE-1, Article 2(4). The 2010 COWI Report, Exhibit JE-21 lists three indigenous communities in Alaska: Inupiat, Yupik and Aleut. 2010 COWI Report, Exhibit JE-21, section 3.1, p. 23. The non-exhaustive list of indigenous people in the Basic Seal Regulation, Article 2(4), includes the Inupiat and Yupik, but not the Aleut. If the EU does not regard the Aleut as "Inuit", their hunt would then be eligible under the second category: "other indigenous communities". *See* also 2010 COWI Report, Exhibit JE-21, section 3.1, p. 24: "The hunt and trading of seal products by indigenous communities in Alaska is likely to comply with article 3.1".
[598] On Sweden, *see* 2010 COWI Report, Exhibit JE-21, section 3.1, p. 33. COWI also indicates that the Kihnu community in Estonia hunts seals, but does not provide further details. 2010 COWI Report, Exhibit JE-21, section 3.1, p. 22. COWI also indicates that indigenous communities that hunt seals "include" the Sami in Finland, but states that this community is not analysed in its report and concludes ultimately that "Finnish seal

conditions, the closed group of countries cannot, at this stage, be expanded to include additional countries.

381. As set forth in paragraphs 161 to 163 above, the legal character of the Indigenous Communities Requirements is defined through a series of conditions, each of which must be satisfied in order for a seal product to qualify. In sum, these conditions may be sub-divided into two groups: the first relates to the person conducting the seal hunt and the community to which s/he belongs; and, the second relates to the products derived from the seal hunt.

- The <u>persons</u> conducting the seal hunt must be members of an <u>indigenous community</u>, including an Inuit community, which meets the following requirements:
  - the community must be part of the "Inuit homeland" in "arctic and subarctic areas", including communities resident in Canada, Denmark (Greenland), Russia, and the United States (Alaska); **<u>or</u>**
  - the community must reside in an "independent countr[y]"; it must descend from "populations which *inhabited the country, or a geographical region to which the country belongs,* at the time of conquest or colonisation or the establishment of present State boundaries"; and it must, "irrespective of its legal status, retain some or all of [its] own social, economic, cultural and political institutions"; **<u>and</u>**,
  - seal hunting must be traditional in the community and the geographic region in question.[600]
- The <u>products of the seal hunt</u> must:
  - contribute to the subsistence of the community; and,
  - be partly used, consumed, or processed within the community in question according to tradition.

382. Through the first set of conditions, the European Union defines the group of permissible <u>*seal hunters*</u> by reference to the <u>*community*</u> to which they belong. The European Union defines the community by reference, *first*, to the <u>*territory*</u> inhabited by the community and, *second*, to the existence of a seal hunting tradition in the community and the

hunting is unlikely to comply with Article 3.1 as Finnish seal hunt is not undertaken by indigenous communities": 2010 COWI Report, Exhibit JE-21, *compare* section 3.1, p. 22 and p. 28.

[599] 2010 COWI Report, Exhibit JE-21, section 3.1, pp. 30-32: according to COWI, some Sami coastal hunt may qualify, but it is not clear that it would, and "there is no separate indigenous hunt". *Ibid.*, p. 30.

[600] Implementing Regulation, Exhibit JE-2, Article 2(1).

"*geographic region*" in question.[601] Through the second set of conditions, the European Union imposes a requirement that the products of the hunt be, at least partly, used within the *community* to which the hunters belong.

383. As a result, the Indigenous Communities Requirements firmly tie access to the EU market to the *origin* of the beneficiary goods, thereby conditioning market access on origin. Specifically, seal products granted market access must be derived entirely from seals (*e.g.*, a seal skin) or incorporate inputs derived exclusively from seals (*e.g.*, omega-3 capsules containing seal oil) that are: hunted by persons living in defined *territories*, who belong to a community descending from populations that have long inhabited the *territories*, and with a seal hunting tradition in those *territories*; and the products of the seal hunt must be at least partly used in the relevant *territories*, by the community to which the hunters belong.

384. The advantage of access to the EU market is thus not extended *unconditionally* to the like product originating in all WTO members as required by Article I:1. As we have explained above, for the conditions to be met, the seal inputs from which eligible seal products are derived must originate in one of a closed list of territories. In other words, based on the wording of the EU Seal Regime, the qualifying territories that confer market access on a seal product (finished or intermediate) are necessarily a defined, limited, and closed group.

385. Hence, the design and structure of the EU Seal Regime – as evidenced by the words expressly used and their necessary implication – reveal that the EU Seal Regime discriminates on grounds of origin. Specifically, seal products enjoy market access opportunities under the conditions solely if they originate in one of a limited number of countries (*i.e.*, those inhabited by relevant indigenous communities) or if they are derived from input products originating in one of those countries, whereas like seal products from other Members are deprived of that opportunity.

386. For example, tanned seal skins entirely derived from seals hunted in Denmark (Greenland) or the European Union (*e.g.*, Sweden) may qualify for access to the EU market under the Indigenous Communities Requirements, whereas that opportunity is not afforded to

[601] With respect to Inuit communities, the EU specifically identifies the territories as being "arctic and subarctic areas" in named origins, *i.e.*, Canada, Denmark (Greenland), Russia, and the United States (Alaska); with respect to other indigenous communities, the EU makes repeated references to the territory inhabited by the community (it refers to communities that have historically inhabited that a "countr[y]" or "geographical region" including the country.

like seal products derived from seals hunted in Iceland or Namibia. Likewise, omega-3 capsules containing seal oil inputs that are derived from seals hunted in Denmark (Greenland) or the European Union (*e.g.*, Sweden) may qualify for access to the EU market under the Indigenous Communities Requirements, whereas that opportunity is not afforded to like seal products derived from seals hunted in Iceland or Namibia.

387. Thus, the European Union has established a general rule that makes market access for seal products dependent, as one of several conditions, upon the *origin* of either the imported seal products or their inputs.

388. Moreover, by conditioning market access on the existence of a tradition of producing certain goods in the country or of belonging to a certain people that has long resided in the country or on factors such as partial use of the product in the country of production, the European Union has also conditioned market access on the *situation or conduct*"[602] of the exporting countries. This also reflects a failure to extend the advantage of market access "unconditionally" to like products originating in all WTO Members, as required by Article I:1 of the GATT 1994.

ii. The expected operation of the Indigenous Communities Requirements reveals predominant benefits to seal products from Denmark (Greenland)

389. Although, through their design and structure, the Indigenous Communities Requirements provide more favourable treatment to goods from six Members,[603] in terms of their "expected operation"[604] the Indigenous Communities Requirements benefit predominantly a single country out of this list of six, namely Denmark (Greenland). Conversely, the requirements are expected to operate, in practice, in a manner that confers little or no benefit on seal products originating in Norway. Similarly, Canada is disfavoured compared to Denmark (Greenland), because the overwhelming proportion of Canadian production is denied access under the Indigenous Communities Requirements. Hence, the "expected operation" of the Indigenous Communities Requirements reveals further discriminatory effects.

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[602] Panel Report, *Canada – Autos*, para. 10.23. Emphasis added.
[603] Canada, the European Union, Denmark (Greenland), Norway, Russia, and the United States (Alaska).
[604] Appellate Body Report, *US - COOL*, paras. 103-104 and footnote 95.

390. The factors that determine the extent to which a Member may benefit from the Indigenous Communities Requirements are:

- the size of the indigenous community with a seal hunting tradition;
- the volume of seals harvested by that community; and
- 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.

391. In Table 1 below, Norway provides an overview of the extent to which these conditions are met with respect to each of the six Members that are eligible to benefit from the Indigenous Communities Requirements. This overview is based largely on: (i) the 2010 assessment provided by COWI on a mandate from the European Commission as part of the process of adopting EU Regulations to implement the Requirements; and (ii) official figures provided by the national governments concerned in recent years.

Table 1. Indigenous Communities Requirements

Country	Number of seals caught by community	Total national catch	% of national total
Canada	Ca. 35,000 seals[605]	Ca. 365,000 seals[606]	9.6%
European Union (Sweden and possibly Finland)	Sweden: unavailable; Finland: zero[607]	Sweden: 100-115 seals;[608] Finland: 400-500 seals[609]	Unavailable
Denmark (Greenland)	Ca. 189,000 seals[610]	Ca. 189,000 seals[611]	100%[612]
Iceland	N/A	Ca. 400 seals[613]	0%
Namibia	N/A	Ca. 80,000 seals[614]	0%
Norway	If at all, a fraction of 810[615]	17,847 seals[616]	A fraction of 4.5%
Russia	Unavailable	Ca. 100,000 seals[617]	Unavailable
USA (Alaska)	Ca. 1,600 seals[618]	Ca. 1,600 seals[619]	100%

[605] 2010 COWI Report, Exhibit JE-21, section 3.1, p. 27 (unspecified year). *See* also 2012 Nunavut Report, Exhibit JE-30, p. 1: The total annual ringed seal harvest is estimated at 30,000 (unspecified year).
[606] 2010 COWI Report, Exhibit JE-21, section 3.1, p. 27: in 2006, the total commercial catch was approximately 330,000, and the indigenous catch is approximately 35,000 seals annually.
[607] 2010 COWI Report, Exhibit JE-21, section 3.1, p. 28: "The Finnish Ministry … indicated that the Saami communities on Finnish territory do not hunt seals".
[608] Total catch in 2009. 2010 COWI Report, Exhibit JE-21, section 3.1, p. 33.
[609] 2010 COWI Report, Exhibit JE-21, section 3.1, p. 28 (unspecified year).
[610] Total catch in 2006. *See* 2010 COWI Report, Exhibit JE-21, section 3.1, pp. 28-30, and 2012 Management and Utilization of Seals in Greenland, Exhibit JE-26, pp. 13 and 22.
[611] Total catch in 2006. Over the period 2006-2009, the average annual catch was 162,000 seals. 2012 Management and Utilization of Seals in Greenland, Exhibit JE-26, p. 22.
[612] *See* 2010 COWI Report, Exhibit JE-21, section 3.1, pp. 28-30, and 2012 Management and Utilization of Seals in Greenland, Exhibit JE-26, p. 13.
[613] Total catch in 2011. Icelandic Marine Research Institute, *Summary of State of Marine Stocks in Icelandic Waters 2011/2012: Prospects for the Quota Year 2012/2013* (2012), Exhibit NOR-21, p. 180.
[614] Estimated total catch in 2006. 2010 COWI Report, Exhibit JE-21, annex 6, p. 5.
[615] The Sami communities only take part in the coastal seal hunt. 2010 COWI Report, Exhibit JE-21, section 3.1, pp. 30-31. In 2006, the coastal seal catch was 810. Norwegian Ministry of Fisheries and Coastal Affairs, *Facts about Fisheries and Aquaculture 2010*, L-0542 E (2010) ("Facts about Fisheries and Acquaculture 2010"), Exhibit NOR-63, p. 21.
[616] Total catch in 2006. Over the period 2006-2009, the average annual catch was 11,336 seals. Facts about Fisheries and Acquaculture 2010, Exhibit NOR-63, p. 21.
[617] Estimated total catch in 2006. 2010 COWI Report, Exhibit JE-21, annex 6, p. 5, footnote 5. Pursuant to regulations in force since 2009, the hunting of harp seal pups less than one year old has been banned in Russia, as well as hunting of adult female harp seals in close vicinity to the pups. In 2011, Russian vessels did not hunt any seals. 2011 Report of the Norwegian/Russian Working Group on Seals, Exhibit NOR-22, p. 2.
[618] 2010 COWI Report, Exhibit JE-21, section 3.1, p. 23 (unspecified year). In 2010, the catch in the Pribilof Islands was 435 seals. 2012 USDOC Harvest Estimate, Exhibit NOR-23, pp. 6682-6683. The US Marine Mammal Protection Act forbids hunting other than by indigenous people of Alaska. *See* USMMPA, Exhibit JE-15.

392. As illustrated in this table, Denmark (Greenland) is, by far, the main beneficiary of the Indigenous Communities Requirements. Almost the entirety of its population is Inuit with a strong seal hunting tradition; the products derived from the seal hunt are, at least partly, consumed within the community and contribute to its subsistence,[620] and the seal hunt is still widespread, representing "a vital component of everyday life".[621] As a result, all, or virtually all, seals caught in Denmark (Greenland) are expected to qualify under the requirements.[622] On average, between 1993 and 2009, the volume of the seal hunt catch in Denmark (Greenland) was 165,000, with a peak of 191,000 in 2005. This represents a very large proportion of the total worldwide catch. Norway also notes that, even during a year in which the catch in Greenland was relatively low, such as 2009, that catch still amounted to 17 times the entire Norwegian hunt for the same year.[623] Significant quantities of seal products from Denmark (Greenland) have also been exported directly to the European Union.[624]

393. The position of each of the other countries that, by the structure and design of the EU Seal Regime, may benefit from the Indigenous Communities Requirements, is different from that of Denmark (Greenland). In contrast to seal products originating in Denmark (Greenland), virtually no Norwegian seal products will benefit under the Indigenous Communities Requirements, either in absolute terms or as a proportion of total Norwegian production. The total coastal hunt in Norway, the only hunt in which Sami, at times, currently take part accounted for 810 seals in total in 2006, which is about 4.5% of the total Norwegian hunt during the same year.[625]

394. Similarly, although a significant gross volume of Canadian seal products may qualify under the requirements, the vast majority of Canada's production – some 91% on the figures set out above – would *not* be eligible.

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[619] 2010 COWI Report, Exhibit JE-21, section 3.1, p. 23 (unspecified year). In 2010, the catch in the Pribilof Islands was 435 seals. 2012 USDOC Harvest Estimate, Exhibit NOR-23, pp. 6682-6683.
[620] 2010 COWI Report, Exhibit JE-21, section 3.1, pp. 29-30.
[621] 2012 Management and Utilization of Seals in Greenland, Exhibit JE-26, p. 11.
[622] 2010 COWI Report, Exhibit JE-21, section 3.1, p. 30.
[623] 2010 COWI Report, Exhibit JE-21, annex 5, pp. 14-15; 2012 Management and Utilization of Seals in Greenland, Exhibit JE-26, p. 22.
[624] 2008 COWI Report, Exhibit JE-20, section 3.3.2, para. 3.3.2, p. 46, and section 5.2, tables 5.2.2, 5.2.3, 5.2.4, and 5.2.5, pp. 105-108.
[625] Facts about Fisheries and Acquaculture 2010, Exhibit NOR-63, p. 21.

395. The size of the Inuit hunt in Denmark (Greenland) and Canada is so significant that, in its 2007 Scientific Opinion, EFSA observed that, at the time, the Inuit in Denmark (Greenland) and Canada were responsible for 25 percent of the catch of Northwest Atlantic harp seals,[626] and that:

> … if ringed seals (*Pusa hispida*) are included, then the Inuit share of the total catch of harp and ringed seals by Canada and Denmark (Greenland) becomes even higher.[627]

396. In 2010, in an assessment conducted as part of the process of adopting the Implementing Regulations, COWI reported that, in Denmark (Greenland), the *annual trade* of Inuit communities in seal skins in 2006 amounted to 83,000 skins.[628] The large indigenous hunt in Denmark (Greenland) compares with much smaller indigenous hunts in each of the other eligible countries, and the minuscule indigenous hunt in Norway.

397. As a result, through its design, structure, and expected operation, the Indigenous Communities Requirements confer a significant advantage on seal products (finished and intermediate) that originate in Denmark (Greenland). The competitive opportunity conferred on seal products from this origin either to enter the EU market or to be incorporated into further processed seal products destined for the EU market is, in fact, not extended immediately and unconditionally to seal products (finished or intermediate) originating in other countries, including Norway.

(1) The expected operation of the Indigenous Communities Requirements is confirmed by statements made during the EU legislative process

398. Norway finds confirmation of its assessment of *de facto* discrimination with respect to Denmark (Greenland) in statements made during the EU legislative process by the official Rapporteur of the Responsible Committee of the European Parliament, Diana Wallis,[629] [*Redacted due to withdrawal of evidence*].[630]

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[626] 2007 EFSA Scientific Opinion, Exhibit JE-22, p. 10.
[627] 2007 EFSA Scientific Opinion, Exhibit JE-22, p. 10.
[628] 2010 COWI Report, Exhibit JE-21, section 4.2, p. 42, Table 4-3. These figures were tabulated in a section of the report addressing the question "how many of the skins are caught by Inuit or indigenous peoples and could by made available [under Article 3.1 of the Basic Seal Regulation] on the EU market in response to demand?"
[629] *See* paras. 123 to 126 above.
[630] *See* paras. 138 and **Error! Reference source not found.** above.

399. Rapporteur Wallis described what she saw as "structural flaws" in the European Commission's proposal, on the one hand, to prohibit trade in seal products in order to ensure animal welfare, while, on the other hand, granting an exception to seals hunted by indigenous communities. She noted the "Inuit exception" could:

> ... *apply to a large majority of the traded products*, thus defeating the animal welfare intentions of the proposal [for a ban on trade in seal products].[631]

400. Rapporteur Wallis also explicitly addressed the WTO-consistency of the discrimination arising from the Indigenous Communities Requirements, finding "a strong argument" that the measure would have discriminatory effects:

> ... given the relatively high contribution of products from Inuit hunting to Greenland's trade in seal products compared to other countries, there is a strong argument that a [legislative] proposal that maintains the Inuit exception is discriminatory towards other countries, in practice providing an advantage to a good portion of the hunt of seals in Greenland.[632]

401. [*Redacted due to withdrawal of evidence*] [633] [634]

402. In summary, Rapporteur Wallis [*Redacted due to withdrawal of evidence*] considered that the Indigenous Communities Requirements would, *in fact*, impermissibly discriminate in favour of Denmark (Greenland).

403. As we have already discussed in paragraphs 389 to 397 above, these concerns are borne out in the evidence. Specifically, the evidence discussed above shows that all, or virtually all, seal products from Denmark (Greenland) (representing a very large proportion of the total worldwide catch) are eligible to access the EU market under the Indigenous Communities Requirements.[635] Conversely, a negligible proportion of the like products

[631] Rapporteur Wallis' Explanatory Statement, in EU Parliament Final Report on Trade in Seal Products, Exhibit JE-4, p. 29.
[632] Rapporteur Wallis' Explanatory Statement, in EU Parliament Final Report on Trade in Seal Products, Exhibit JE-4, p. 29.
[633] [*Redacted due to withdrawal of evidence*]
[634] [*Redacted due to withdrawal of evidence*]
[635] *See* Table 1 above, and 2010 COWI Report, Exhibit JE-21, section 3.1, pp. 28-30, to the effect that all of Denmark (Greenland)'s hunt would qualify under the Indigenous Communities Requirements. To recall, EFSA found that, together, the Denmark (Greenland) and Canadian indigenous catch represent at least 25 percent of the total worldwide catch of seals and possibly a higher percentage. 2007 EFSA Scientific Opinion, Exhibit JE-22, p. 10.

produced by Norway (which, in turn, comprises only a tiny fraction of worldwide allowable/actual catch),[636] are eligible to benefit from the same requirements.

7. Conclusion under Article I:1

404. For the reasons outlined above, through their design, structure and expected operation, the Indigenous Communities Requirements, *de facto*, grant an advantage to seal products from Denmark (Greenland) that is not granted immediately and unconditionally to products from all other Members, including Norway, in violation of Article I:1 of the GATT 1994.

D. Through the Sustainable Resource Management Requirements the EU Seal Regime violates Article III:4 of the GATT 1994

1. Overview of facts

405. During the legislative process, Finland and Sweden, EU Member States that permit hunting of seals, objected to the limited grounds available for marketing seal products in the European Union, noting that, in order to continue their resource management activities, they had to be allowed to continue killing seals, which "cause[d] problems to fisheries by damaging gears and catches".[637] They also explained that the number of seals their fishermen killed to protect their fishing activities was small.[638]

406. These Member States explained that it was necessary not only to allow the killing of seals to protect fisheries (the European Union never envisaged prohibiting seal hunting within its territory), but it was also necessary to allow the placing on the market of products from those seals, because prohibiting their placing on the market would lead both to: (i) a waste of natural resources;[639] and (ii) risks for animal welfare. Risks for animal welfare would arise:

> ... since the incentive for ensuring that the seal hunt is undertaken without causing avoidable pain, distress or any

[636] *See* Table 1 above; and, *e.g.*, the 2007 EFSA Scientific Opinion, Exhibit JE-22, pp. 16-18.
[637] Member States' Comments on the Proposed Regulation (19 January 2009), Exhibit JE-10, pp. 16 (indicating that "[s]eals cause problems to fisheries by damaging gears and catches. As a part of the comprehensive national Baltic seal management plan, measures to address this problem have been taken. Based on the management plan about 500 seals are hunted yearly") and 18 (requesting an "exemption possibility for seal products originating from states with small scale, statutory controlled hunting with the main purpose to reduce damages from [sic] fisheries and which is done in accordance with a management plan").
[638] Member States' Comments on the Proposed Regulation (19 January 2009), Exhibit JE-10, pp. 16 and 18.
[639] Member States' Comments on the Proposed Regulation (19 January 2009), Exhibit JE-10, pp. 16 and 19.

> other form of suffering is strengthened if the seal is viewed as a resource rather than as solely a pest animal for fishery.[640]

Thus, Finland and Sweden advocated allowing the placing on the market of seal products "with small scale, statutory controlled hunting ... done in accordance with a management plan",[641] although Sweden recognized that such an arrangement might be "entirely unviable in view of *e.g.* WTO rules".[642]

407. Sweden also drew support for its position from the Opinion of the AGRI committee,[643] whose Rapporteur had expressed similar concerns as justifying certain derogations to allow seal products "to be marketed at a local or regional level".[644]

408. In summary, Finland explained, encouraging the seal management efforts underway in the European Union would "address[] local needs in the Community".[645]

409. In response to such concerns, as described in section II.C.1 above,[646] a clause was added to the draft legislation that would allow those EU countries that kill seals to protect their fisheries to continue marketing the resulting seal products. The clause, which ultimately became Article 3(2)(b) of the Basic Seal Regulation,[647] embodies the Sustainable Resource Management Requirements. The introduction of this provision was described as a compromise that would "satisfy those Member States who are concerned the Regulation would impact upon their policies for controlling seal populations".[648]

410. The Sustainable Resource Management Requirements satisfy these concerns but are carefully crafted not to go beyond what was required to meet the concerns of the EU Member States. Thus, because the concern of EU Member States was that they should be allowed to

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[640] Member States' Comments on the Proposed Regulation (19 January 2009), Exhibit JE-10, p. 19. A similar comment had been made by the Rapporteur of one of the Committees of the European Parliament asked for an Opinion: AGRI: *see* Opinion of AGRI, short justification, in EU Parliament Final Report on Trade in Seal Products, Exhibit JE-4, p. 57 ("If the regulation were to be applied in its current form, hunters would therefore no longer be able to derive any financial benefit, no matter how small, from their activities. That ban on trade would be liable to lead to an increase in poaching and to hunters shooting seals without caring which part of the body had been hit or checking whether the animal was dead or not.").
[641] Member States' Comments on the Proposed Regulation (19 January 2009), Exhibit JE-10, p. 18.
[642] Member States' Comments on the Proposed Regulation (19 January 2009), Exhibit JE-10, p. 18.
[643] Member States' Comments on the Proposed Regulation (19 January 2009), Exhibit JE-10, p.19.
[644] *See* Opinion of AGRI, short justification, in EU Parliament Final Report on Trade in Seal Products, Exhibit JE-4, p. 57
[645] Member States' Comments on the Proposed Regulation (19 January 2009), Exhibit JE-10, p. 16.
[646] *See* paras. 133-137, **Error! Reference source not found.**-142 and 148 above.
[647] Article 3(2)(b) of the Basic Seal Regulation is further developed in Article 5 of the Implementing Regulation.
[648] Message from Mr. Harbour, IMCO Coordinator, in email conversation "Compromise on Article 3" (2-8 April 2009), Exhibit NOR-27.

continue killing seals to protect fisheries, the requirements apply to "by-products of hunting that is regulated by national law and conducted for the sole purpose of the sustainable management of marine resources".[649] However, because of the nature (occasional) and quantity (small scale) of the culling effort in the EU Member States concerned, the permission to market seal products deriving from the sustainable management of marine resources was limited to products whose "nature and quantity [is] not such as to indicate that they are being placed on the market for commercial reasons".[650] In particular, this meant that the seal products in question had to be placed on the market "in a non-systematic way".[651]

411. In addition, a requirement was introduced that the products in question be allowed on the market "only on a non-profit basis",[652] *i.e.*, at a price not exceeding the recovery of the costs borne to kill the seals.[653]

412. In the parliamentary debate that preceded voting on the final text of the measure, the responsible member of the Commission, Mr. Stavros Dimas, explained that through the Sustainable Resource Management Requirements, "small-scale hunting"[654] would be allowed. More specifically,

> fishermen engaged in incidental seal hunting will be allowed, but only for the purpose of sustainable management of marine resources, to place seal products on the market on a not-for-profit basis, in order to cover their related expenses.[655]

413. While expressing misgivings about the measure as a whole, Finnish MEP Lasse Lehtinen observed the compromise (introducing the Sustainable Resource Management Requirements) was an "improvement",[656] and noted:

> Each year in my country, Finland, fishermen catch a few hundred seals, because the seal population has soared and will soon threaten fish stocks in the Baltic Sea. The compromise

[649] Basic Seal Regulation, Exhibit JE-1, Article 3(2)(b).
[650] Basic Seal Regulation, Exhibit JE-1, Article 3(2)(b).
[651] Implementing Regulation, Exhibit JE-2, Article 5(1)(c).
[652] Basic Seal Regulation, Exhibit JE-1, Article 3(2)(b).
[653] Implementing Regulation, Exhibit JE-2, Article 2(2). The Commission further specified that any subsidy provided by a government in connection with a sustainable management hunt would have to be added for purposes of the "non-profit" requirement, meaning otherwise unprofitable hunting would fail the "non-profit" requirement. *Ibid*.
[654] European Parliament Debates, Exhibit JE-12, p. 64.
[655] European Parliament Debates, Exhibit JE-12, p. 64.
[656] European Parliament Debates, Exhibit JE-12, p. 72.

> reached with the Council means that fishermen can carry on as before as long as they do not make a profit.[657]

2. Overview of the requirements of Article III:4

a. Overview

414. Article III:4 of the GATT 1994 provides, in relevant part:

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

415. Thus, three elements must be examined to assess a measure's consistency with Article III:4: (i) whether the measure is a law, regulation or requirement affecting the internal sale, offering for sale, purchase, or use of goods; (ii) whether the products at issue are like; and (iii) whether imported products are afforded less favourable treatment than that given to the like domestic products.

416. We have already examined the first and second prongs of this test. We have thus demonstrated that the EU Seal Regime sets forth "laws, regulations [or] requirements affecting … internal sale, offering for sale, purchase … or use" of seal products (finished or intermediate).[658] We have also shown that seal products – in the form of raw or refined seal oil, raw or tanned seal fur skins, omega-3 capsules containing seal oil, seal skin boots and slippers, or seal meat – that do not conform to the Sustainable Resource Management Requirements are in each case "like" the comparable product that conforms to the Requirements.[659]

417. The third element of the test under Article III:4 calls for an examination of whether the challenged measure affords imported products "less favourable" treatment than that accorded to like domestic products. We discuss this element below.

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[657] European Parliament Debates, Exhibit JE-12, p. 72.
[658] *See* paras. 366-371 above.
[659] *See* section III.B above.

b. Less favourable treatment

418. Having determined products are "like", and therefore in a relationship of actual or potential competition, in order to show a violation of Article III:4, a "complaining member must still establish that the measure accords to the group of 'like' *imported* products 'less favourable treatment' than it accords to the group of 'like' domestic products".[660]

419. "Less favourable" treatment in the sense of Article III:4 is treatment that affects the competitive conditions in the market in favour of domestic over imported goods.[661] Thus,

> Whether or not imported products are treated "less favourably" than like domestic products should be assessed instead by examining whether a measure modifies the *conditions of competition* in the relevant market to the detriment of imported products.[662]

420. On this basis, the Appellate Body has explained that a formal difference in treatment is neither necessary nor sufficient to establish discrimination.[663] Rather, the question is in what way the challenged measure is expected to operate with regard to domestic and imported products. The analysis through which this question may be answered

> must be grounded in close scrutiny of the "fundamental thrust and effect of the measure itself". This examination cannot rest on simple assertion, but must be founded on a careful analysis of the contested measure and of its implications in the marketplace.[664]

421. The examination of the measure's implications in the marketplace "need not be based on the *actual effects* of the contested measure in the marketplace."[665] Rather,

> The implications of the contested measure for the equality of competitive conditions are, first and foremost those that are discernible from the design, structure and expected operation of the measure.[666]

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[660] Appellate Body Report, *EC – Asbestos*, para 100.
[661] *See e.g.*, Appellate Body Report, *EC – Bananas III*, para. 213; and Appellate Body Report, *Korea – Beef*, paras. 137 and 144.
[662] Appellate Body Report, *Korea – Beef*, para. 137 (emphasis original).
[663] Appellate Body Report, *Korea – Beef*, para. 137.
[664] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 215.
[665] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 215 (emphasis original).
[666] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 130.

422. In examining a claim of "less favourable treatment" of imported versus domestic products under Article 2.1 of the *TBT Agreement*, the Appellate Body held that this provision requires a two-pronged analysis, the first prong of which consists in assessing whether "the measure at issue modifies the conditions of competition in the [defendant's] market to the detriment of [imported] products".[667] In other words, the first prong of the analysis of less favourable treatment under Article 2.1 corresponds to the analysis of the same phrase under Article III:4 of the GATT 1994.[668] Applying this test, the Appellate Body has found that a measure's implications in the marketplace may depend on how the measure interacts with the "practices" of the domestic and foreign industry "as they [...] stand".[669] In that case, the Appellate Body held that a measure that reflected the practices of "most"[670] of the domestic industry (which had adjusted to the measure), but not those of "most"[671] of the foreign industry (which had not adjusted to the measure), had "a detrimental impact on the competitive opportunities"[672] of imported products in the market.

423. On these bases, we turn to demonstrating that the EU Seal Regime provides less favourable treatment to imported products than to like domestic products, and therefore violates Article III:4 of the GATT 1994.

3. Through the Sustainable Resource Management Requirements, the EU Seal Regime provides less favourable treatment to imported products than to the like domestic products, in violation of Article III:4 of the GATT 1994

424. As observed in paragraphs 415 to 417 above, Norway has already demonstrated compliance with the first two prongs of the test under Article III:4 of the GATT 1994, namely: (1) that the EU Seal Regime is a law, regulation or set of requirements affecting the internal sale, offering for sale, purchase, or use of products; and (2) that imported products, which cannot be marketed under the Sustainable Resource Management Requirements, and domestic products, which can be marketed under the Sustainable Resource Management Requirements, are like. In this section, Norway demonstrates that, through the Sustainable Resource Management Requirements, the EU Seal Regime affords less favourable treatment

[667] Appellate Body Report, *US – Tuna II (Mexico)*, para. 231.
[668] *See, e.g.,* Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 128; and Appellate Body Report, *Korea – Beef*, para. 137.
[669] Appellate Body Report, *US – Tuna II (Mexico)*, para. 234.
[670] Appellate Body Report, *US – Tuna II (Mexico)*, para. 234.
[671] Appellate Body Report, *US – Tuna II (Mexico)*, para. 234.
[672] Appellate Body Report, *US – Tuna II (Mexico)*, para. 235.

to imported than like domestic products. As directed by the Appellate Body, Norway's analysis addresses the design, structure and expected operation of the Sustainable Resource Management Requirements.

a. The conditions of the Sustainable Resource Management Requirements

425. To recall,[673] the Sustainable Resource Management Requirements were introduced as a "compromise" to "satisfy those [EU] Member States who are concerned that the Regulation would impact upon their policies for controlling seal populations".[674] To resolve this concern, the requirements allow the placing on the market of certain seal products, subject to certain conditions.

426. The first of these conditions is that seal products be derived from hunts "regulated by national law" and conducted for the "purpose of the sustainable management of natural resources".[675] Norway does not contend that this condition is *per se* discriminatory. Indeed, as detailed elsewhere in this submission,[676] Norway's seal hunt is strictly regulated by Norwegian law and is undertaken with careful regard to the sustainable management of marine resources. On that basis, Norway would expect the products of its hunt to meet this condition.

427. However, in addition to the basic condition that seal products be derived from regulated hunting for the purpose of sustainable resource management, the European Union added certain other conditions, which, in addition to being unnecessary to fulfil the measure's stated objectives,[677] are discriminatory.[678]

428. In particular, the European Union discriminates in favour of domestic seal products over seal products from Norway by limiting eligibility for the Sustainable Resource Management Requirements to products meeting the following additional conditions:

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[673] *See* paras. 140 to 142 above.
[674] Message from Mr. Harbour, IMCO Coordinator, in email conversation "Compromise on Article 3" (2-8 April 2009), Exhibit NOR-27.
[675] Basic Seal Regulation, Exhibit JE-1, Article 3(2)(b).
[676] *See* paras. 258 to 266 above.
[677] *See* section VI.D.4 below.
[678] Norway notes that, in addition to discriminating contrary to Article III:4 of the GATT 1994 as addressed in this section, conditions imposed under the Sustainable Resource Management Requirements also introduce arbitrary and unjustifiable discrimination between WTO Members where the same conditions prevail: *see* paras. 730-733, 739-743 and 752 below.

- The "nature and quantity" of the seal products must not be "such as to indicate that they are being placed on the market for commercial reasons";[679] this requires, in particular, that the seal products are "placed on the market in a non-systematic way";[680]

- The seal products must be placed on the market on a "non-profit basis", *i.e.*, at a price not exceeding the recovery of the costs incurred to kill the seals.[681]

429. Neither of these conditions is rationally related to the sustainable management objective, and indeed, as Norway demonstrates in section VI.D.4 below, both the "non-systematic" condition and the "not-for-profit" condition undermine this objective.[682] The "fundamental thrust and effect" of each of these two conditions is to prevent imported seal products from Norway being able to access the EU market under the Sustainable Resource Management Requirements, while allowing the placing on the market of seal products from the European Union. By denying the opportunity to compete to Norwegian seal products, while at the same time allowing domestic production to be marketed, these conditions fundamentally alter the conditions of competition to the advantage of domestically produced seal products.

b. The "non-systematicity" requirement provides less favourable treatment to Norwegian than to EU seal products

430. *First*, the requirement that products be placed on the market in a non-systematic way, in a limited quantity, *reflects* the characteristics of seal culling as it is carried out in the European Union. Both Finland and Sweden, in requesting to be allowed to continue placing on the market their seal products, indicated that the size of their respective hunts was small.[683] Similarly, Finnish MEP Lasse Lehtinen, expressing some relief at the introduction of the Sustainable Resource Management Requirements in the draft measure, noted that each year, in Finland, "fishermen catch a few hundred seals".[684]

431. Scientific literature on interaction between seals and fisheries in EU countries confirms the relatively limited number of seals posing a threat to EU fisheries, and the non-

[679] Basic Seal Regulation, Exhibit JE-1, Article 3(2)(b).
[680] Implementing Regulation, Exhibit JE-2, Article 5(1)(c).
[681] Basic Seal Regulation, Exhibit JE-1, Article 3(2)(b); and Implementing Regulation, Exhibit JE-2, Article 2(2).
[682] For discussion, *see* paras. 721-743 below.
[683] Member States' Comments on the Proposed Regulation (19 January 2009), Exhibit JE-10, pp. 16 and 18: Finland indicated that it took on average 500 seals yearly, and Sweden requested a derogation for "small scale" hunt.
[684] European Parliament Debates, Exhibit JE-12, p. 72.

systematic nature of the hunt conducted by EU Member States. According to scientific literature, the problem posed by seals to the fishing activities of Finland, Latvia, Lithuania and Sweden relates to the seals' attacks on fishing gear.[685] Therefore, in these countries, fishermen kill seals non-systematically, when they pose a direct threat to their own fishing gear. A similar situation, with similar conduct by fishermen, exists in the United Kingdom (Scotland), although the possibility is being examined of delivering chemical sterilization as a substitute for killing seals.[686]

432. *Second*, non-systematicity is a condition that ***excludes*** the products of the sustainable management hunt conducted in non-EU countries including Norway from access under the Sustainable Resource Management Requirements.

433. The definition of "sustainable use" of natural resources that Norway applies in its policy and legislation[687] is the same as the definition set out in the *Convention on Biological Diversity*, pursuant to which resources must be used "at a rate that does not lead to the long-term decline of biological diversity", and within this limit, may be used "to meet the needs and aspirations of present and future generations".[688] Thus, there are two prongs to sustainable management, namely:

- Ensuring that resources do not decline in the long-term through the establishment, on the basis of scientific evidence, of a total allowable catch; and
- Within the limits of this quota, using resources to satisfy "needs and aspirations" of human communities.

434. In this section, Norway explains how it implements the first prong of this definition, showing that the Sustainable Resource Management Requirements exclude Norwegian seal

[685] *See*, *e.g.*, Finnish Game and Fisheries Research Institute ("RKTL"), *Symposium on Biology and Management of Seals in the Baltic Area held in Helsinki, Finland* (15-18 February 2005), Exhibit NOR-64, pp. 11, 15, 25-29, 40-42, 45-47 and 69.
[686] University of St. Andrews' Sea Mammal Research Unit, Special Committee on Seals ("SCOS"), *Scientific Advice on Matters Related to the Management of Seal Populations* (2007), available at http://www.smru.st-andrews.ac.uk/documents/SCOS_2007_FINAL_ADVICE_1.pdf (last checked 12 October 2012), Exhibit NOR-65, p. 13.
[687] *See*, in particular, the Norwegian Marine Resources Act, Exhibit NOR-44, section 7, and paras. 259 to 261 above.
[688] *United Nations Convention on Biological Diversity*, adopted on 5 June 1992, entered into force on 29 December 1993, 1760 UNTS 79; 31 ILM 818 (1992) ("Convention on Biological Diversity"), Exhibit NOR-66, Article 2: "'Sustainable use' means the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations".

products from access to the EU market. Section III.D.3.c below relates to the second prong of this definition.

435. Current Norwegian sealing takes place principally in the West Ice.[689] Every five years, the Norwegian Institute of Marine Research performs aerial surveys of the West Ice harp seal population, using helicopters, airplanes and research vessels. Such independent population estimates are required for the assessment of stock status, together with information on the population's productivity and mortality.[690] These assessments are carried out on a yearly basis by the ICES/NAFO Working Group on Harp and Hooded Seals. The harp seal population in the West Ice was estimated to 649,566 individuals in 2011. The largest population estimates of 650,000 for the most recent years are the largest on record.[691] On the basis of the status of seal stocks, the ICES[692] submits scientific advice within relevant sustainability parameters on the maximum number of seals that may be caught each year in the West Ice. On this basis, the Ministry of Fisheries and Coastal Affairs sets the yearly Total Allowable Catch.

436. The TAC, therefore, is based on population estimates taking account of expected mortality, pup production estimates, reproductive rates, and total removals, all of which serve as a basis for scientific advice on the expected evolution of the population over ten years for different levels of catches. Factors such as the status of prey species, the effect of seals on such species, and climate change, are not quantified in the model, but included in the overall considerations.[693] The overarching objective is to maintain seal populations above a target level that ensures its long-term sustainability. Typically, the TAC is set at the level that "stabilizes" the future population of adult seals.[694] However, in case of pronounced population increases well above a level already considered sustainable, TACs may also target a reduction of the population.[695]

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[689] *See* para. 49 above.
[690] T. Haug et al., *Report from Surveys to Assess Harp and Hooded Seal Pup Production in the Greenland Sea Pack-Ice in 2012* (Institute of Marine Research, 2012), Exhibit NOR-67, p. 3.
[691] 2012 NAFO Scientific Council Meeting, Exhibit NOR-19, p. 2.
[692] For an overview of the scientific principles that serve as a basis for the ICES advice, *see, e.g.*, ICES, *Report of the ICES Advisory Committee 2012*, Book 1, section 1.2 – "Advice Basis" (June 2012) ("ICES Advice 2012"), Exhibit NOR-68.
[693] *See, e.g.*, ICES Advice 2012, Exhibit NOR-68. *See* also, generally, 2011 WGHARP Report, Exhibit NOR-12.
[694] 2011 WGHARP Report, Exhibit NOR-12, p. 4.
[695] *See, e.g.*, with reference to the harp seal stock in the West Ice, ICES, *Report of the ICES Advisory Committee 2011*, Book 3 – "The Barents Sea and the Norwegian Sea" (2011), Exhibit NOR-69, p. 6.

437. On this basis, in 2012 for example, the TAC for harp seals in the West Ice was 25,000, and 5,593 seals were caught.[696] Thus, as a result of the size of the seal populations involved in the Norwegian seal hunt, and of the scientific advice on sustainable management of the seal resource (*i.e.*, the harvesting of seals in a way that does not lead to their long-term decline), the Norwegian seal hunt represent a systematic effort, involving larger numbers than the occasional, incidental hunting carried out in the European Union.

438. Moreover, Norway regulates the seal hunt in detail, requiring that it take place only between mid-April and the end of June, a period chosen, among other reasons, to ensure compliance with the ban on hunting unweaned pups;[697] and requiring that participants be properly trained professionals subject to license, training and testing requirements.[698]

439. Given the size of the total allowable catch, and other features of the hunt, Norway harvests a large but sustainable number of seals. As a result, Norway has a large number of seals, and resulting seal products, that may be placed on the EU market. However, given this large number of seals, the volume and frequency of the sales means that Norway would not meet the requirement that seal products be placed on the market in a non-systematic manner.

440. In its 2009 assessment, the consultancy COWI reached, preliminarily, similar conclusions. In considering the potential impact of the Sustainable Resource Management Requirements, it concluded that seal products from Sweden and Finland would "probably" qualify under the Sustainable Resource Management requirements, while non-EU seal products would not.[699] In the case of Norway, while observing that the hunt was conducted "based on ecosystem management principles",[700] COWI took the view that the nature and quantity of the hunt indicated that Norwegian seal products would not fulfil the Sustainable Resource Management Requirements.[701]

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[696] The 2012 Management and Participation Regulation, Exhibit NOR-13, section 4, and 2012 Report of the Norwegian/Russian Working Group on Seals, Exhibit NOR-16, p. 2. In addition, 21 seals were caught for scientific purposes. *Ibid*.
[697] Landmark Statement, Exhibit NOR-8, para 33.
[698] *See* paras. 248 to 251 above.
[699] COWI, *Traceability systems for trade in seal products – Briefing note for workshop participants*, 20 October 2009, p. 15, in 2010 COWI Report, Exhibit JE-21, annex 5.
[700] COWI, *Traceability systems for trade in seal products – Briefing note for workshop participants*, 20 October 2009, p. 13, in 2010 COWI Report, Exhibit JE-21, annex 5.
[701] COWI, *Traceability systems for trade in seal products – Briefing note for workshop participants*, 20 October 2009, p. 15, in 2010 COWI Report, Exhibit JE-21, annex 5.

441. As a result, by their design, structure, and expected operation, the Sustainable Resource Management Requirements exclude Norwegian seal products from access to the EU market. In short, in response to concerns expressed by its own Member States, the European Union has designed a set of requirements that correspond to the reality of seal hunting in EU Member States, while being incompatible with the manner in which seal hunting is conducted outside the European Union, and in particular in Norway. This condition is apt to allow marketing of product derived from seal hunting in the European Union, while denying an opportunity to compete to product of the Norwegian hunt. Thus, the "non-systematicity" requirement provides treatment to the group of imported seal products that is less favourable than that accorded to the group of like EU seal products.

c. The "non-profit" requirement provides less favourable treatment to Norwegian than to EU seal products

442. To recall, seal products may be placed on the EU market under the Sustainable Resource Management Requirements only if they are sold "on a non-profit basis",[702] *i.e.*, at a price that does not exceed cost recovery.[703] The "non-profit" requirement, too, fits the reality of the EU seal hunt, while excluding seal products from Norway.

443. In the European Union, the seal hunt is an occasional activity conducted by fishermen, *incidental* to their fishing activities. The economic benefit derived from seal hunting consists of the elimination of seals "caus[ing] problems to fisheries by damaging gears and catches".[704] Thus, even if the price at which the seal or seal products are sold only allows for the recovery of the costs of killing the seals, the fishermen derive a net economic benefit in the form of a more efficient fishing activity, with gear and catches not damaged by attacks from seals. In other words, by killing seals, EU fishermen avoid incurring the costs (and losses) that would ensue from seals' attacks.

444. The situation is different in Norway. In Norway, sealing is not merely an activity *incidental* to fishing; instead, during ten to eleven consecutive weeks, it is the *only* activity of the professionals carrying out the hunt. To engage in the hunt, they must travel long distances to the West Ice, remaining at sea for the duration of the hunt.

[702] Basic Seal Regulation, Exhibit JE-1, Article 3(2)(b).
[703] Implementing Regulation, Exhibit JE-2, Article 2(2).
[704] *See, e.g.*, Member States' Comments on the Proposed Regulation (19 January 2009), Exhibit JE-10, pp. 16 ("Seals cause problems to fisheries by damaging gears and catches") and 18 ("small scale, statutory controlled hunting with the main purpose to reduce damages from [sic] fisheries").

445. This organized and strictly regulated effort is thus not one that is merely incidental to fishing or some other activity, and unlike in the European Union, this effort is not compensated by the avoidance of damage to fishing gear and fishing activities. Thus, although the Norwegian seal hunt may be, at times, unprofitable, it cannot be carried out *on condition* that no profit be derived from the hunt.[705]

446. Thus, the result of the non-profit requirement is that while seal products from the European Union have access to the EU market, seal products from Norway do not.

447. The arbitrariness of the discrimination introduced by the "non-profit" requirement is all the more apparent when one observes that the only economic operators to whom the "non-profit" requirement applies are the hunters, *i.e.*, those that harvest the raw natural resource. Article 2(2) of the Implementing Regulation defines "non-profit" only in relation to the costs "borne by the hunter". Conversely, for example, those processing the raw natural resources into intermediate or final goods, or offering the products for sale at EU auction houses, may derive profits from their activities.[706]

448. One further aspect of the non-profit requirement compounds the discrimination introduced by it. The European Union has adopted a particular rule for the determination of whether seal products are sold without a profit. Specifically, the European Union requires that, if "any subsidies [were] received in relation to the hunt",[707] these must be added to the sales price in order to determine whether a profit was made. In order to allow the long-term viability of the seal hunt and maintain the professional capabilities necessary to carry out the hunt, Norway does provide a subsidy in relation to the hunt.[708]

449. In light of this, the peculiar treatment of subsidies in the EU definition of "non-profit" serves further to exclude Norwegian products from the EU market, while allowing EU products. To recall, EU hunters typically are fishermen that non-systematically kill seals because of the risk to fishing activities. Therefore, they do not need to receive financial support exceeding cost recovery. Conversely, Norwegian hunters devote ten to eleven weeks

[705] In paras. 734 to 743 below, Norway also explains that this requirement does not contribute to the purpose of sustainable management of marine resources.
[706] *See also* para. 740 below.
[707] Implementing Regulation, Exhibit JE-2, Article 2(2).
[708] The purpose of the subsidy is to ensure that the recommended TAC quotas are taken. *See, e.g.*, Norwegian Ministry of Fisheries and Coastal Affairs, *Proposition No. 1 to the Storting for Budget Year 2012*, available at http://www.regjeringen.no/pages/35168309/PDFS/PRP201120120001FKDDDDPDFS.pdf (last checked 7 November 2012) ("2011-2012 Budget Proposal"), Exhibit NOR-71, pp. 108 and 109.

of their year *exclusively* to the hunt, sailing long distances, remaning at sea throughout this extended period. Such an effort would not be tenable without any financial reward beyond cost recovery. Thus, the requirement that even subsidies allow only for cost recovery is further tailored to the reality of the EU seal hunt, to the exclusion of the Norwegian seal hunt.

4. Conclusion under Article III:4

450. By introducing two conditions, the "non-systematic" sale condition and the "non-profit" condition, into the Sustainable Resource Management Requirements, the European Union has tailored the Sustainable Resource Management Requirements to the realities of the seal hunt in the European Union, while making seal products from Norway ineligible, despite Norway's strong commitment to sustainable resource management. Thus, whereas within the European Union seal hunting and the marketing of the products of seal hunting are permitted to "carry on as before",[709] market access is now denied to the products of the Norwegian seal hunt. In this way, the European Union denies to Norwegian products an opportunity to compete, which alters fundamentally the conditions of competition between Norwegian products and like products originating in the European Union that are permitted to be placed on the market.

451. Accordingly, through the "non-systematic" sale condition and the "non-profit" condition, the EU Seal Regime violates Article III:4 of the GATT 1994.

IV. THE EU SEAL REGIME IS A QUANTITATIVE RESTRICTION PROHIBITED BY ARTICLE XI:1 OF THE GATT 1994 AND ARTICLE 4.2 OF THE *AGREEMENT ON AGRICULTURE*

A. Introduction

452. The EU Seal Regime constitutes a quantitative restriction on the importation of seal products, prohibited by Article XI:1 of the GATT 1994 and Article 4.2 of the *Agreement on Agriculture*. To recall the discussion of the measure at issue in section II.C above, the EU Seal Regime introduces a patchwork of requirements for importation of seal products into the EU.[710] The seal products permitted to be placed on the market are restricted to seal products meeting the Indigenous Communities, Sustainable Resource Management or Personal Use Requirements.

[709] European Parliament Debates, Exhibit JE-12, p. 72.
[710] Basic Seal Regulation, Exhibit JE-1, Article 3(1).

B. Article XI:1 of the GATT 1994

1. Overview of obligations under Article XI:1 of the GATT 1994

453. Article XI:1 of the GATT 1994 forbids all "prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, … on the importation of any product of the territory of any other contracting party".

454. Article XI:1 has been frequently interpreted. In its 1988 report, the GATT panel in *Japan – Semi-Conductors* noted that the wording of Article XI:1:

> … was comprehensive: it applied to all measures instituted or maintained by a contracting party prohibiting or restricting the importation, exportation or sale for export of products other than measures that take the form of duties, taxes or other charges.[711]

455. Numerous panels thereafter have repeated the same view, stressing, amongst other things, that the term "restriction" includes a condition that limits importation.[712] In this vein, the panel in *India – Quantitative Restrictions* concluded that the word "restriction" encompasses "a limitation on action, a limiting condition or regulation"; and, in *India – Autos*, the panel noted that the word covers conditions that have a "limiting effect … on importation itself".[713]

456. Most recently, the Appellate Body in *China – Raw Materials* noted that the noun "restriction" "refers generally to something that has a limiting effect".[714] With reference to the title of Article XI, "General Elimination of Quantitative Restrictions", the Appellate Body further noted that the use of the adjective "quantitative" in the title "informs the interpretation of the words 'restriction' and 'prohibition'",[715] and "suggests that Article XI of the GATT 1994 covers those prohibitions and restrictions that have a limiting effect on the quantity or amount of a product being imported or exported."[716]

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[711] GATT panel report, *Japan – Semi-Conductors*, para. 104.
[712] Panel Report, *Colombia – Ports of Entry*, paras. 7.232-7.241.
[713] Panel Report, *India – Quantitative Restrictions*, para. 5.128; Panel Report, *India – Autos*, para. 7.270.
[714] Appellate Body Report, *China – Raw Materials*, para. 319.
[715] Appellate Body Report, *China – Raw Materials*, para. 320.
[716] Appellate Body Report, *China – Raw Materials*, para. 320.

2. The EU Seal Regime violates Article XI:1 of the GATT 1994

457. Under Article 3 of the Basic Seal Regulation, the importation of seal products is permitted only if the products conform to the Indigenous Communities, Sustainable Resource Management, or Personal Use Requirements.[717] Effectively, the measure operates as a border measure that is inconsistent with Article XI:1 of the GATT 1994.

458. In terms of the expected operation of the EU Seal Regime, *all* seal products produced in the EU will meet the conditions of the Sustainable Resource Management Requirements and will thus be able to be placed on the market. By contrast, the Indigenous Communities. Sustainable Resource Management, and Personal Use Requirements have a limiting effect on importation of seal products from Norway.

459. In relation to the Personal Use Requirements, the quantitative nature of the conditions is expressly stated in the measure, since the quantity that may be imported is restricted to goods for personal use by the importer and his/her family. In addition, the other conditions in the Requirements[718] also have a limiting effect on importation, for example by prescribing that in order to import products containing seal, EU residents must travel abroad and acquire them "on site",[719] and cannot import them without having travelled abroad.

460. Similar to the Personal Use Requirements, the Sustainable Resource Management Requirements include an express reference to "quantity", requiring that, to qualify, the goods must not be placed on the market in such a "quantity [...] as to indicate that they are being placed on the market for commercial reasons".[720] Moreover, the other conditions in the Requirements also have a limiting effect on importation, for example by prescribing that the products in question only qualify to be imported if they are placed on the market "on a non-profit basis".[721]

461. Also similarly, the Indigenous Communities Requirements restrict access to seal products from a limited number of sources.[722]

[717] Basic Seal Regulation, Exhibit JE-1, Article 3(1) and (2).
[718] *See* paras. 758 to 766 below.
[719] Implementing Regulation, Exhibit JE-2, Article 4(3).
[720] Basic Seal Regulation, Exhibit JE-1, Article 3(2)(b). *See* also para. 428 above.
[721] Basic Seal Regulation, Exhibit JE-1, Article 3(2)(b).
[722] *See* paras. 337 to 343 above.

462. Thus, the three sets of Requirements in the EU Seal Regime establish limiting conditions that must be respected in order for importation to occur. As a result of these limiting conditions, the quantity of imports is restricted. Therefore, the Seal Regime is a "restriction other than duties, taxes or other charges … instituted … on the importation" of seal products, prohibited by Article XI:1 of the GATT 1994.

C. Article 4.2 of the *Agreement on Agriculture*

1. Overview of the obligations under Article 4.2 of the *Agreement on Agriculture*

463. Article 4.2 of the *Agreement on Agriculture* provides:

> Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties, except as otherwise provided for in Article 5 and Annex 5.

464. In Article 4.2, the drafters ensured that certain types of measure, which were required to be converted into ordinary customs duties during the Uruguay Round, "could not be maintained, by virtue of [Article 4.2], from the date of entry into force of the WTO Agreement on 1 January 1995".

465. Footnote 1 of the *Agreement on Agriculture*, which is attached to Article 4.2, expressly states that the measures subject to the prohibition in Article 4.2 include "quantitative import restrictions".

466. In terms of the relationship between Article XI:1 of the GATT 1994 and Article 4.2, the panel in *Korea – Various Measures on Beef* noted that:

> … the general prohibition against import restrictions contained in Article XI and its Ad Note find a more specific application in Article 4.2 of the Agreement on Agriculture together with its footnote with regard to agricultural products.[723]

467. Accordingly, when a measure affecting trade in agricultural products violates Article XI:1 of the GATT 1994, it also violates Article 4.2 of the *Agreement on Agriculture*.[724]

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[723] Panel Report, *Korea – Beef*, footnote 400.
[724] *See* Panel Report, *Korea – Beef*, paras. 762 and 768; and Panel Report, *India – Quantitative Restrictions*, paras. 5.241-5.242.

2. The Seal Regime violates Article 4.2 of the *Agreement on Agriculture*

a. The Agreement on Agriculture is applicable to seal products

468. As a threshold matter, Article 2 of the *Agreement on Agriculture* provides that the *Agreement* applies solely to the products listed in Annex 1 to the *Agreement*. Annex 1 provides that the *Agreement* applies, *inter alia*, to products covered by HS Chapters 1 to 24 (less fish and fish products) plus HS Headings 4101 to 4103, and 4301. The *Agreement on Agriculture* applies to those seal products restricted by the EU Seal Regime that are included among those listed in Annex 1 of the *Agreement*.[725]

469. Article 2(2) of the Basic Seal Regulation defines "seal products" as:

> … all products, either processed or unprocessed, deriving or obtained from seals, including meat, oil, blubber, organs, raw fur skins and fur skins, tanned or dressed, including fur skins assembled in plates, crosses and similar forms, and articles made from fur skins.[726]

470. In addition to providing this definition of the product scope of the EU Seal Regime, Article 3(3) of the Basic Seal Regulation also required the Commission to "issue technical guidance notes setting out an indicative list of the codes of the Combined Nomenclature [(CN)] which may cover seal products". In December 2010, four months after the EU Seal Regime entered into force, the Commission issued a Technical Guidance Note to facilitate the enforcement of the restrictions on the importation of seal products.[727] The EU's list of products subject to the EU Seal Regime includes products classified under the following CN codes:

- HS Chapter 2 (meat and edible offal);
- HS Chapter 5 (products of animal origin, not elsewhere specified or included);
- HS Chapter 15 (animal or vegetable fats and oils and their cleavage products; prepared edible fats; animal or vegetable waxes);

[725] Those seal products for which the EU has made tariff concessions are listed in Exhibit JE-42. All of the specific products listed in this exhibit, except those falling outside of HS Chapters 1 to 24 (less fish and fish products) plus HS headings 4101 to 4103, and 4301, are covered by the *Agreement on Agriculture*.
[726] Basic Seal Regulation, Exhibit JE-1, Article 2(2).
[727] Technical Guidance Note, Exhibit JE-3.

- HS Chapter 16 (preparations of meat, of fish or of crustaceans, mollusks or other aquatic invertebrates);
- HS Chapter 21 (miscellaneous edible preparations);
- HS Chapter 23 (residues and waste from the food industries, prepared animal fodder);
- HS Heading 4103 (hides and skins);
- HS Heading 4301 (raw furskins).[728]

471. All of the seal products classified under these chapters and headings fall within the scope of the *Agreement on Agriculture*.[729] Accordingly, with respect to these seal products, the EU Seal Regime is subject to the obligations in the *Agreement on Agriculture*.

b. The EU Seal Regime constitutes a quantitative import restriction prohibited by Article 4.2

472. As explained in section IV.B.2 above, the import restriction established by the EU Seal Regime is a quantitative restriction on importation for purposes of Article XI:1 of the GATT 1994. For the same reasons for which the EU Seal Regime constitutes a quantitative restriction for purposes of Article XI:1, it constitutes a "quantitative import restriction" on agricultural products that is prohibited by Article 4.2 of the *Agreement on Agriculture*.

V. THE EU SEAL REGIME IS A TECHNICAL REGULATION

A. Introduction

473. Norway claims that the EU Seal Regime constitutes a "technical regulation" that violates Article 2.2 of the *TBT Agreement* and in relation to which the EU has failed to comply with its obligations under Article 5 of the *TBT Agreement*. The relevant provisions of the *TBT Agreement* apply to measures meeting the definition of a "technical regulation" that is set forth in paragraph 1 of Annex 1 ("Annex 1.1") of the *TBT Agreement*.[730] Accordingly, Norway addresses this threshold issue at the outset.

[728] A more detailed list of the relevant products from these chapters is provided in the Technical Guidance Note, Exhibit JE-3, pp. 44-48.
[729] *Agreement on Agriculture*, Annex 1, para. 1.
[730] *TBT Agreement*, Article 2. *See also, e.g.,* Appellate Body Reports, *EC – Sardines*, para. 175; and EC Asbestos, para. 59.

B. Overview of facts

474. As set forth in paragraphs 158 to 166 above, the Basic Seal Regulation establishes three sets of Requirements, one of which must be met for products to be able to contain seal. Each of the three sets of requirements, taken individually and viewed as a whole, simultaneously prescribe when products may contain seal, and prohibit non-conforming products from containing seal.

475. Specifically, Article 3 of the Basic Seal Regulation provides that "seal products" may "only" be placed on the market when certain requirements are met. Further, the Regulation defines seal products as "all products, either processed or unprocessed, deriving or obtained from seals".[731] A Technical Guidance Note published by the European Union lists, indicatively, EU Customs Nomenclature codes "with the greatest likelihood"[732] of covering products that might contain seal. Norway has described in detail the requirements that must be met for products to be able to contain seal, including the certification requirements, in section II.C.3 above.[733]

476. The European Union notified the Proposed Regulation to the Committee on Technical Barriers to Trade on 11 February 2009, under Article 2.9.2 of the *TBT Agreement*, *i.e.*, the provision of the *TBT Agreement* that relates to notifications of technical regulations, although the European Union added that it was taking the initiative of this notification "without prejudice to the question of the applicability of the *TBT Agreement*."[734] The European Union submitted supplementary notifications to the WTO throughout the EU legislative process, pursuant to the *TBT Agreement* requirements for technical regulations.[735]

C. The definition of "technical regulation" in Annex 1.1 of the *TBT Agreement*

477. Annex 1.1 of the *TBT Agreement* defines a "technical regulation" as follows:

> Document which lays down product characteristics or their related processes and production methods, including the

[731] Basic Seal Regulation, Exhibit JE-1, Article 2(2).
[732] Technical Guidance Note, Exhibit JE-3, Foreword, p. 44. The Technical Guidance Note was adopted as envisaged in Article 3(3) of the Basic Seal Regulation, Exhibit JE-1.
[733] *See* paras. 158 to 166 above.
[734] WTO document G/TBT/N/EEC/249, p. 1.
[735] WTO documents G/TBT/N/EEC/249/Add.1 (amendments to the Proposed Regulation); G/TBT/N/EEC/249/Add.2 (adoption of the Basic Seal Regulation); G/TBT/N/EEC/325 (draft Implementing Regulation); and G/TBT/N/EEC/325/Add.1 (adoption of the Implementing Regulation).

> applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

478. Based on the wording of this definition, the Appellate Body has established three criteria that a "document" must meet to constitute a "technical regulation":

> *First*, the document must apply to an identifiable product or group of products. The *identifiable* product or group of products need not, however, be expressly *identified* in the document. *Second*, the document must lay down one or more characteristics of the product. These product characteristics may be intrinsic, or they may be related to the product. They may be prescribed or imposed in either a positive or a negative form. *Third*, compliance with the product characteristics must be mandatory.[736]

479. We will examine these three prongs in turn. Before doing so, we note that in *EC – Asbestos*, the Appellate Body emphasised that, to determine whether a measure is a technical regulation, it is necessary to consider the measure in its entirety:

> In our view, the proper legal character of the measure at issue cannot be determined unless the measure is examined as a whole.[737]

480. In *EC – Asbestos*, the measure consisted of prohibitions on asbestos fibres and products containing asbestos fibres, coupled with exceptions from the prohibitions. The panel adopted a "two-stage" approach by examining, first, the application of the *TBT Agreement* to the prohibitions, and, then, "second and separately", its application to the exceptions.[738] The Appellate Body reversed this approach, because it considered that it was necessary to take into account the "complexities" of the measure, which included both prohibitive and permissive elements, and added:

> ... the exceptions in the measure would have no autonomous legal significance in the absence of the prohibitions. We, therefore, conclude that the measure at issue is to be examined

[736] Appellate Body Report, *EC – Sardines*, para. 176, citing with approval Appellate Body Report, *EC – Asbestos*, paras. 66-70. *See also* Appellate Body Report, *US – Tuna II (Mexico)*, para. 183.
[737] Appellate Body Report, *EC – Asbestos*, para. 64.
[738] Appellate Body Report, *EC – Asbestos*, para. 65.

> as an integrated whole, taking into account, as appropriate, the prohibitive and the permissive elements that are part of it.[739]

1. Applicable to "identifiable" products

481. As to the first prong, to qualify as a "technical regulation", a document must be "applicable to an *identifiable* product, or group of products."[740] In this regard, the Appellate Body has explained that:

> … this does not mean that a "technical regulation" must apply to "*given*" products which are actually *named*, *identified* or *specified* in the regulation. … Although the TBT Agreement clearly applies to "products" generally, nothing in the text of that Agreement suggests that those products need be named or otherwise *expressly* identified in a "technical regulation". Moreover, there may be perfectly sound administrative reasons for formulating a "technical regulation" in a way that does *not* expressly identify products by name, but simply makes them identifiable – for instance, through the "characteristic" that is the subject of regulation.[741]

482. For example, in *EC – Asbestos*, the Appellate Body found that a measure banning products that contained asbestos applied to an identifiable group of products, *i.e.*, "*all* products".[742]

2. Product characteristics including the applicable administrative provisions

483. A measure meets the second prong of the definition of a "technical regulation", *inter alia*, if it lays down "product characteristics", which may include "applicable administrative provisions".[743]

a. Product characteristics

484. In *EC – Asbestos*, the Appellate Body elaborated on the meaning of the term "product characteristics". *First*, the Appellate Body noted that a number of synonyms of the word "characteristic" are helpful in understanding the word's ordinary meaning in the context of the *TBT Agreement*:

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[739] Appellate Body Report, *EC – Asbestos*, para. 64.
[740] Appellate Body Report, *EC – Asbestos*, para. 70.
[741] Appellate Body Report, *EC – Asbestos*, para. 70, reiterated in Appellate Body Report, *EC – Sardines*, para. 180.
[742] Appellate Body Report, *EC – Asbestos*, para. 72 (emphasis original).
[743] *TBT Agreement*, Annex 1.1.

> Thus, the "characteristics" of a product include, in our view, any objectively definable "features", "qualities", "attributes", or other "distinguishing mark" of a product. Such "characteristics" might relate, *inter alia*, to a product's composition, size, shape, colour, texture, hardness, tensile strength, flammability, conductivity, density, or viscosity.[744]

485. For example, in *EC – Sardines*, the requirement that "preserved sardines" be prepared exclusively from fish of the species *Sardina pilchardus* was held to be a product characteristic "'intrinsic to' preserved sardines".[745]

486. *Second*, in *EC – Asbestos* the Appellate Body observed that some of the examples of product characteristics listed in Annex 1.1 show that the scope of this term might extend beyond intrinsic characteristics:

> In the definition of a "technical regulation" in Annex 1.1, the TBT Agreement itself gives certain examples of "product characteristics" – "terminology, symbols, packaging, marking or labelling requirements". These examples indicate that "product characteristics" include, not only features and qualities intrinsic to the product itself, but also related "characteristics", such as the means of identification, the presentation and the appearance of a product.[746]

487. Although product characteristics set forth in a technical regulation are typically prescribed as affirmative requirements, they may also be formulated negatively. In *EC – Asbestos*, with respect to a prohibition on asbestos products, the Appellate Body held:

> … although formulated *negatively* – products containing asbestos are prohibited – the measure, in this respect, effectively prescribes or imposes certain objective features, qualities or 'characteristics' on *all* products. That is, in effect, the measure provides that *all* products must *not* contain asbestos fibres.[747]

[744] Appellate Body Report, *EC – Asbestos*, para. 67.
[745] Appellate Body Report, *EC – Sardines*, para. 190.
[746] Further, a technical regulation "may be confined to laying down only one or a few 'product characteristics'." Appellate Body Report, *EC – Asbestos*, para. 67, also cited in Appellate Body Report, *EC – Sardines*, para. 189. In *EC – Trademarks and Geographical Indications (Australia)*, the panel held that the required features of a label may constitute "product characteristics". Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.451.
[747] Appellate Body Report, *EC – Asbestos*, para. 72.

b. Applicable administrative provisions

488. In *EC – Asbestos*, the Appellate Body noted that Annex 1.1 provides that "a 'technical regulation' may set forth the 'applicable administrative provisions' for products which have certain 'characteristics'."[748]

489. The measure challenged in *EC – Asbestos*, as noted, laid down a ban and exceptions for asbestos products. In order to rely on the exceptions, detailed documentary justification had to be provided to the authorities.[749] The Appellate Body took the view that

> … through these exceptions, the measure sets out the 'applicable administrative provisions, with which compliance is mandatory' for products with certain objective 'characteristics'.[750]

3. Mandatory compliance

490. The third prong of the test for whether a measure is a technical regulation is whether compliance with the measure's requirements is mandatory. As the Appellate Body has explained, the ordinary meaning of the word "mandatory" means "obligatory in consequence of a command, compulsory" or "being obligatory".[751] In *EC – Asbestos*, the Appellate Body simply observed that compliance with the measure at issue was "mandatory and … enforceable through criminal sanctions".[752] In *EC – Sardines*, the panel found that compliance was mandatory on the following basis:

> Article 9 of the EC Regulation states that the requirements contained therein are "binding in its entirety and directly applicable in all Member States".[753]

491. In *US – Tuna II (Mexico)*, the Appellate Body noted that the determination of whether a measure is mandatory for purposes of Annex 1.1 must be made in light of the characteristics of the measure and the circumstances of the case. Relevant elements of consideration may include:

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[748] Appellate Body Report, *EC – Asbestos*, para. 67.
[749] Appellate Body Report, *EC – Asbestos*, para. 73.
[750] Appellate Body Report, *EC – Asbestos*, para. 74.
[751] Appellate Body Report, *US – Tuna II (Mexico)*, para. 185, citing to *Shorter Oxford English Dictionary*, 6th ed., A. Stephenson (ed.) (Oxford University Press, 2007), p. 1694; and *Merriam-Webster's Dictionary of Law*, L.P. Wood (ed) (Merriam-Webster Inc., 1996), p. 304.
[752] Appellate Body Report, *EC – Asbestos*, para. 72.
[753] Panel Report, *EC – Sardines*, para. 7.29.

> whether the measure consists of a law or a regulation enacted by a WTO Member, whether it prescribes or prohibits particular conduct, whether it sets out specific requirements that constitute the sole means of addressing a particular matter, and the nature of the matter addressed by the measure.[754]

492. In that case, the Appellate Body observed, first, that the challenged measure and its implementing regulations "constitute[d] legislative or regulatory acts of the US federal authorities".[755] Second, the measure provided for "specific enforcement mechanisms".[756] Moreover, the measure "condition[ed] eligibility for a 'dolphin-safe' label upon certain documentary evidence",[757] and prohibited the use of "dolphin-safe" or equivalent labels if products did not comply with those conditions.[758] As a result, the Appellate Body upheld the panel's finding that the challenged measure was a technical regulation.[759]

D. The EU Seal Regime is a technical regulation within the meaning of Annex 1.1 of the *TBT Agreement*

493. As set out below, the EU Seal Regime is a technical regulation within the meaning of paragraph Annex 1.1, because: (i) it applies to identifiable products; (ii) it sets out product characteristics, including applicable administrative provisions; and (iii) compliance with its requirements is mandatory. We will address each of these elements in turn.

1. The EU Seal Regime applies to identifiable products

494. The first element of the definition of a technical regulation under the *TBT Agreement* is that it must apply to "*identifiable*" products.[760] To recall, the Appellate Body has held that products need not be "named, identified or specified in the regulation." Instead, the regulation may make it possible to identify them, for example, "through the 'characteristic' that is the subject of regulation".[761]

495. In *EC – Asbestos*, the measure at issue imposed a ban on asbestos products. To recall, the Appellate Body found that the ban laid down a negative product characteristic, *i.e.*, that

[754] Appellate Body Report, *US – Tuna II (Mexico)*, para. 188.
[755] Appellate Body Report, *US – Tuna II (Mexico)*, para. 191.
[756] Appellate Body Report, *US – Tuna II (Mexico)*, para. 194. *See also id.*, para. 195.
[757] Appellate Body Report, *US – Tuna II (Mexico)*, para. 193.
[758] Appellate Body Report, *US – Tuna II (Mexico)*, paras. 193 and 195.
[759] Appellate Body Report, *US – Tuna II (Mexico)*, para. 199.
[760] *See* paras. 481-482 above.
[761] Appellate Body Report, *EC – Asbestos*, para. 70, reiterated in Appellate Body Report, *EC – Sardines*, para. 180.

products *not* contain asbestos.[762] According to the Appellate Body, such a measure applied to identifiable products, namely "*all* products", because it amounted to requiring that *all* products *not* contain asbestos.[763]

496. The EU Seal Regime, too, requires that products not be derived or obtained from seals, unless they meet the conditions set out under the Indigenous Communities, Sustainable Resource Management, or Personal Use Requirements.[764] Thus, like in *EC – Asbestos*, the measure applies to an *identifiable* group of products, namely, all products: no product can be derived or obtained from seals unless it satisfies the requirements for trade specified in the Basic Seal Regulation and Implementing Regulation.

497. The European Union has also positively *identified* numerous product categories to which the EU Seal Regime applies. Article 3(3) of the Basic Seal Regulation required the Commission to indicate the tariff codes that "may cover seal products".[765] Pursuant to this requirement, the European Commission has issued a Technical Guidance Note, setting out the tariff codes, spanning 22 HS chapters, that have "the greatest likelihood of covering products subject to the prohibition in Council Regulation (EC) No. 1007/2009",[766] while clarifying that the EU Seal Regime "potentially" encompasses products covered by "a far larger number" of tariff codes.[767]

498. Therefore, the EU Seal Regime satisfies the first prong of the definition of "technical regulation" in Annex 1.1.

2. The EU Seal Regime lays down product characteristics and applicable administrative provisions

499. Under the EU Seal Regime, products placed on the EU market may contain inputs derived from seal solely if they comply with one of three sets of requirements, including certain administrative provisions that apply to products containing seal inputs. Conversely, if these requirements are not met, products must not contain seal. The EU Seal Regime thus prescribes when products may, or may not, contain seal inputs. The measure, therefore, lays

[762] *See* paras. 487 and 482 above.
[763] Appellate Body Report, *EC – Asbestos*, para. 72 (emphasis original).
[764] Basic Seal Regulation, Exhibit JE-1, Articles 3(1) and 3(2).
[765] Basic Seal Regulation, Exhibit JE-1, Article 3(3).
[766] Technical Guidance Note, Exhibit JE-3, p. 44.
[767] Technical Guidance Note, Exhibit JE-3, p. 44.

down product characteristics in both a positive and negative form, including the applicable administrative provisions.

500. *First*, the Indigenous Communities, Sustainable Resource Management and Personal Use Requirements lay down characteristics for products, describing when they may be obtained or derived from seals. Specifically, the measure lays down, through these three sets of Requirements, when the characteristics of a product may include seal inputs as part of the product content.[768]

501. *Second*, if the requirements are not met, the EU Seal Regime effectively provides that products may *not* contain seal: pursuant to Article 3, seal products (*i.e.*, "products, either processed or unprocessed, deriving or obtained from seals"[769]) may not be placed on the market unless the requirements are met. Through this prohibitive element, the EU Seal Regime lays down, in negative terms, characteristics for all products, namely, that they may not be derived or obtained from seals. Several illustrations can be given of the manner in which the prohibitive element lays down product characteristics: for example, apparel and footwear may not contain seal skin; and omega-3 oil capsules may not contain seal oil. Thus, like the ban on asbestos products in *EC – Asbestos*, the EU Seal Regime prescribes "certain objective features, qualities or 'characteristics' on *all* products. That is, in effect, the measure provides that *all* products must *not* [be obtained from or contain seals]".[770] Or, to borrow the words of the Appellate Body in *US – Tuna II (Mexico)*, through the three sets of Requirements, the EU Seal Regime "enforces a prohibition against the use of [seal inputs] on a [...] product that does not comply with the requirements set out in the measure".[771]

502. *Third*, in relation to the Indigenous Communities and Sustainable Resource Management Requirements, the EU Seal Regime also lays down "applicable administrative provisions" that must be satisfied for products to contain seal pursuant to these requirements. Specifically, parties wishing to market seal products under the Indigenous Communities and Sustainable Resource Management Requirements must obtain a certificate to prove that the

[768] *See, e.g.,* Appellate Body Report, *US – Tuna II (Mexico)*, paras. 193 ("[the measures] condition eligibility for a 'dolphin-safe' label upon certain documentary evidence…") and 195 ("the US measure […] sets out […] conditions for the use of a label…").
[769] Basic Seal Regulation, Exhibit JE-1, Article 2(2).
[770] Appellate Body Report, *EC – Asbestos*, para. 72.
[771] Appellate Body Report, *US – Tuna II (Mexico)*, para. 195.

requirements set out in either exception are met.[772] These certificates may be issued only by certification bodies recognized for this purpose by the EU.[773] The certificates must accompany the seal product when first placed on the market.[774] Without such certificates, seal products cannot be imported or sold.[775] Competent authorities designated by the Member States may verify the certificates accompanying imported products, and control the issuing of certificates by recognized bodies established in their territory.[776]

503. Somewhat similarly, administrative provisions are laid down under the Personal Use Requirements, for seal products acquired by EU residents travelling abroad, and imported into the European Union "at a later date".[777] In such cases, when returning from their journey, EU residents must present to customs authorities, "upon arrival", "a written notification of import" and "a document giving evidence that the products were acquired in the third country concerned".[778] Both documents must be "endorsed by the customs authorities and returned to the travellers", to be presented to the customs authorities, at the time of importation, together with the customs declaration.[779]

504. Thus, similar to the situation in *EC – Asbestos*,[780] the EU Seal Regime also establishes administrative provisions that apply to products with objective characteristics, *i.e.*, products obtained from or contain seals. Compliance with the applicable administrative provisions is necessary to place on the market products with the regulated characteristics. The administrative requirements are, therefore, an integral part of the rules in the EU Seal Regime laying down the permissible and prohibited characteristics of all products.

505. Accordingly, taking into account the requirements that must be complied with to place on the market products containing seal, and the prohibition on seal content that otherwise applies, the EU Seal Regime meets the second prong of the definition of "technical regulation" under Annex 1.1 of the *TBT Agreement*.

[772] Implementing Regulation, Exhibit JE-2, Article 8(3) to 8(6).
[773] Implementing Regulation, Exhibit JE-2, Article 6.
[774] Implementing Regulation, Exhibit JE-2, Article 6(3). *See also id.*, Article 6(4).
[775] Implementing Regulation, Exhibit JE-2, Article 6(6).
[776] Implementing Regulation, Exhibit JE-2, Article 9(1).
[777] Implementing Regulation, Exhibit JE-2, Article 4(3).
[778] Implementing Regulation, Exhibit JE-2, Article 4(3).
[779] Implementing Regulation, Exhibit JE-2, Article 4(3).
[780] *See* Appellate Body Report, *EC – Asbestos*, paras. 73-74.

3. Compliance with the EU Seal Regime is mandatory

506. The third prong of the definition of a technical regulation is that compliance with the product characteristics, related processes, and administrative provisions it lays out must be mandatory.[781]

507. The EU Seal Regime satisfies this criterion. *First*, the Basic Seal Regulation is a legislative instrument adopted by the European Parliament and the Council of the European Union, *i.e.*, the bodies to which the Treaty on the European Union assigns the "legislative function".[782] The Implementing Regulation, in turn, is an act of delegated legislation adopted by the European Commission pursuant to the authority conferred to it with the Basic Seal Regulation.[783]

508. *Second*, the Basic Seal Regulation and the Implementing Regulation both state they are, respectively, "binding in [their] entirety and directly applicable in all Member States". The inclusion of this same phrase in the measure at issue in *EC – Sardines* led the panel to conclude the measure was mandatory.[784]

509. *Third*, the text of the Basic Seal Regulation and the Implementing Regulation make it clear that: the product characteristics laid out therein must be complied with; non-compliant products may not be placed on the EU market; and failure to comply is subject to penalties and enforcement measures to be laid down by Member States.

510. Article 3(1) of the Basic Seal Regulation begins:

> The placing on the market of seal products *shall be allowed only where*…[785]

511. Article 3(2) reads:

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[781] *See* para. 490 above.
[782] Treaty on European Union, Article 14(1). Pursuant to Article 10(2) of the Treaty on European Union, the European Parliament represents the citizens of the European Union, and the Council represents its Member States. Articles 10 and 14 of the Treaty on European Union, Exhibit NOR-72.
[783] The Implementing Regulation was adopted by the Commission, pursuant to legislative powers conferred on that institution under Article 3(4) of the Basic Seal Regulation, pursuant to Article 202 of the EC Treaty. For conferrals of power on or after 1st December 2009, Article 291 of the Treaty on the functioning on the European Union has replaced, in modified form, the relevant portion (third indent) of Article 202 of the Treaty establishing the European Community, together with Article 290 of the Treaty on the functioning of the European Union. TFEU Articles 290 and 291, Exhibit NOR-73. The Commission's implementing powers were exercised within the framework of Council Decision 1999/468, Exhibit NOR-74. *See* footnote 253 above.
[784] Panel Report, *EC – Sardines*, para. 7.29.
[785] Emphasis added.

> By way of derogation from paragraph 1:
>
> (a) the import of seal products *shall also be allowed where*…
>
> (b) the placing on the market of seal products *shall also be allowed where*…[786]

512. Similarly, Articles 3(1) and 5(1) of the Implementing Regulation provide that seal products resulting, respectively, from hunts by indigenous communities or from the management of marine resources:

> may *only be placed on the market where* it can be established that they originate from seal hunts which satisfy all of the following conditions …

513. And Article 4(1) provides that seal products for the personal use of EU residents or their families:

> may *only be imported where* one of the following requirements is fulfilled…

514. As regards "Penalties and Enforcement", Article 6 of the Basic Seal Regulation provides:

> Member States shall lay down the rules on penalties applicable to infringements of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive.

515. Thus, compliance with the requirements at issue is mandatory. Therefore, the EU Seal Regime fulfils the third element of the definition of a technical regulation.

4. Conclusion

516. In sum, the EU Seal Regime satisfies the definition of a technical regulation and, hence, is subject to the obligations relating to technical regulations in Articles 2.2 and 5 of the *TBT Agreement*.

[786] Emphasis added.

VI. THE EU SEAL REGIME VIOLATES ARTICLE 2.2 OF THE *TBT AGREEMENT*

A. Introduction

517. The EU Seal Regime pursues a patchwork of objectives. According to the European Union's statements, the principal objectives of the EU Seal Regime are to promote animal welfare, in particular in response to public concern regarding the animal welfare aspects of the seal hunt, and to harmonise the internal market. A further stated objective of the EU Seal Regime is to prevent consumer confusion over whether products sold in the EU market contain seal inputs. Alongside these objectives, the EU Seal Regime pursues certain other objectives, namely: pursuing sustainable marine resource management; the personal choice of consumers; and protecting the "fundamental economic and social interests of Inuit" and certain other indigenous communities located in the territories of certain Members, by allowing their products on the EU market.

518. The stated objectives are deserving, even though, as Norway explains, not all are legitimate for purposes of Article 2.2 of th*e TBT Agreement*. Norway itself attaches great importance to, among others, animal welfare and the sustainable management of natural resources.[787] Unfortunately, however, the measures comprising the EU Seal Regime are not rationally related to the stated legitimate objectives; instead, the Regime imposes trade restrictions that either do not contribute at all to these objectives, or do not contribute more than less trade-restrictive alternatives. As a result, the EU Seal Regime is inconsistent with Article 2.2 of th*e TBT Agreement*.

519. In pursuing its patchwork of objectives, the EU Seal Regime lacks coherence amongst these objectives, such that elements of the measure pursuing one set of objectives undermine and contradict the fulfilment of other objectives. Indeed, as a Member of the European Parliament noted at the time of voting on the Basic Seal Regulation, the measure is a "poor compromise", by which the issues that the measure was intended to address were "swept under the carpet".[788]

[787] *See* paras. 231 to 257 above in relation to animal welfare, and paras. 258 to 266 in relation to sustainable management of resources.
[788] European Parliament Debates, Exhibit JE-12, p. 64.

B. Overview of the facts

520. While referring to section II.C.1 for a fuller account, Norway recalls here factual elements that are relevant to the analysis under Article 2.2 of the *TBT Agreement*.

521. In 2007, the European Commission "undertook to make a full assessment of the animal welfare aspects of seal hunting and, based on the results, report back to the European Parliament with possible legislative proposals if warranted by the situation".[789] In doing so, the European Commission was responding to a request from the European Parliament that it draft a regulation to ban seal products.[790] As part of such an assessment, the Commission sought, in particular, a scientific opinion from EFSA and an impact assessment from the consultancy COWI.[791] As summarized by the Commission, EFSA found that it was "possible to kill seals rapidly and effectively without causing them avoidable pain or distress", but that hunting practices differed widely and "in practice, effective and humane killing does not always happen".[792] COWI concluded that, so as best to safeguard animal welfare, any measures relating to trade in seal products should seek to "pursue good practices and avoid bad practices",[793] in connection with seal hunting and management of the seal harvest.

522. The European Union also commissioned an "Internet-based public consultation" to ascertain the public's views "on regulation of seal hunting".[794] According to COWI, among other results, the public consultation laid bare a "knowledge gap", with at least 79 percent of respondents having an incorrect understanding of the hunting methods used.[795]

523. In concluding the impact assessment, the European Commission explained:

> The outcome of the assessment of impacts in relation to the animal welfare, economic and social dimension shows that a combination of several options appears to be *the best way to meet the overarching objectives, i.e.*
>
> - protect seals from acts that cause them avoidable pain, distress, fear and other forms of suffering during the killing and skinning process

[789] Proposed Regulation, Exhibit JE-9, Explanatory Memorandum, p. 9.
[790] EU Parliament Declaration, Exhibit JE-19.
[791] Proposed Regulation, Exhibit JE-9, Explanatory Memorandum, p. 9.
[792] Proposed Regulation, Exhibit JE-9, Explanatory Memorandum, pp. 9-10, citing the EFSA Scientific Opinion.
[793] 2008 COWI Report, Exhibit JE-20, section 7.2, p. 136, "Recommendations" (underlining original).
[794] Proposed Regulation, Exhibit JE-9, Explanatory Memorandum, p. 8.
[795] 2008 COWI Report, Exhibit JE-20, Executive Summary, p. 5; section 6.1.1, p. 126; and section 6.3, p. 132.

> - address the concerns of the general public with regard to the killing and skinning of seals
>
> This should be done through prohibiting the placing on the market and the import, transit through, or export from, the Community of all seal products from a given date. *Trade in those products would however be possible when certain conditions, which concern the manner and method whereby seals are killed and skinned, are met. Information requirements would also need to be established* aimed at ensuring that seal products whose trade would be possible by derogation to the prohibitions otherwise in force would be clearly indicated as coming from a country meeting the above-mentioned conditions.[796]

524. On 23 July 2008, as an outcome of this process, the European Commission tabled the Proposed Regulation, explaining that its aims were: to address the animal welfare concerns around the hunting of seals, and to harmonise the conditions governing the trade in seal products within the European Union.[797] The Proposed Regulation envisaged that seal products could be placed on the EU market if they were derived from seals hunted in a country where, or by persons to whom, adequate animal welfare requirements applied.[798] In line with the recommendations of EFSA and COWI,[799] the European Commission explained that conditioning market access on compliance with animal welfare requirements would provide "incentives" for sealing countries to "adapt their legislation and practice" to the animal welfare standards set by the European Union.[800] The European Commission also specified that this approach reflected the results of the public consultation.[801]

525. The Proposed Regulation also envisaged that seal products could be placed on the EU market if they resulted from hunts traditionally conducted by Inuit communities;[802] and could be imported into the European Union for the personal use of travellers.[803]

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[796] Commission Impact Assessment, Exhibit JE-16, section 1, p. 7 (original emphasis removed; emphasis and underlining added).
[797] *See, e.g.*, Proposed Regulation, Exhibit JE-9, Explanatory Memorandum, p. 2. The same objectives have been notified to the TBT Committee: *see* paras. 104 and 105..
[798] *See*, in particular, Proposed Regulation, Exhibit JE-9, Articles 4-7 and Annex II.
[799] 2008 COWI Report, Exhibit JE-20, section 7.2, p. 136, "Recommendations"; and 2007 EFSA Scientific Opinion, Exhibit JE-22, pp. 87-95.
[800] *See, e.g.*, Proposed Regulation, Exhibit JE-9, Explanatory Memorandum, pp. 9 and 12.
[801] Proposed Regulation, Exhibit JE-9, Explanatory Memorandum, p. 9.
[802] Proposed Regulation, Exhibit JE-9, Article 3(2).
[803] Proposed Regulation, Exhibit JE-9, Article 2(4).

526. During the legislative process, a number of EU entities recommended the adoption of an alternative measure, such as labelling of seal products, that would have been less trade restrictive than the final EU Seal Regime.

527. [*Redacted due to withdrawal of evidence*] [804]

528. In July 2008, the Commission itself explained that labelling "could directly contribute to an improvement of the welfare of seals", as it "might encourage a natural self-selection process regarding compliance and thus maintain the balance between the animal welfare, economic and social dimension".[805]

529. In January 2009, the European Parliament's Rapporteur Wallis explained that "an appropriately and robustly constructed mandatory labelling system would have more chance of achieving both of Parliament's policy goals", *i.e.* "those of animal welfare and of respecting and minimising the impact on Inuit communities".[806] The Rapporteur also noted that such an alternative "would also demonstrate greater compliance with EU and International Trade Law".[807] Discussing specifically the European Union's WTO commitments, Rapporteur Wallis observed:

> … it could be argued that a certification or labelling scheme ensuring appropriate information of the public is sufficient to protect public morals and that a trade ban has not been proven necessary, given that alternative measures have not been appropriately tested or considered.[808]

530. [*Redacted due to withdrawal of evidence*] [809] [810]

531. However, instead of adopting a less trade restrictive measure to pursue its stated objectives of addressing the animal welfare concerns and preventing consumer confusion, the European Union opted for a more trade restrictive alternative, which, moreover, bears no rational relationship with those objectives. In its final form, as we explain below, the EU

[804] [*Redacted due to withdrawal of evidence*]
[805] Commission Impact Assessment, Exhibit JE-16, section 6.5, p. 47.
[806] Rapporteur Wallis' Draft Explanatory Statement, in EU Parliament Draft Report on Trade in Seal Products, Exhibit JE-18, p. 34.
[807] Rapporteur Wallis' Draft Explanatory Statement, in EU Parliament Draft Report on Trade in Seal Products, Exhibit JE-18, p. 34.
[808] Rapporteur Wallis' Draft Explanatory Statement, in EU Parliament Draft Report on Trade in Seal Products, Exhibit JE-18, pp. 33-34.
[809] [*Redacted due to withdrawal of evidence*]
[810] [*Redacted due to withdrawal of evidence*]

Seal Regime *prohibits* trade in seal products derived from seals caught in *compliance* with animal welfare requirements, while *permitting*, without quantitative limitation, trade in seal products derived from seals caught in *violation* of animal welfare requirements. All labelling requirements have also been dropped, with the result that nothing distinguishes seal products permitted under the EU Seal Regime from other products on shop shelves across the European Union.

532. [*Redacted due to withdrawal of evidence*] [811] The Committee on Legal Affairs of the European Parliament reached similar conclusions,[812] noting that "it is perfectly possible to argue, as many have, that the welfare of seals would not be promoted by a total ban, since sealers would have no incentive to adopt more humane killing methods".[813]

533. To recall,[814] the final EU Seal Regime as adopted restricts access to the EU market to seal products that meet one of three alternative sets of requirements. *First*, pursuant to the Indigenous Communities Requirements, access to the market is conditioned, among others, on the origin of the hunters, and the relationship of the hunters and their forebears to the region where the hunt takes place.[815] None of the conditions in the Indigenous Communities Requirements relates to animal welfare (or consumer information). Provided seal products meet the conditions of the Indigenous Communities Requirements, they may be marketed irrespective of whether the hunting and killing method used complied with animal welfare considerations. Further, the EU Seal Regime does not require such products to bear a label indicating that they contain seal, or whether the seals were hunted in compliance with animal welfare requirements.

534. *Second*, pursuant to the Sustainable Resource Management Requirements, access to the EU market is granted to seal products that "result from the by-products of hunting that is regulated by national law and conducted for the sole purpose of the sustainable management

[811] [*Redacted due to withdrawal of evidence*]
[812] European Parliament, Committee on Legal Affairs, *Opinion on the legal basis of the Proposal for a regulation of the European Parliament and of the Council concerning trade in seals products*, AL\778488EN.doc, PE423.732v01-00 (1 April 2009) ("Opinion of the EU Parliament Committee on Legal Affairs – Legal Basis"), Exhibit NOR-76, p. 13: "… it would be difficult to argue that the ban is not disproportionate, especially having regard to the Commission's justification of its original proposal, which could be used against the institutions in any litigation…"
[813] Opinion of the EU Parliament Committee on Legal Affairs – Legal Basis, Exhibit NOR-76, p. 13.
[814] *See* paras. 161 to 166 above.
[815] Basic Seal Regulation, Exhibit JE-1, Articles 2(4) and 3(1); Implementing Regulation, Exhibit JE-2, Articles 2(1) and 3(1).

of marine resources", provided certain further conditions are met.[816] The further conditions include that the products in question be placed on the market in a non-systematic way and on a non-profit basis. As is the case under the Indigenous Communities Requirements, seal products may be marketed irrespective of whether the hunting and killing methods used complied with animal welfare considerations. Again, there is no requirement as to labelling.

535. *Third*, pursuant to the Personal Use Requirements, placing on the market of seal products is allowed when EU residents acquire the seal products outside the European Union, on an occasional basis, and introduce them into the European Union for their personal use or that of their families.[817] In a non-paper, the Commission noted that one class of products allowed under the Personal Use Requirements is "hunting trophies".[818] In determining whether a seal product may be imported and consumed for personal use, it is *irrelevant* whether the seal product ("hunting trophy") results from seals killed in a manner contrary to animal welfare considerations.

C. Obligations under Article 2.2 of the *TBT Agreement*

1. Overview

536. In the preamble of the *TBT Agreement* , Members have explained that they agreed to adopt the *TBT Agreement*:

> [2] *Desiring* to further the objectives of GATT 1994;
>
> …
>
> [5] *Desiring* however to ensure that technical regulations and standards, including packaging, marking and labelling requirements, and procedures for assessment of conformity with technical regulations and standards do not create unnecessary obstacles to international trade;
>
> [6] *Recognizing* that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of

[816] Basic Seal Regulation, Exhibit JE-1, Article 3(2)(b) and Implementing Regulation, Exhibit JE-2, Article 5(1)(c). Pursuant to Article 2(2) of the Implementing Regulation, "placing on the market on a non-profit basis" means "placing on the market for a price less than or equal to the recovery of the costs borne by the hunter reduced by the amount of any subsidies received in relation to the hunt".
[817] Basic Seal Regulation, Exhibit JE-1, Article 3(2)(a). *See* also Implementing Regulation, Exhibit JE-2, Article 4.
[818] European Commission Services, *Non-Paper on Possible Elements for a Commission Implementing Regulation*, COM-TSP 1/2 (15 January 2010), Exhibit NOR-33, Article 4(3).

> the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement.

537. Article 2.2 of the *TBT Agreement* reads:

> Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products.

538. The first sentence of Article 2.2 requires Members to "ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade". This language embodies the objective of the *TBT Agreement* that is set out in the fifth recital of the preamble, namely, ensuring that technical regulations "do not create unnecessary obstacles to international trade".[819]

539. The second sentence requires that technical regulations "not be more trade restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create". As the Appellate Body has observed in *US – COOL*,

> The words 'for this purpose' linking the first and second sentences suggest that the second sentence informs the scope and meaning of the obligation contained in the first sentence.[820]

540. The second sentence calls for a panel to assess whether a respondent has struck an appropriate balance between the interests of international trade and other legitimate interests, such as animal welfare. According to the text, the balance is appropriate when a restriction

[819] *See* Panel Report, *US – Tuna II (Mexico)*, para. 7.385.
[820] Appellate Body Report, *US – COOL*, para. 369.

on international trade is "necessary". As Norway sets out in greater detail below, the Appellate Body has explained that an assessment of "necessity" requires a "relational analysis"[821] of: the measure's trade restrictiveness; the contribution that the trade-restrictiveness makes to the measure's legitimate objectives; and, the risks that non-fulfilment of the objectives would create.

541. The third sentence of Article 2.2 provides an illustrative list of relevant "legitimate objectives", and the fourth sentence of the same provision sets out "relevant elements of consideration" in assessing the risks that non-fulfilment would create.

542. To assess whether a measure meets the requirements of Article 2.2, a panel must undertake an analysis of different factors identified in that provision. The Panel must:

(a) identify the objectives pursued with the challenged measures;[822]

(b) evaluate the legitimacy of those objectives;[823]

(c) carry out a "relational analysis"[824] in order to assess whether the trade-restrictiveness is necessary to fulfil a legitimate objective by ascertaining, then weighing and balancing, each of the following:

(i) the trade restrictiveness of the challenged measure;[825]

(ii) "the degree of contribution that the technical regulation makes toward the achievement of the legitimate objective";[826] and

(iii) the risks that would be created if the objective pursued were not fulfilled.[827]

Typically, this relational analysis will involve a comparison with possible alternative measures.[828]

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[821] Appellate Body Report, *US – Tuna II (Mexico)*, para. 318; and Appellate Body Report, *US – COOL*, para. 374.
[822] *See* Appellate Body Report, *US – Tuna II (Mexico)*, paras. 313-314; and Appellate Body Report, *US – COOL*, para. 371.
[823] *See* Appellate Body Report, *US – Tuna II (Mexico)*, para. 313; and Appellate Body Report, *US – COOL*, paras. 370 and 372.
[824] Appellate Body Report, *US – Tuna II (Mexico)*, para. 318. *See* also Appellate Body Report, *US – COOL*, para. 374.
[825] *See* Appellate Body Report, *US – Tuna II (Mexico)*, para. 319; and Appellate Body Report, *US – COOL*, para. 375.
[826] Appellate Body Report, *US – Tuna II (Mexico)*, para. 315. *See* also Appellate Body Report, *US – Tuna II (Mexico)*, paras. 316-318; and Appellate Body Report, *US – COOL*, paras. 373-374 and 390.
[827] *See* Appellate Body Report, *US – Tuna II (Mexico)*, para. 321; and Appellate Body Report, *US – COOL*, para. 377.

543. Below, we expand upon each of these issues in turn.

2. The identification of the objectives pursued

544. Article 2.2 requires that technical regulations be "not more trade-restrictive than necessary to fulfil a *legitimate objective*", and provides a non-exhaustive list of examples of such objectives.

545. A necessary step in the analysis under Article 2.2 is therefore the identification of the regulating Member's objectives. Although a Member is free to choose its own objectives,[829] it is for the panel to assess what the chosen objectives are, on the basis of the available evidence, including the text of the measure and the legislative history:

> in adjudicating a claim under Article 2.2 of the *TBT Agreement*, a panel must assess what a Member seeks to achieve by means of a technical regulation. In doing so, it may take into account the texts of statutes, legislative history, and other evidence regarding the structure and operation of the measure. A panel is not bound by a Member's characterization of the objectives it pursues through the measure, but must independently and objectively assess them.[830]

546. The panel in *US – COOL* also regarded the regulating Member's notification to the TBT Committee as "one of the objective circumstances that will inform the complainants of the objectives of the challenged measure".[831]

547. Thus, it is by analysing all the relevant evidence together – statutes, legislative history, other evidence on the measure's structure and operation, and TBT notifications – that a panel may ascertain the regulating Member's objectives.

548. The Appellate Body's reading of Article 2.2, to the effect that panels must objectively ascertain the regulating Member's objectives, reflects the well-established position under Article XX of the GATT 1994 and Article XIV of the GATS that panels must make an objective assessment of the objectives pursued by a measure. In *US – Gambling*, the

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[828] *See* Appellate Body Report, *US – Tuna II (Mexico)*, paras. 318, 320 and 322; and Appellate Body Report, *US – COOL*, paras. 374 and 376.
[829] *See, e.g.,* Appellate Body Report, *EC – Sardines*, paras. 276-282 and Panel Report, *US – Tuna II (Mexico)*, para. 7.405.
[830] Appellate Body Report, *US – Tuna II (Mexico)*, para. 314 (underlining added). *See* also Appellate Body Report, *US – COOL*, para. 371; and Panel Report, *US – Tuna II (Mexico)*, para. 7.405, citing Appellate Body Report, *US – Gambling*, para. 304.
[831] Panel Report, *US – COOL*, para. 7.605.

Appellate Body found that in conducting its analysis under Article XIV of the GATS, a panel had to take into account the defendant's characterisation of the objectives pursued, but was "not bound" by such categorisation.[832] In *Korea – Various Measures on Beef*, the Appellate Body rejected Korea's characterisation of the level at which the measure pursued its stated objective on the ground that the facts before it did not support this characterisation.[833]

3. The legitimacy of the objectives pursued

549. Once a panel has identified the objectives pursued by a measure, it must establish whether those objectives are "legitimate".[834]

550. The third sentence of Article 2.2 provides an illustrative list of legitimate objectives, namely: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment.[835] If a panel finds that the regulating Member's objectives fall among those listed in Article 2.2, no further enquiry into the objectives' legitimacy is necessary.[836]

551. When the objective is not among those listed in Article 2.2, the Appellate Body has explained that the list in Article 2.2 provides:

> … a reference point for which other objectives may be considered to be legitimate in the sense of Article 2.2.[837]

552. Further guidance on what may be considered to be a legitimate objective under Article 2.2 is also provided by the list of objectives in the sixth and seventh recitals of the preamble to the *TBT Agreement*, and the objectives recognized in other provisions of the covered agreements.[838]

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[832] Appellate Body Report, *US – Gambling*, para. 304.
[833] Appellate Body Report, *Korea – Beef*, paras. 175-178.
[834] Appellate Body Report, *EC – Sardines, para. 286 ;* Panel Report, *US – Clove Cigarettes*, para. 7.333; Panel Report, *US – Tuna II (Mexico)*, paras. 7.387, 7.436; and Panel Report, *US – COOL*, para. 7.555.
[835] These objectives are also recognized in the sixth and seventh paras. of the preamble to the *TBT Agreement*, together with the objective of ensuring "the quality of [a Member's] exports".
[836] Appellate Body Report, *US – COOL*, para. 372.
[837] Appellate Body Report, *US – Tuna II (Mexico)*, para. 313.
[838] Appellate Body Report, *US – Tuna II (Mexico)*, para. 313; and Appellate Body Report, *US – COOL*, para. 370.

4. A relational analysis to assess necessity

553. The first sentence of Article 2.2 bars "unnecessary" obstacles to international trade. The second sentence of Article 2.2[839] requires that technical regulations be no more restrictive than "necessary" to fulfil a legitimate objective, taking into account the risks non-fulfilment would create. Thus, both sentences contain the notion of "necessity".[840] Referring to its earlier case law on the term "necessary", while at the same time considering the different context provided by Article 2.2, the Appellate Body has explained that in this provision,

> … the assessment of 'necessity' involves a relational analysis of the trade-restrictiveness of the technical regulation, the degree of contribution that it makes to the achievement of a legitimate objective, and the risks non-fulfilment would create.[841]

554. Thus, an analysis of necessity must be based on a consideration of these three factors taken together and viewed in their reciprocal relations. A panel must ascertain the challenged measure's trade-restrictiveness, the contribution that the trade-restrictiveness makes to fulfilment of the objective, as well as the risks non-fulfilment would create. A panel must then draw the threads of its analysis together, by evaluating these elements against each other to reach a holistic conclusion as to whether the measure is "more trade restrictive than necessary to fulfil" a legitimate objective.

a. The trade-restrictiveness of the challenged measure

555. One of the elements to be considered under Article 2.2 is the trade-restrictiveness of the challenged measure. The first sentence of Article 2.2 refers to an "obstacle to international trade", while the second sentence refers to "trade-restrictive" measures.

556. The terms "international trade" and "trade", in this context, refer to the commercial exchange of goods between WTO Members. An "obstacle" refers to a "hindrance" or "impediment" to international trade. The dictionary meaning of the word "restrictive"

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[839] The second sentence "informs the scope and meaning of the obligation contained in the first sentence": *see* para. 539 above.
[840] *See* also Appellate Body Report, *US – Tuna II (Mexico)*, para. 318; and Appellate Body Report, *US – COOL*, para. 374.
[841] Appellate Body Report, *US – Tuna II (Mexico)*, para. 318 (underlining added). *See* also Appellate Body Report, *US – COOL*, para. 374. The Appellate Body has also made it clear that the question relates to the necessity of the "trade-restrictiveness": Appellate Body Report, *US – Tuna II (Mexico)*, para. 318.

includes "implying, conveying or expressing a restriction or limitation".[842] In the context of Article XI of the GATT 1994, the word "restriction" has been defined as "something that has a limiting effect".[843] Accordingly, the Appellate Body has held that, in Article 2.2, the phrase "means something having a limiting effect on trade".[844]

557. Thus, these terms encompass prohibitions on trade, which are the most severe form of obstacle or restriction, but also the imposition of restrictive conditions that limit, rather than banning entirely, trade.

558. It is worth noting that the establishment of the extent to which a measure restricts trade "does not require the demonstration of any actual trade effects" but may, instead, be based "on the design of the measure, as opposed to resulting trade effects".[845]

559. Article 2.2 does not prohibit restrictions on trade *per se*. Rather,

> Article 2.2 is […] concerned with restrictions on international trade that exceed what is necessary to achieve the degree of contribution that a technical regulation makes to the achievement of a legitimate objective.[846]

560. We discuss the legal standard relating to a panel's assessment of the contribution made by a measure to its legitimate objectives in the following subsection.

b. The challenged measure's contribution to the achievement of the legitimate objectives

561. Article 2.2 requires that technical regulations be not more trade restrictive than "*necessary to fulfil* a legitimate objective". The dictionary meanings of the verb "fulfil" include:

> To perform, execute, accomplish (a deed)…

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[842] The Oxford English Dictionary, OED Online, Oxford University Press, accessed 8 November 2012, http://www.oed.com/view/Entry/164025?redirectedFrom=restrictive&, *restrictive*, Exhibit JE-39. *See* also, *e.g.*, Panel Report, *US – COOL*, para. 7.567.
[843] *See*, *e.g.*, Appellate Body Report, *China – Raw Materials*, para. 319, cited in Appellate Body Report, *US – Tuna II (Mexico)*, para. 319.
[844] Appellate Body Report, *US – Tuna II (Mexico)*, para. 319. *See* also Appellate Body Report, *US – COOL*, para. 375.
[845] Panel Report, *US – COOL*, para. 7.572. *See also* Panel Report, *Colombia – Ports of Entry*, para. 7.241. *See* also, *ibid*., paras. 7.232-7.240.
[846] Appellate Body Report, *US – Tuna II (Mexico)*, para. 319. *See* also Appellate Body Report, *US – COOL*, para. 375.

> To fill the requirements of, answer (a purpose), comply with (conditions) […][847]

562. These dictionary meanings indicate that the ordinary meaning of the verb "fulfil" refers to a situation when a purpose is attained or achieved; when the "requirements" associated with a "purpose" have been "fill[ed]", "perform[ed]", or "accomplish[ed]". The French and Spanish versions of Article 2.2 support this reading, using the verbs "*réaliser*" (to make real, to achieve)[848] and "*alcanzar*" (to reach),[849] respectively.

563. In Article 2.2, the verb "fulfil" refers to the achievement of "a legitimate objective". Addressing the textual relationship between the words "fulfil" and "objective", the Appellate Body has said:

> … it is inherent in the notion of an "objective" that such a "goal, or aim" may be something that is pursued and achieved to a greater or lesser degree. Accordingly, we consider that the question of whether a technical regulation 'fulfils' an objective is concerned with the degree of contribution that the technical regulation makes toward the achievement of the legitimate objective.[850]

564. In *US – COOL*, the Appellate Body reached the same conclusion, concluding that a panel must "ascertain the degree of contribution made by the [technical regulation] to [its legitimate] objective".[851]

565. The question that a panel must answer is, therefore, to what degree or extent the challenged technical regulation "actually contributes"[852] to the legitimate objectives being pursued. The question, in other words, is not one to be answered in the abstract:

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[847] The Oxford English Dictionary, OED Online, Oxford University Press, accessed 8 November 2012, http://www.oed.com/view/Entry/75291?redirectedFrom=fulfil&, *fulfil*, Exhibit JE-40.
[848] "Réaliser" is defined, among others, as: "Faire exister à titre de réalité concrète (ce qui n'existait que dans l'esprit); faire correspondre une chose, un objet, à une possibilité, à une idée, à un mot. […] Atteindre". Le Grand Robert de la Langue Française online, accessed 8 November 2012, http://www.lerobert.com/index.php?option=com_enligne&page=authentification&task=identification&Itemid=818&auto=1, *réaliser*, Exhibit NOR-77.
[849] "Alcanzar" is defined as, among others: "1. tr. *Llegar a* juntarse con alguien o algo que va delante. 2. tr. *Llegar a* tocar, golpear o herir a alguien o algo" (emphasis added). Diccionario de la Real Academia Española online, accessed 8 November 2012, http://lema.rae.es/drae/, *alcanzar*, Exhibit NOR-78.
[850] Appellate Body Report, *US – Tuna II (Mexico)*, para. 315.
[851] Appellate Body Report, *US – COOL*, para. 476.
[852] Appellate Body Report, *US – Tuna II (Mexico)*, para. 317; and Appellate Body Report, *US – COOL*, para. 373.

> Neither Article 2.2 in particular, nor the *TBT Agreement* in general, requires that, in its examination of the objective pursued, a panel must discern or identify, in the abstract, the level at which a responding Member wishes or aims to achieve that objective.[853]

566. The Appellate Body has also said that the degree to which a technical regulation actually contributes to an objective:

> … may be discerned from the design, structure and operation of the technical regulation, as well as from evidence relating to the application of the measure.[854]

567. Specifically, the enquiry must relate to the contribution that the measure's "trade-restrictiveness" makes to the legitimate objective.[855] In other words, the assessment focuses on the contribution of the particular elements of the measure that give rise to a restriction on international trade.

568. In *US – Tuna II (Mexico)* and *US – COOL*, the Appellate Body also found relevant context for the interpretation of Article 2.2 and, in particular, the verb "fulfil", in the sixth recital of the preamble. This recital, the Appellate Body noted,

> recognizes that a Member shall not be prevented from taking measures necessary to achieve its legitimate objectives "at the levels it considers appropriate", subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the *TBT Agreement*.[856]

569. The Appellate Body has explained that the "preamble of the *TBT Agreement* is part of the context" of Articles 2.1 and 2.2, "and also sheds light on the object and purpose of the Agreement".[857] In that regard, it found that the fifth recital "reflects the trade liberalizing objective of the *TBT Agreement*" by setting forth the desire of WTO Members "to ensure that

[853] Appellate Body Report, *US – COOL*, para. 390.
[854] Appellate Body Report, *US – Tuna II (Mexico)*, para. 317. *See* also Appellate Body Report, *US – COOL*, para. 373.
[855] *See* Appellate Body Report, *US – Tuna II (Mexico)*, para. 318.
[856] Appellate Body Report, *US – Tuna II (Mexico)*, paras. 213, 316, and 339. *See* also Appellate Body Report, *US – Clove Cigarettes*, paras. 94, 95, 106, 109, 172, and 173; *US – COOL*, para. 373 and footnote 739.
[857] Appellate Body Report, *US – Clove Cigarettes*, para. 89.

technical regulations ... do not create unnecessary obstacles to international trade".[858] Nevertheless, the "objective of avoiding the creation of unnecessary obstacles to international trade through technical regulations [is] qualified in the sixth recital", which contains elements "counterbalancing" the trade liberalizing objective expressed in the fifth recital.[859] Just as this "balance"[860] is reflected in the substantive provisions of Article 2.1 of the *TBT Agreement* , it is also reflected in the provisions of Article 2.2.

570. Thus – reflecting this "balance" – when adopting technical regulations to fulfil a legitimate objective, a regulating Member must observe the requirement that the regulations are not applied in a manner that would constitute a means of "arbitrary or unjustifiable discrimination" or a "disguised restriction on international trade".

571. The Appellate Body has addressed these concepts in the context of Article 2.1 of the *TBT Agreement*. In *US – COOL*, the Appellate Body found that a trade restrictive element of the challenged measure – that producers were required to bear the burden of tracking and transmitting data well beyond what was actually conveyed to consumers – could not be justified by a legitimate regulatory distinction because the burden it imposed was "arbitrary".[861] In describing the facts giving rise to this arbitrariness, the Appellate Body emphasized that: the result being sought was not "commensurate with"[862] the burden imposed; the burden imposed was "significantly greater than",[863] or "disproportionate"[864] to, the result sought; there was a "lack of correspondence"[865] and a "disconnect"[866] between the two, and no "rational basis"[867] to explain the disconnect. Consistent with the sixth recital of the preamble, a measure that involves such arbitrariness in the treatment of products from countries where the same conditions prevail is not "necessary" under Article 2.2.

572. The language found in the sixth recital of the preamble has also been interpreted by the Appellate Body in the context of other covered agreements. In particular, in the context of Article XX of the GATT 1994, the Appellate Body has explained that this language is an

[858] Appellate Body Report, *US – Clove Cigarettes*, para. 89.
[859] Appellate Body Report, *US – Clove Cigarettes*, para. 95.
[860] Appellate Body Report, *US – Clove Cigarettes*, para. 96.
[861] Appellate Body Report, *US – COOL*, para. 347.
[862] Appellate Body Report, *US – COOL*, para. 343.
[863] Appellate Body Report, *US – COOL*, para. 346.
[864] Appellate Body Report, *US – COOL*, para. 347.
[865] Appellate Body Report, *US – COOL*, para. 348.
[866] Appellate Body Report, *US – COOL*, para. 347.
[867] Appellate Body Report, *US – COOL*, para. 347.

expression of the principle of good faith, and in particular of the doctrine of *abus de droit*, which:

> … prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right "impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably."[868]

573. Applying this language under Article XX, the Appellate Body has held that discrimination is "arbitrary or unjustifiable" when it does not have "a legitimate cause or rationale"[869] in light of the legitimate objectives pursued. Thus, for example,

> there is arbitrary or unjustifiable discrimination when a measure is applied in a discriminatory manner "between countries where the same conditions prevail", and when the reasons given for this discrimination *bear no rational connection* to the objective [pursued by the measure], or would *go against* that objective.[870]

574. In a similar vein, the panel in *China – Raw Materials* stated that

> an analysis of the material contribution to a stated objective should take into account at least *those policies whose effects may counter in some respects the stated objective*.[871]

575. Both cases show that in assessing a measure's contribution to its objective, a panel must take into account all elements breaking, or loosening the connection between the measure and the objective, which may include: (1) arbitrary or unjustifiable discrimination between countries where the same conditions prevail; and (2) policies that in fact undermine the stated objective. It is only by taking into account all such relevant factors that a panel may properly balance the regulating Member's right to pursue legitimate non-trade objectives and other Members' rights to pursue their trade interests under the *TBT Agreement*.

576. The Appellate Body has also noted that the notion of "disguised restriction on international trade" is broader than (and includes) that of arbitrary or unjustifiable

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[868] Appellate Body Report, *US – Shrimp*, para. 158 (footnote omitted).
[869] Appellate Body Report, *Brazil – Retreated Tyres*, para. 225.
[870] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 227. (emphasis added)
[871] Panel Report, *China – Raw Materials*, para. 7.537. (emphasis added) *See also Id*., para. 7.536 ("[T]he test for material contribution to the stated objective *must account for those policies that may offset the alleged effect of the policy in place*"). This element of the panel's analysis was not appealed.

discrimination".[872] In contexts other than that of the *TBT Agreement*, the Appellate Body has confirmed that a panel may look cumulatively at a series of "warning signals" and other factors to determine whether a measures constitutes a disguised restriction on international trade. Such "warning signals" may include: the degree of discrepancy in treatment between comparable situations;[873] the arbitrary or unjustifiable character of the discrepancy in treatment;[874] or the failure to accord with requirements of the covered agreements, leading to the view that "the measure is not really concerned" with its ostensible objective, but "is instead a trade-restrictive measure in the guise" of a measure that would be permissible.[875] Other relevant factors include the existence of "substantial, but unexplained" changes in conclusions about whether less trade restrictive measures will meet an objective at a certain level of protection.[876]

577. In this way, like arbitrary or unjustifiable discrimination, disguised restrictions on international trade may also exist where a restrictive condition is rationally disconnected from or goes against its purported objective, for example if, for no good reason, there is a great discrepancy in the treatment of some goods when compared to others, or if there are other factors that suggest the ostensible objective is simply a guise for restricting trade. That too would disturb the balance of rights and obligations struck by members in the *TBT Agreement*.

c. The risks non-fulfilment would create

578. In assessing whether a measure is "not more trade-restrictive than necessary to fulfil a legitimate objective" in the sense of Article 2.2, a panel is also required to "tak[e] account of the risks non-fulfilment would create". In the view of the Appellate Body, this element refers to:

> the nature of the risks at issue and the gravity of the consequences that would arise from non-fulfilment of the legitimate objective.[877]

[872] Appellate Body Report, *US – Gasoline*, p. 25.
[873] Appellate Body Report, *EC – Hormones*, para. 240; Appellate Body Report, *Australia – Salmon*, paras. 163-164.
[874] Appellate Body Report, *Australia – Salmon*, paras. 161-162.
[875] Appellate Body Report, *Australia – Salmon*, paras. 165-166
[876] Appellate Body Report, *Australia – Salmon*, paras. 170-172.
[877] Appellate Body Report, *US – Tuna II (Mexico)*, para. 321 (underlining added); and Appellate Body Report, *US – COOL*, para. 377 (underlining added).

579. Consideration of the risks that would be created by non-fulfilment introduces a "further element of weighing and balancing"[878] in the determination of whether the trade-restrictiveness of the challenged measure is necessary, "or, alternatively,"[879] whether a less trade-restrictive alternative would make an equivalent contribution to the measure's objectives.

580. Article 2.2 also sets out "relevant elements of consideration" for assessing the risks non-fulfilment would create, namely: "available scientific and technical information, related processing technology or intended end-uses of products." These elements suggest an enquiry that is grounded as far as possible in concrete considerations, capable of being appraised with a fair degree of objectivity.

d. Consideration of less trade restrictive alternatives

581. The Appellate Body has explained that in determining the conformity of a measures with Article 2.2 of the *TBT Agreement* "the assessment of 'necessity' involves a relational analysis" considering together trade restrictiveness, contribution and the risks that non-fulfilment would create. [880] Thus, an analysis of necessity must be based on a consideration of these three factors taken together and viewed in their reciprocal relations.

582. Most often, in performing such a relational analysis to assess whether a measure is "more trade restrictive than necessary to fulfil" its objective, a panel will rely on the "conceptual tool"[881] of less trade restrictive alternatives:

> In most cases, this would involve a comparison of the trade-restrictiveness and the degree of achievement of the objective by the measure at issue with that of possible alternative measures that may be reasonably available and less trade restrictive than the challenged measure, taking account of the risks non-fulfilment would create.[882]

[878] Appellate Body Report, *US – Tuna II (Mexico)*, para. 321; and Appellate Body Report, *US – COOL*, para. 377.
[879] Appellate Body Report, *US – Tuna II (Mexico)*, para. 321.
[880] Appellate Body Report, *US – Tuna II (Mexico)*, para. 318 (underlining added). *See* also Appellate Body Report, *US – COOL*, para. 374. The Appellate Body has also made it clear that the question relates to the necessity of the "trade-restrictiveness": Appellate Body Report, *US – Tuna II (Mexico)*, para. 318.
[881] Appellate Body Report, *US – Tuna II (Mexico)*, para. 320.
[882] Appellate Body Report, *US – Tuna II (Mexico)*, para. 320 (underlining added, emphasis removed). *See* also Appellate Body Report, *US – COOL*, para. 376.

583. A panel may, of course, dispense with such a relational analysis if it concludes that the challenged measure: (1) does not pursue a legitimate objective; or (2) is unnecessary because it does not contribute to the fulfilment of such an objective, which may arise because of deficiencies in the measure, such as being based on erroneous facts, or because the measure constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade. In these events, the challenged measure imposes unnecessary restrictions on international trade and disturbs the "balance"[883] of interests struck in the *TBT Agreement*, as reflected in the fifth and sixth recitals of the preamble.

584. In assessing less trade-restrictive alternatives put forward by the complainant, a panel will consider, in particular:

> … whether the proposed alternative is less trade restrictive, whether it would make an equivalent contribution to the relevant legitimate objective, taking account of the risks non-fulfilment would create, and whether it is reasonably available.[884]

585. Thus, if a reasonably available alternative measure is less trade restrictive and would make an equivalent contribution to the challenged measure's objectives, taking account of the risks non-fulfilment would create, the challenged measure is "unnecessary" within the meaning of Article 2.2.

586. The question of reasonable availability has been considered in the context of other provisions of the covered agreements. The Appellate Body has held that a measure that "the responding Member is not capable of taking [or that imposes] prohibitive costs"[885] would not be a reasonably available alternative. However, the Appellate Body has also emphasized that WTO-consistent alternatives "could well entail higher […] costs for the national budget" than WTO-inconsistent measures.[886]

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[883] Appellate Body Report, *US – Clove Cigarettes*, para. 96.
[884] Appellate Body Report, *US – Tuna II (Mexico)*, para. 322. *See* also Appellate Body Report, *US – COOL*, para. 376.
[885] Appellate Body Report, *US – Gambling*, para. 308, discussing Article XIV(a) of the GATS.
[886] Appellate Body Report, *Korea – Beef*, para. 181.

587. In *Korea – Various Measures on Beef*, the Appellate Body indicated that measures taken by the importing Member in "related product areas"[887] might provide guidance on what alternatives are reasonably available to that Member. The Appellate Body agreed with the panel that examining alternative measures applicable to:

> … like, or at least similar, products […] may provide useful input in the course of determining whether an alternative measure which could 'reasonably be expected' to be utilized, is available or not.[888]

588. In the next section, Norway applies the legal framework just outlined to the EU Seal Regime.

D. The EU Seal Regime is more trade restrictive than necessary in violation of Article 2.2 of the *TBT Agreement*

1. Introduction

589. The EU Seal Regime is more trade restrictive than necessary in violation of Article 2.2 of the *TBT Agreement*. In demonstrating this point, following (1) this brief introduction, Norway examines, in turn: (2) the objectives of the EU Seal Regime; (3) the legitimacy of these objectives; and (4) the necessity of the trade restriction. In order to reach a conclusion on necessity, Norway considers: (a) the trade-restrictiveness of the EU Seal Regime; (b) the degree of contribution of the trade-restrictiveness to the asserted objectives; (c) the risks that non-fulfilment would create; and (d) less trade restrictive alternatives that would make an equal or greater contribution to attainment of the relevant objectives, taking account of the risks non-fulfilment would create.

590. At each step, Norway considers the EU Seal Regime as a whole, while also giving an appropriate focus to individual features of the measure and the manner in which these diverse individual features of the measure are related to other aspects of the measure. Through this analysis, Norway demonstrates that the EU Seal Regime is at once trade restrictive, incoherent, and rationally disconnected from the objectives it purports to pursue. Norway ultimately shows that aspects of the EU Seal Regime itself go against several of the regime's stated objectives, and that less trade restrictive alternatives are reasonably available to fulfil

[887] Appellate Body Report, *Korea – Beef*, para. 169.
[888] Appellate Body Report, *Korea – Beef*, para. 170.

the legitimate objectives of the regime, demonstrating that the EU Seal Regime is more trade restrictive than necessary, contrary to Article 2.2 of the *TBT Agreement*.

2. The objectives of the EU Seal Regime

591. To carry out its analysis under Article 2.2, the Panel must first ascertain the regulating Member's objectives, "independently and objectively".[889] For this purpose, a panel may look, in particular, at "the texts of statutes, legislative history, and other evidence regarding the structure and operation of the measure",[890] which may be complemented by the regulating Member's notifications to the TBT Committee.[891]

a. The objectives revealed in the preamble of the EU Seal Regime

592. Norway begins its analysis with the text of the measure. The Basic EU Regulation comprises a preamble and an operative part. The preamble contains the recitals, which, in EU law, "are the part of the act which contains the statement of reasons for the act".[892] The statement of reasons contained in the recitals should be "genuine".[893]

593. Examining, first, the preamble, the recitals point to a number of objectives.

594. *First*, the preamble refers to animal welfare, and public concerns relating to animal welfare. Recital 1 observes that: "Seals are sentient beings that can experience pain, distress, fear and other forms of suffering". Recital 5 refers to "concerns of citizens and consumers about the animal welfare aspects of the killing and skinning of seals". Recital 9 refers to the EU Protocol on protection and welfare of animals, noting that pursuant to it "the harmonized rules provided for in this Regulation should […] take fully into account considerations of the welfare of animals". Recital 10 reiterates that harmonization must be pursued "while taking into account animal welfare considerations", and states that the placing on the market of seal

[889] Appellate Body Report, *US – Tuna II (Mexico)*, para. 314. *See* also section VI.C.2 above.
[890] Appellate Body Report, *US – Tuna II (Mexico)*, para. 314.
[891] Panel Report, *US – COOL*, para. 7.605.
[892] European Communities, *Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of legislation within the Community institutions* (25 August 2003), preface and section 10, ("Joint Practical Guide on Drafting of EU Legislation"), Exhibit JE-14, p. 31, point 10.1.
[893] Joint Practical Guide on Drafting of EU Legislation, Exhibit JE-14, p. 32, point 10.5.1. An inadequate statement of reasons may lead to the annulment of the measure in question by the Court of Justice of the European Union. *See, e.g.*, Court of Justice of the European Communities, Judgment, *Federal Republic of Germany v Commission of the European Economic Community*, Case C-24/62 (4 July 1963), Exhibit NOR-79.

products "should, as a general rule, not be allowed in order to restore consumer confidence while, at the same time, ensuring that animal welfare concerns are fully met".

595. *Second*, the preamble refers to consumer confusion and consequent lack of "confidence",[894] which the EU Seal Regime seeks to restore. Recital 3 notes that "it is difficult if not impossible for consumers to distinguish [seal products] from similar products not derived from seals". As a consequence, and as a result of disparate regulation of trade in seal products in different Member States, consumers are discouraged "from buying products not made of seals, but which may not be easily distinguishable from similar goods made from seals".[895] According to the preamble, the Basic Seal Regulation, therefore, sets out "to restore consumer confidence",[896] affected by the fear of confusion.

596. *Third*, recitals 5-7 of the preamble to the Basic Seal Regulation refer to the existence of disparate provisions regulating trade in seal products in different Member States, and recital 8 concludes that the Regulation "should therefore harmonize the rules across the Community". Recital 10 notes that "[t]o eliminate the present fragmentation of the internal market, it is necessary to provide for harmonized rules". Recital 21 refers to "the objective of this Regulation" as "the elimination of obstacles to the functioning of the internal market by harmonizing national bans concerning the trade in seal products at Community level".[897]

597. *Fourth*, recital 14 of the preamble states that:

> The fundamental economic and social interests of Inuit communities engaged in the hunting of seals as a means to ensure their subsistence should not be adversely affected. …

598. And, consequently, that:

> ... the placing on the market of seal products which result from hunts traditionally conducted by Inuit and other indigenous communities and which contribute to their subsistence should be allowed.

[894] Basic Seal Regulation, Exhibit JE-1, Preamble, recital 10.
[895] Basic Seal Regulation, Exhibit JE-1, Preamble, recital 7.
[896] Basic Seal Regulation, Exhibit JE-1, Preamble, recital 10.
[897] The objective of harmonising the internal market is also reflected, among others, in Article 1 of the Basic Seal Regulation, Exhibit JE-1, which provides: "This Regulation establishes harmonised rules concerning the placing on the market of seal products".

599. This recital highlights that a further objective that the European Union seeks to achieve through its technical regulation is to protect the "fundamental economic and social interests of Inuit" and certain other indigenous communities, and that this objective is to be achieved by allowing their products on the market.

600. Thus, four disparate objectives appear to emerge from the preamble to the Basic Seal Regulation: (i) the protection of animal welfare, including to respond to consumer concerns regarding animal welfare; (ii) the prevention of consumer confusion; (iii) harmonization of the internal market; and (iv) the promotion of the "economic and social interests" of indigenous communities.

b. The objectives revealed in operative parts of the EU Seal Regime

i. The objective of protecting animal welfare

601. There is *no trace*, in the operative part of the EU Seal Regime, of the objective of protecting animal welfare. The operative part of the Basic Seal Regulation describes the specific regulatory requirements or conditions that must be met in order to be able to place a seal product on the EU market. There are three sets of restrictive conditions established in the operative part of the Basic Seal Regulation: the Indigenous Communities Requirements; the Sustainable Resource Management Requirements; and the Personal Use Requirements.

602. The restrictive conditions set forth in each of these three sets of requirements simultaneously permit trade in seal products that conform to the conditions and prohibit trade in other non-conforming seal products.

603. Strikingly, as discussed in more detail in paragraphs 677 to 704 below, none of the regulatory conditions governing market access under the three sets of requirements bears any relationship to animal welfare. Indeed, provided that the chosen regulatory conditions are met, seal products derived from seals hunted in an inhumane manner can be placed on the EU market. In other words, in terms of the European Union's chosen regulatory conditions, animal welfare is irrelevant for placing seal products on the EU market.

ii. The objective of preventing consumer confusion

604. There is also *no trace*, in the operative part of the EU Seal Regime, of the objective of preventing consumer confusion. As discussed in more detail in paragraphs 705 to 716 below,

the Basic Seal Regulation allows seal products to be placed on the market if they respect the regulatory conditions under the three sets of requirements, but does not require seal products to be labelled as such. The Basic Seal Regulation also does not require labelling that would indicate whether seal products were obtained in compliance with animal welfare requirements. Indeed, the Basic Seal Regulation does not even provide for the collection of information on whether products were obtained in compliance with animal welfare requirements. Thus, the objective of preventing consumer confusion with respect to the marketing of seal products is also irrelevant when placing seal products on the EU market.

iii. The objective of harmonising the EU market

605. The third objective indicated in the preamble, namely the harmonization of the internal market, features prominently in the operative part of the Basic Seal Regulation. As set out in Article 1, this Regulation "establishes harmonised rules concerning the placing on the market of seal products".

iv. The objective of protecting the "economic and social interests" of indigenous communities by allowing their products on the market

606. The fourth objective indicated in the preamble, namely protecting the "fundamental economic and social interests" of indigenous communities is also reflected in the operative part by allowing the products of these communities on the market. The first set of requirements in the Basic Seal Regulation – the Indigenous Communities Requirements – conditions the placing on the market of seal products on whether they "result from hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence".[898]

[898] Basic Seal Regulation, Exhibit JE-1, Article 3(1). Norway has described the Indigenous Communities Requirements, which are further detailed in the Implementing Regulation, in paras. 161 to 163 above.

v. The objectives of allowing the personal choice of EU consumers and pursuing the sustainable management of marine resources

607. An examination of the design and structure of the Basic Seal Regulation appears to suggest the existence of two further objectives, namely, promoting or pursuing the personal choice of EU consumers, and the sustainable management of marine resources.[899]

608. Article 3(2)(a) of the Basic Seal Regulation, which sets out the second set of requirements for placing seal products on the EU market, allows EU residents to import into the EU seal products they have acquired abroad, provided these goods are for their personal use or that of their families.[900] On this basis, Norway discerns that the European Union seeks to promote or pursue the personal choice of EU consumers. More specifically, for EU consumers with the financial means to travel abroad to acquire seal products for personal use, the EU legislator seeks to promote the ability to choose whether to consume seal products, based on their personal convictions. Hence, if the consumer is opposed to seal products, it can choose not to purchase, import, and consume seal products. Conversely, if the consumer is not opposed to seal products, it can exercise personal choice by importing and consuming seal products.

609. Article 3(2)(b) of the Basic Seal Regulation sets out the third set of requirements for placing seal products on the EU market:[901] in particular, their seal inputs must be "by-products of hunting that is regulated by national law and conducted for the sole purpose of the sustainable management of marine resources". This suggests the existence of a further objective, namely, promoting the sustainable management of marine resources.

vi. Summary of the operative parts of the EU Seal Regime

610. To summarize, a plain reading of the operative part of the EU Seal Regime suggests: (i) no regard for animal welfare; (ii) no regard for consumer information; (iii) pursuit of harmonization of the internal market; (iv) protecting the "fundamental economic and social

[899] In the preamble, the only mention of these is found in recital 17. Recital 17 does not refer to them as objectives; instead, this recital simply refers to the need to empower the European Commission to adopt implementing measures, in particular noting that such implementing measures will have to define in more detail the manner of operation of the Indigenous Communities, Sustainable Resource Management and Personal Use Requirements.
[900] Norway has described the Personal Use Requirements, which are further detailed in the Implementing Regulation, Exhibit JE-2, in para. 166 above.
[901] Norway has described the Sustainable Resource Management Requirements, which are further detailed in the Implementing Regulation. Exhibit JE-2, in paras. 164 and 165 above.

interests" of indigenous communities; (v) pursuit of freedom of choice for EU residents; and (vi) pursuit of sustainable resource management.

c. The objectives revealed in legislative history of the EU Seal Regime

611. Norway turns to the legislative history for further clarity on the objectives that the European Union pursues through the EU Seal Regime.

i. Assessment and proposal of the European Commission

612. In a 2006 Declaration, the European Parliament requested the European Commission to table a regulation to ban trade in seal products. In response to the European Parliament's declaration, the European Commission "undertook to make a full objective assessment of the animal welfare aspects of seal hunting"[902] and, on that basis, report back to the European Parliament on any necessary measures.

613. Presenting the results of the assessment conducted, the European Commission stated that the "overarching objectives" being pursued were to protect animal welfare and to address the concerns of the public relating to animal welfare, as reflected in the following characterisation:

> … the overarching objectives, *i.e.*
>
> - protect seals from acts that cause them avoidable pain, distress, fear and other forms of suffering during the killing and skinning process
> - address the concerns of the general public with regard to the killing and skinning of seals[903]

614. In the memorandum accompanying the Proposed Regulation, the European Commission set out the "Grounds for and objectives of the proposal" for a regulation on trade in seal products. The European Commission wrote:

> For several years, many members of the public have been concerned about the animal welfare aspects of the killing and skinning of seals and about trade occurring in products possibly

[902] *See* Proposed Regulation, Exhibit JE-9, Explanatory Memorandum, p. 9.
[903] Commission Impact Assessment, Exhibit JE-16, section 1, p. 7.

> derived from seals that have been killed and skinned with avoidable pain, distress and other forms of suffering.[904]

615. Mindful of the constraints on the EU's competence to legislate, the European Commission also explained the grounds on which it considered that it could adopt a measure pursuing animal welfare objectives. On the on hand, the Commission noted that the European Court of Justice "has recognised that the protection of animal welfare is a legitimate objective in the public interest".[905] On the other hand, a number of EU Member States had adopted measures relating to trade in seal products, resulting in fragmentation of the EU internal market.[906] EU action to harmonize the regulation of the internal market was therefore needed in order to remove obstacles to the functioning of the internal market that had arisen from divergent legislation in different Member States. The need for harmonization justified the adoption of measures at the level of the European Union, irrespective of the fact that:

> animal welfare considerations would be a decisive factor in the choices to be made. [907]

616. In the same document, the Commission also noted that:

> The fundamental economic and social interests of Inuit communities traditionally engaged in the hunting of seals should not be adversely affected.[908]

617. The following objectives emerge from these European Commission documents: (i) as "overarching objectives", protecting animal welfare and addressing public concerns relating to animal welfare; and, in addition, (ii) protecting the "fundamental economic and social interests" of indigenous communities; and (iii) harmonizing the internal market.

[904] Proposed Regulation, Exhibit JE-9, Explanatory Memorandum, p. 2, "Grounds for and objectives of the proposal".
[905] Proposed Regulation, Exhibit JE-9, Explanatory Memorandum, p. 4, "Grounds for and objectives of the proposal".
[906] Proposed Regulation, Exhibit JE-9, Explanatory Memorandum, pp. 2-3, "Grounds for and objectives of the proposal".
[907] Proposed Regulation, Exhibit JE-9, Explanatory Memorandum, p. 4, "Grounds for and objectives of the proposal".
[908] Proposed Regulation, Exhibit JE-9, Explanatory Memorandum, p. 5, "Grounds for and objectives of the proposal".

ii. Examination by the European Parliament and the Council of the European Union

618. Once the European Commission presented the Proposed Regulation to the European Parliament, it was assigned to the Committee on the Internal Market and Consumer Protection, which, in turn, chose Diana Wallis as its Rapporteur.[909] Rapporteur Wallis describes Parliament's policy goals as "those of animal welfare and of respecting and minimising the impact on Inuit communities".[910] Rapporteur Wallis also noted that these "twin policy goals" led to an "underlying contradiction" in the proposed measure,[911] and the "Inuit exception" could "apply to a large majority of the trade [seal] products, thus defeating the animal welfare intentions of the proposal".[912]

619. Around the time of Rapporteur Wallis' remarks, what later became the "sustainable resource management" objective appears to have surfaced. According to the "short justification" that formed part of the opinion provided by the Committee on Agriculture and Rural Development,[913] there was a desire to distinguish, on the one hand, commercial seal hunting, which had caused the "outcry from sections of the public" due to "the pictures of the serial slaughter of thousands of animals",[914] and on the other hand, the killing of seals "simply to eliminate them, since they are viewed as pests that endanger fish stocks",[915] and more generally the potential need to kill seals should they constitute a "threat to the survival of other species".[916]

620. Similar remarks were made by Finland and Sweden within the Council of the European Union. Finland observed:

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[909] *See* paras. 123 to 126 above.
[910] Rapporteur Wallis' Draft Explanatory Statement, in EU Parliament Draft Report on Trade in Seal Products, Exhibit JE-18, p. 34.
[911] Rapporteur Wallis' Draft Explanatory Statement, in EU Parliament Draft Report on Trade in Seal Products, Exhibit JE-18, pp. 32-33; and Rapporteur Wallis' Explanatory Statement, in EU Parliament Final Report on Trade in Seal Products, Exhibit JE-4, p. 28.
[912] Rapporteur Wallis' Draft Explanatory Statement, in EU Parliament Draft Report on Trade in Seal Products, Exhibit JE-18, p. 33; and Rapporteur Wallis' Explanatory Statement, in EU Parliament Final Report on Trade in Seal Products, Exhibit JE-4, p. 29.
[913] *See* paras. 133 to 136 above.
[914] Opinion of AGRI, Short Justification, in EU Parliament Final Report on Trade in Seal Products, Exhibit JE-4, p. 57.
[915] Opinion of AGRI, Short Justification, in EU Parliament Final Report on Trade in Seal Products, Exhibit JE-4, p. 57.
[916] Opinion of AGRI, Short Justification, in EU Parliament Final Report on Trade in Seal Products, Exhibit JE-4, p. 57.

> Seals cause problems to fisheries by damaging gears and catches. As a part of the comprehensive national Baltic seal management plan, measures to address this problem have been taken. Based on the management plan about 500 seals are hunted yearly.[917]

621. Accordingly, it was suggested that the proposed measure should encourage such "seal management" efforts, thus "addressing *local needs in the Community*".[918]

622. Sweden too advocated that certain seal products should be allowed onto the EU market:

> … seal products originating from states with small scale, statutory controlled hunting with the main purpose to reduce damages from fisheries and which is done in accordance with a management plan.[919]

623. Sweden is such a state with small scale, controlled hunting that seeks to address the prejudice that seals pose to fisheries.[920] While stating its "preference" for such a solution, Sweden conceded that this option might be "entirely unviable in view of *e.g.* WTO rules".[921]

d. The objectives revealed in the EU's notifications to the TBT Committee

624. Also at the time of these debates, the European Union notified the draft measure to the TBT Committee. In doing so, it described its "objective and rationale" as follows:

> *Harmonization* of the different prohibitions or restrictive measures in the Member States regarding trade in seal products, *while taking into account animal welfare* considerations.[922]

625. In subsequent notifications, the European Union has left the statement of the measure's objective and rationale unchanged.[923]

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[917] Member States' Comments on the Proposed Regulation (19 January 2009), Exhibit JE-10, p. 16.
[918] Member States' Comments on the Proposed Regulation (19 January 2009), Exhibit JE-10, p. 16. The "Community" that this statement refers to is now the European Union.
[919] Member States' Comments on the Proposed Regulation (19 January 2009), Exhibit JE-10, p. 18.
[920] *See, e.g.*, European Parliament Debates, Exhibit JE-12, p. 67 (statement of MEP Hélène Goudin); and 2010 COWI Report, Exhibit JE-21, section 5.4.1, p. 58 ("Sweden and Finland […] have no commercial sealing industry and a very small-scale hunt altogether").
[921] Member States' Comments on the Proposed Regulation (19 January 2009), Exhibit JE-10, p. 18.
[922] EU notification of the draft Basic Seal Regulation to the TBT Committee, 11 February 2009, WTO document G/TBT/N/EEC/249.
[923] In notifying the draft Implementing Regulation to the TBT Committee, on 3 May 2010, the EU reiterated this description of its objective and rationale: document G/TBT/N/EEC/325, p. 1. In other notifications, the EU has

e. Conclusion on the objectives of the EU Seal Regime

626. The analysis of the preambular and operative language of the EU Seal Regime and its the legislative history, as well as consideration of the European Union's notification to the TBT Committee, disclose the pursuit of a patchwork of disparate objectives, through three sets of restrictive conditions that, as noted, simultaneously permit trade in some seal products and prohibit trade in other seal products.

627. The disparate objectives are: (i) the protection of animal welfare, including to respond to consumer concerns regarding animal welfare; (ii) the prevention of consumer confusion; (iii) protecting the "fundamental economic and social interests" of indigenous communities; (iv) the encouragement of the sustainable management of marine resources; (v) allowing consumer choice; and, (vi) the harmonization of the internal market.

628. As will be seen below, the rational relationship between the stated objectives and the measure is often entirely missing, even for objectives whose importance is, according to EU statements, extremely high. Most notably, the purported "overarching objectives" of pursuing animal welfare and responding to consumer concerns on animal welfare are entirely forgotten in the operative part of the EU's measure, which permits violations of animal welfare requirements in three different ways, while simultaneously failing to provide any information to the consumer.

629. Indeed, as we will show, the "rational disconnect"[924] between these objectives of the EU Seal Regime and the way it purports to address them gives rise to arbitrary and unjustifiable discrimination between countries where the same conditions prevail and a disguised restriction on international trade. In particular, under the Indigenous Communities Requirements, the European Union permits the sale of seal products from a closed list of countries, including prominently Denmark (Greenland), even though the European Union prohibits the sale of seal products from other Members where the same conditions prevail as regards the animal welfare and consumers confusion objectives. Moreover, under the Sustainable Resource Management Requirements, the European Union imposes market

said nothing to modify this description: documents G/TBT/N/EEC/249/Add.1; G/TBT/N/EEC/249/Add.2; and G/TBT/N/EEC/325/Add.1.

[924] Appellate Body Report, *US – COOL*, para. 347.

access conditions that go against or undermine achievement of the aim pursued and are thus entirely "disproportionate"[925] to the end sought.

630. Before turning to consider the legitimacy of the EU's objectives, Norway notes that, although the regulating Member's characterisation of its objectives is not decisive, it sought to use the opportunity afforded by Article 2.5 of the *TBT Agreement* to seek clarification of the disparate objectives of the EU Seal Regime from the European Union.[926] The European Union has failed to respond.

3. The legitimacy of the European Union's objectives

631. Norway considers that several – although not all – of the objectives set out in paragraph 627 above fall among the objectives that may be considered "legitimate" for purposes of Article 2.2 of the *TBT Agreement*.

a. The objective of protecting animal welfare

632. In particular, Norway emphasises its own commitment to animal welfare, and considers that pursuit of such an objective is legitimate in the sense of Article 2.2.

633. The EU's "overarching objective" of protecting animal welfare permeates Norwegian legislation relating to animals, including Norway's regulation of the seal hunt.[927] Norway refers to its discussion of animal welfare in paragraphs 171 to 257 above. Article 2.2, and the sixth recital of the *TBT Agreement*'s preamble, expressly refer to the objective of protecting animal life or health. Norway considers that ensuring the humane treatment of animals is related to this objective. Thus, using the objectives specifically identified in Article 2.2 as a "reference point",[928] Norway considers that the protection of animal welfare is a type of objective envisaged by Article 2.2 and the sixth recital of the *TBT Agreement*'s preamble.

[925] Appellate Body Report, *US – COOL*, para. 347.
[926] Article 2.5 of the *TBT Agreement* "establishes a *compulsory* mechanism requiring the supplying of information by the regulating Member". Appellate Body Report, *EC – Sardines*, para. 277. Norway's Request to the European Union pursuant to Article 2.5 of the *TBT Agreement*, 20 April 2011.
[927] *See* paras. 231 to 257 above. Examples of Norwegian regulations that pursue an animal welfare objective include the *Act relating to Hunting and Trapping of Wildlife*, promulgated by the Norwegian Parliament as Act of 29 May 1981 No. 38, sections 19 *ff*.
[928] Appellate Body Report, *US – Tuna II (Mexico)*, para. 313.

b. The objective of pursuing the sustainable management of marine resources

634. Norway applies and strongly supports the sustainable management of marine resources. Such resource management is important to the sustainable use of marine resources and, at the same time, to the protection of the environment. As protection of the environment is deemed by Article 2.2 of the *TBT Agreement* to be a "legitimate objective" for purposes of that provision, Norway acknowledges that promoting the sustainable management of marine resources is itself a legitimate objective.

635. As part of the context, Article XX(g) of the GATT 1994 permits Members to pursue similar objectives through measures that restrict international trade. In *China – Raw Materials*, the panel held that

> … a proper reading of Article XX(g) in the context of the GATT 1994 should take into account the challenge of *using and managing resources in a sustainable manner that ensures the protection and conservation of the environment* while promoting economic development.[929]

636. The sustainable management of marine resources is an objective actively pursued by Norway, including through the Norwegian seal hunt. Indeed, this objective is grounded in the Norwegian constitution, which provides:

> Every person has a right to […] a natural environment whose productivity and diversity are maintained. Natural resources should be managed on the basis of comprehensive long-term considerations whereby this right will be safeguarded for future generations as well.[930]

637. Therefore, Norwegian legislation mandates an approach that ensures sustainable management of wild living marine resources, and of the genetic material derived from them. Legislation gives importance to the precautionary principle and an ecosystem approach that takes into account habitats and biodiversity.[931]

638. The sustainable management of marine resources is also specifically identified as one of the objectives of the Norwegian legislation on the seal hunt, and is reflected in numerous

[929] Panel Report, *China – Raw Materials*, para. 7.375.
[930] Norwegian Constitution, Exhibit NOR-43, Article 110(b).
[931] *See* para. 260 above.

legislative and regulatory provisions. Specific requirements addressing this issue include provisions on hunting areas, quotas, hunting periods, reporting, control and inspection.[932]

639. The seal hunting quotas are determined based on scientific advice from the International Council for the Exploration of the Seas ("ICES") .[933] These recommendations "are used as a basis for drawing up a multi-species management regime, which takes into account, *inter alia*, how the harvesting of seals will affect other species".[934] In particular, the quotas set by Norway are typically identical to those recommended by the ICES,[935] which, with "a network of more than 1600 scientists" is the "prime source" of research and scientific advice "on the marine ecosystem to governments and international regulatory bodies that manage the North Atlantic Ocean and adjacent seas", providing advice to all countries that border the North Atlantic Ocean and the Baltic Sea.[936] The annual Norwegian seal hunt takes place within the limits of quotas set on the basis of scientific advice.[937]

640. Finally, in acknowledging the legitimacy of seeking to promote sustainable management of marine resources, Norway emphasises that conditions imposed within the framework of the EU Seal Regime that ostensibly relate to sustainable resource management in fact have no rational relation to it. Norway develops this point below.[938]

c. The objective of protecting the "economic and social interests" of indigenous communities

641. Norway regards the protection of the "fundamental economic and social interests" of indigenous communities as deserving, and Norway itself strongly promotes the interests of indigenous communities both in Norway and elsewhere, in a manner that is consistent with its WTO obligations.

642. For instance, Norway's Marine Resources Act requires, in the evaluation of management measures necessary to ensure sustainable management of wild marine living resources, that importance be attached, among others, to "ensuring that management

[932] VKM Report, Exhibit JE-31, section 9, p. 44 (which refers to the Regulation Relating to the Regulatory Measures as the "Adjustment Regulation"). *See* also para. 263.
[933] For illustration, *see* 2010 COWI Report, Exhibit JE-21, annex 4, p. 4, Table 7-1. *See* also, *ibid.*, p. 3.
[934] 2010 COWI Report, Exhibit JE-21, annex 4, p. 3.
[935] 2010 COWI Report, Exhibit JE-21, annex 4, p. 4, Table 7-1.
[936] ICES web site, *About us*, available at http://www.ices.dk/aboutus/aboutus.asp (last checked 14 October 2012), Exhibit NOR-81.
[937] 2010 COWI Report, Exhibit JE-21, annex 4, p. 4, Table 7-1.
[938] *See* paras. 717 *ff.* below.

measures help to maintain the material basis for Sami culture".[939] Indeed, Norway's Sami policy requires that consideration of Sami interests shall always be included in the development of national policies in relevant areas[940], and that the Sami have the right to be consulted on matters that may affect them directly. The Norwegian Sami parliament, elected by Sami, represents the interests of the Sami in such cases.[941] The Norwegian Government also contributes to international efforts in relation to indigenous communities; *inter alia*, Norway played an active part in the development of the *United Nations Declaration on the Rights of Indigenous Peoples* and in the establishment of the UN's Permanent Forum for Indigenous Issues.[942] Moreover, Norway was the first country to ratify the ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries.[943] As a State party to that Convention, Norway recognizes the aspirations of indigenous peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live.

643. In each case, Norway's initiatives to promote the interests of indigenous communities do not involve the imposition of international trade restrictions to the prejudice of Norway's trading partners under the WTO agreements.

644. Within the framework of the *TBT Agreement*, Norway does not consider that the objective of protecting the "economic and social interests" of specific producers located in certain Members, at the expense of the interests of producers located in other Members, is one that may be pursued through trade restrictive measures under Article 2.2. In particular, Article 2.2 does not permit a regulating Member to exclude specific producers located in

[939] Norwegian Marine Resources Act, Exhibit NOR-44, section 7(g).
[940] *See* Norwegian Ministry of Government Administration, Reform and Church Affairs web site, *Sami policy*, available at http://www.regjeringen.no/en/dep/fad/Selected-topics/Sami-policy.html?id=1403 (last checked 8 November 2012), Exhibit NOR-82.
[941] *See* Norwegian Ministry of Government Administration, Reform and Church Affairs web site, *Consultation duty in Sami matters*, available at http://www.regjeringen.no/en/dep/fad/Selected-topics/Sami-policy/midtspalte/consultation-duty-in-sami-matters.html?id=86931 (last checked 8 November 2012), Exhibit NOR-83.
[942] *See* Norwegian Ministry of Government Administration, Reform and Church Affairs web site, *International efforts in relation to indigenous peoples*, available at http://www.regjeringen.no/en/dep/fad/Selected-topics/Sami-policy/international-efforts-in-relation-to-ind.html?id=24393 (last checked 8 November 2012), Exhibit NOR-84.
[943] Norwegian Ministry of Government Administration, Reform and Church Affairs web site, *The ILO Convention on the Rights of Indigenous Peoples*, available at http://www.regjeringen.no/en/dep/fad/Selected-topics/Sami-policy/international-efforts-in-relation-to-ind/the-ilo-convention-on-the-rights-of-indi.html?id=487963 (last checked 8 November 2012), Exhibit NOR-85.

certain Members from the general application of a technical regulation, with the effective purpose of granting discriminatory trade preferences and selective special and differential treatment to protect the economic and social interests of those producers.

645. Irrespective of the worthiness of the interests being pursued, Norway does not consider that the objective of protecting the "economic and social interests" of particular producers to be a "legitimate objective" in the sense of Article 2.2. Such an objective must be pursued through means other than the imposition, through a technical regulation, of discriminatory restrictions on trade. As Norway will outline when discussing less trade-restrictive alternatives, it is perfectly possible to safeguard the interests of indigenous communities, without introducing discriminatory measures that restrict trade from some sources, but not others.[944]

646. A "legitimate" objective within the meaning of Article 2.2 is one that, in principle, justifies (makes "necessary") trade restrictions resulting from the preparation, adoption or application of technical regulations. The Appellate Body has noted that, in assessing the legitimacy of objectives that are not listed in Article 2.2, the listed objectives may serve as an initial "reference point".[945] In that regard, Article 2.2 provides a non-exhaustive list of objectives that WTO Members have deemed constitute, *as a matter of principle*, a legitimate reason to restrict international trade, without further decision of the WTO Membership. These "*per se*" legitimate objectives include: national security; preventing deceptive practices; protecting human health or safety, animal or plant life or health, or the environment.

647. Each of these "*per se*" legitimate objectives relates to fundamental *non-trade* interests that Members have decided may *always* prevail over *trade* interests, provided the other requirements of Article 2.2 are met. None of the legitimate objectives authorizes *discriminatory trade preferences* that seek to promote the "economic and social interests" of specific producers located in certain Members at the expense of producers located in other Members. Thus, the listed objectives in Article 2.2 indicate that an objective that seeks to promote the trade interests of some Members over the trade interests of others is not legitimate.

[944] *See* paras. 786 and 905 below.
[945] Appellate Body Report, *US – Tuna II (Mexico)*, para. 313.

648. The context provided by the remainder of the *TBT Agreement* confirms that the drafters did not contemplate discriminatory trade preferences being justified under Article 2.2. Article 2.1 requires that technical regulations treat imports from all Members equally and that they not discriminate on the grounds of origin. Further, although Article 12 of the *TBT Agreement* envisages the preferential treatment of developing countries, that provision does not contemplate that particular Members may be excluded from the application of restrictive technical regulations to protect the "economic and social interests" of their producers.

649. Specifically, under Article 12.2, Members must "take into account the special, development, financial and trade needs of developing country Members, with a view to ensuring that technical regulations ... do not create unnecessary obstacles to exports from developing country Members".[946] This provision does not, however, contemplate that developing country Members may be generally "carved out" of the requirements of a technical regulation on the grounds of their socio-economic situation. Nor does it allow a Member to favour producers in some developing countries over producers either in other developing countries or in developed countries.

650. Article 12.3 adds that, "in their particular technological and socio-economic conditions, developing country Members [may] adopt technical regulations ... aimed at preserving indigenous technology and production methods and processes compatible with their development needs".[947] In other words, developing countries may adopt technical regulations in light of their socio-economic situation and indigenous aspects of production. However, again, nothing authorizes the inverse, namely, allowing Members generally to exclude from the application of a technical regulation the products of a particular country on grounds of the socio-economic situation of the producers of that country.

651. The Appellate Body has also directed the interpreter to seek context on what may be "legitimate" for purposes of Article 2.2 of the *TBT Agreement* in other covered agreements.[948] The exclusion of objectives amounting to discriminatory trade preferences to promote the "economic and social interests" of specific producers located in certain Members

[946] *TBT Agreement*, Articles 12.2 and 12.3.
[947] *TBT Agreement*, Article 12.4.
[948] Appellate Body Report, *US – Tuna II (Mexico)*, para. 313; and Appellate Body Report, *US – COOL*, para. 370.

is borne out by the context found in the GATT 1994. Under the GATT 1994, the drafters have also established a number of "*per se*" legitimate objectives that, in principle, justify trade restrictions. These objectives are enumerated, in particular, in Article XX of the GATT 1994. None of the objectives exhaustively listed in this provision allows the promotion of the "economic and social interests" of specific producers located in certain Members through discriminatory trade preferences.[949]

652. Under the GATT 1994, if a WTO Member wishes to establish discriminatory trade preferences to protect the "economic and social interests" of specific producers located in certain Members, for example for economic development reasons, it may do so solely if it obtains a specific decision of the WTO Membership, such as a waiver, that authorizes the pursuit of that objective and the resulting discriminatory preferences, or if it can rely on the specific authorisation for preferences conferred by the Enabling Clause.

653. Like the GATT 1994, none of the other covered agreements allows a Member to impose discriminatory trade preferences in order to promote the "economic and social interests" of producers located exclusively in certain Members. The promotion of such localized interests, and the resulting discrimination, is not *per se* authorized in the text of the covered agreements themselves but requires a decision of the Membership.[950]

654. This view is confirmed by considering the purpose of Article 2.2 of the *TBT Agreement* itself. Like other provisions of the covered agreements, Article 2.2 reflects a balance between the rights and obligations of Members. On the one hand, it establishes a *discipline* on Members in relation to the preparation, adoption and application of technical regulations, which are regulations mandating "*product characteristics*" or related processes and production methods. On the other hand, Article 2.2 simultaneously *permits* trade restrictions that are "necessary to fulfil a legitimate objective" of the technical regulation; that is, restrictions that are necessary for the specific purpose of the "adoption, preparation and application" of rules regarding product characteristics.

[949] Under Article XXIV of the GATT 1994, discriminatory economic preferences may be granted to the producers of countries in a free trade agreement or customs union, provide stringent conditions are respected. However, these preferences are a necessary feature of enhanced economic integration between countries, and are not intended to promote the economic and social interests of specific producers, such as indigenous people.
[950] Norway notes that even the Enabling Clause constituted a stand-alone decision, taken by the GATT contracting parties in 1979. As a result of the GATT Incorporation Clause, this decision is now formally part of the GATT 1994, constituting a permanent waiver for certain discriminatory measures granting economic preferences to developing and least-developed countries. *See* Appellate Body Report, *EC – Tariff Preferences*, para. 90 and footnote 192.

655. In other words, the restrictions that may be justified by a legitimate objective under Article 2.2 are those that are naturally consequent upon the adoption of rules regarding "*product characteristics*". A trade restriction might, for instance, arise because some products do not correspond with the required product characteristics laid down by the measure.

656. By contrast, the purpose of Article 2.2 is *not* to justify trade restrictions that do not result from the consequences of regulating "product characteristics", but from seeking to protect producers in certain territories from the requirements of that regulation due to their "social and economic" situation, however worthy the circumstances may be. This is because a trade restriction that results from protecting or preferring the producers in certain territories over producers in other WTO Members is not a consequence of adopting a regulation regarding "product characteristics". In particular, a preference for indigenous communities is not a consequence of requiring that products in the marketplace have certain "characteristics". It, rather, is a consequence of a political decision to favour select producers in certain territories, so as to lessen or avoid the impact of the technical regulation on them. As the covered agreements show, such discriminatory trade preferences, or special and differential treatment based on origin, must result from an express waiver or from specifically formulated exceptions for those ends.

657. Accordingly, if the European Union wishes to protect the "fundamental economic and social interests" of indigenous communities by allowing their products on the EU market, while simultaneously restricting trade from other sources, it must secure a decision of the WTO Membership authorizing it to do so. Absent such a decision, the protection of these interests cannot be used to justify trade restrictions for purposes of Article 2.2 of the *TBT Agreement*.

d. The objective of harmonizing the EU market

658. Harmonization of an internal market is not an objective identified in the *TBT Agreement* as legitimate, either amongst the *per se* legitimate objectives set forth in Article 2.2. itself, or in the preamble to the *TBT Agreement.* Harmonization of an internal market within a customs union is also distinct from the kind of harmonization objective envisaged by Article 2.4 of the *TBT Agreement*, and similar provisions of the *SPS Agreement*. These provisions contemplate harmonization amongst markets of diverse WTO Members through

use of international standards in order to *reduce* barriers to trade, as opposed to harmonization of an internal market through the adoption of restrictive measures that instead *raise* such barriers.

659. Likewise, the objective of harmonization of an internal market is different in character from other objectives recognized in the covered agreements. It is, for example, quite distinct from the types of policies listed in Article XX of the GATT 1994 as potentially justifying the imposition of trade restrictive or discriminatory measures. A desire to harmonise an internal market – whether within a customs union like the European Union, or within the national market of any other WTO Member – is also distinct from the objective that is reflected in Article XXIV of the GATT 1994. Article XXIV provides a derogation from GATT provisions that would "prevent ... the formation of a customs union", which could be the case if "restrictive regulations of commerce" were maintained restricting trade within the union. However, Article XXIV provides a defence only "to the extent that the measure is introduced upon the formation of a customs union".[951] Article XXIV is not relevant to internal market harmonization objectives pursued *after* the formation of a customs union, just as it is not relevant to harmonization efforts within the internal market of any individual WTO Member.

660. Accordingly, there is nothing in the covered agreements that indicates that the objective of harmonizing an internal market, in itself, warrants the imposition of a trade restriction that is not necessary for the formation of a customs union. Trade restrictions cannot be imposed simply because of regulatory or legislative convenience in deciding what common rules to adopt in a country or a customs union such as the European Union. A trade restriction imposed for such purposes does not pursue a legitimate objective in the sense of Article 2.2 of the *TBT Agreement*. Rather, there must be some broader policy goal that justifies the adoption of a restriction, such as animal welfare. In other words, the mere fact that a Member pursues harmony and seeks to avoid fragmentation in its internal market does not liberate it from the need to justify a trade restrictive technical regulation by reference to a legitimate objective that warrants the restriction.

[951] Appellate Body Report, *Turkey – Textiles*, para. 52.

e. The objectives of preventing consumer confusion and allowing consumer choice

661. Norway does not contest the legitimacy, for purposes of Article 2.2. of the *TBT Agreement* of the other objectives pursued by the EU Seal Regime, namely: the prevention of consumer confusion; and allowing consumer choice.

4. Necessity

a. The trade-restrictiveness of the EU Seal Regime

662. To recall,[952] the *TBT Agreement* recognizes each Member's right to adopt trade-restrictive measures, while requiring that the trade-restrictiveness of the measure not exceed what is necessary to fulfil a legitimate objective. To be able to assess whether this necessity requirement is respected, it is necessary to identify the "trade-restrictive" aspects of the measure, *i.e.*, the aspects of the measure that "hav[e] a limiting effect on trade",[953] that constitute "limiting condition[s]" on trade.[954]

663. The EU Seal Regime has a "limiting effect on trade" through three distinct sets of requirements, each of which separately imposes conditions that must be respected in order to place seal products on the EU market. These three sets of requirements, taken together, determine whether or not a product containing seal may be placed on the EU market. Products *not* meeting the requirements may *not* be placed on the market.

664. The Indigenous Communities Requirements condition access to the EU market on the following cumulative requirements:

- The seal products must have been hunted by Inuit or other indigenous communities, which the EU Seal Regime defines as:[955]
- Indigenous members of the Inuit homeland, namely those arctic and subarctic areas where, presently or traditionally, Inuit have aboriginal rights and interests, recognised by Inuit as being members of their people and includes

[952] *See* section VI.C.4 above.
[953] Appellate Body Report, *US – Tuna II (Mexico)*, para. 319. *See* also Appellate Body Report, *US – COOL*, para. 375.
[954] Appellate Body Report, *China – Raw Materials*, para. 319. *See* also, *e.g.*, Panel Report, *Colombia – Ports of Entry*, paras. 7.232-7.241.
[955] Basic Seal Regulation, Exhibit JE-1, Article 3(1).

Inupiat, Yupik (Alaska), Inuit, Inuvialuit (Canada), Kalaallit (Greenland) and Yupik (Russia)";[956] and,

- Communities in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions;[957]

- The hunt must be one "traditionally conducted" by the Inuit or other indigenous communities;[958]

- The Inuit or other indigenous communities having hunted the seals "have a tradition of seal hunting in the community and in the geographical region";[959]

- The products of the hunt are at least partly used, consumed or processed within the communities according to their traditions;[960]

- The hunts contribute to the subsistence of the community;[961]

- When first placed on the market, products are accompanied by a certificate attesting that these requirements are met.[962]

665. Thus, the regulatory conditions established under the Indigenous Communities Requirements are plainly "trade restrictive", *i.e.*, they limit the importation of seal products. Moreover, the *chapeau* of Article 3(1) of the Implementing Regulation states, in plain terms, that the importation and sale of seal products is not permitted, unless these requirements are met. The link between these conditions and international trade is expressed, in particular, through the phrase "… may only be placed on the market where…", which conveys that the importation and sale is permissible solely ("only") in the event that the "all of the … conditions" described in Article 3(1) are "satisf[ied]". Each of the cumulative conditions in the Indigenous Communities Requirements, and all of them taken together, constitute a distinct barrier that restricts market access.

[956] Basic Seal Regulation, Exhibit JE-1, Article 2(4).
[957] Implementing Regulation, Exhibit JE-2, Article 2(1). As noted above in paras. 377 to 388 above, this requirement by necessary implication refers exclusively to certain communities in the European Union and Norway.
[958] Basic Seal Regulation, Exhibit JE-1, Article 3(1).
[959] Implementing Regulation, Exhibit JE-2, Article 3(1).
[960] Implementing Regulation, Exhibit JE-2, Article 3(1).
[961] Implementing Regulation, Exhibit JE-2, Article 3(1).
[962] Implementing Regulation, Exhibit JE-2, Article 3(2).

666. The trade restrictions established by the Indigenous Communities Requirements are, moreover, discriminatory. As explained in paragraphs 389 to 403 above, the requirements give rise to discrimination because, through their design, structure and expected operation, they favour seal products from particular Members.

667. The Sustainable Resource Management Requirements condition access to the EU market on the following cumulative requirements:

- The country of the hunt must have a "national or regional resource management plan which uses scientific population models of marine resources and applies the ecosystem-based approach",[963]
- The hunt must comply with such a plan;[964]
- The hunt must be conducted for the "sole" purpose of the sustainable management of marine resources, and the seal products must be "by-products" of such a hunt; [965]
- The seal products must be placed on the market on a non-profit basis,[966] *i.e.*, at "a price less than or equal to the recovery of the costs borne by the hunter reduced by the amount of any subsidies received in relation to the hunt";[967]
- The seal products must be placed on the market in a "non-systematic way";[968]
- The seal products placed on the market must not be of a "nature and quantity"[969] that indicates they are placed on the market for commercial reasons.

668. Under the Sustainable Resource Management Requirements, importation of seal products is permitted solely where the series of regulatory conditions outlined above are met. Seal products not complying with those conditions may not, in principle, be imported. As in the case of the Indigenous Communities Requirements, each of the cumulative conditions, as well as all of them together, constitute a distinct barrier that restricts trade. Moreover, these requirements expressly restrict the *quantity* of products containing seal that may be placed on the EU market, requiring that the products be placed on the market in a "non-systematic way" and not in a "quantity" that would suggest commercial motives.

[963] Implementing Regulation, Exhibit JE-2, Article 5(1)(a).
[964] Implementing Regulation, Exhibit JE-2, Article 5(1)(b).
[965] Implementing Regulation, Exhibit JE-2, Article 5(2)(b).
[966] Basic Seal Regulation, Exhibit JE-1, Article 3(2)(b); Implementing Regulation, Article 5(1)(c).
[967] Implementing Regulation, Exhibit JE-2, Article 2(2).
[968] Implementing Regulation, Exhibit JE-2, Article 5(1)(c).
[969] Basic Seal Regulation, Exhibit JE-1, Article 3(2)(b).

669. Finally, the Personal Use Requirements condition the importation of products containing seal into the EU on the following:

- The seal products are "exclusively […] for the personal use of travellers or their families";[970]
- The importation is "of an occasional nature";[971]
- The "nature and quantity of the products is not "such as to indicate that they are being imported for commercial reasons";[972]
- The seal products are: (i) worn by the travellers, or carried or contained in their personal luggage;[973] or (ii) "contained in the personal property of a natural person transferring his normal place of residence from a third country to the [European] Union";[974] or (iii) "acquired on site in a third country by travellers and imported by those travellers at a later date", provided the required proof is given of acquisition on site in a third country by the traveller.[975]

670. As a result, the Personal Use Requirements confine trade to importation by EU residents that have travelled abroad, have acquired seal products "on site", and import such products in a sufficiently small "quantity" for their own personal use or that of their families. The Personal Use Requirements are, therefore, too, "trade restrictive" within the meaning of Article 2.2.

671. The regulatory conditions imposed under each of the three sets of requirements restrict trade in seal products because, if a given seal product does not satisfy the cumulative conditions of one of the set of requirements, the seal product is prohibited on the EU market.

672. Each of the three sets of requirements, taken individually and viewed as a whole, serves as a restrictive gateway to EU market access, simultaneously permitting conforming seal products onto the EU market and prohibiting non-conforming seal products. Accordingly, the EU Seal Regime is, *by nature*, trade restrictive because it lays down regulatory conditions limiting the importation and sale of seal products.

[970] Basic Seal Regulation, Exhibit JE-1, Article 3.2(a); and Implementing Regulation, Exhibit JE-2, Article 4.
[971] Basic Seal Regulation, Exhibit JE-1, Article 3.2(a).
[972] Basic Seal Regulation, Exhibit JE-1, Article 3.2(a).
[973] Implementing Regulation, Exhibit JE-2, Article 4(1).
[974] Implementing Regulation, Exhibit JE-2, Article 4(2).
[975] Implementing Regulation, Exhibit JE-2, Article 4(3).

673. In addition, there is evidence that, *in practice*, the mere expectation of the adoption of the EU Seal Regime hampered trade. According to a COWI briefing note of 2009:

> At the same time [as the financial crisis,] the current legislation has been in the pipeline and has created uncertainty about the EU market. Hence, trade numbers are down substantially since 2007 and so is the market price of raw skin (less than half).[976]
>
> …
>
> Some European markets [for seal oil], Sweden, Denmark, Finland and Germany were emerging but halted in recent years due to the Regulation.[977]

674. Indeed, before the Commission tabled its original proposal, COWI had warned the European Union that:

> Since seal hunting mostly takes place outside the Community territory, any restrictions to market access in the Community will have trade impacts.[978]

675. Norway now turns to examine the contribution that the trade-restrictiveness of the measure makes to the EU's objectives.

b. The degree of contribution to the EU Seal Regime's objectives

676. As part of an analysis of necessity, the Panel must examine the actual degree of contribution that the trade-restrictive aspects of the technical regulation make to the achievement of the legitimate objective(s) at issue.[979] Norway therefore examines the contribution made by the three sets of trade-restrictive requirements that comprise the EU Seal Regime to: (i) the protection of animal welfare, including to respond to consumer concerns regarding animal welfare; (ii) the prevention of consumer confusion; (iii) the encouragement of the sustainable management of marine resources; and (iv) allowing consumer choice.

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[976] COWI, *Traceability systems for trade in seal products – Briefing note for workshop participants*, 20 October 2009, p. 16, in 2010 COWI Report, Exhibit JE-21, Annex 5. *See also id.*, p. 5.
[977] COWI, *Traceability systems for trade in seal products – Briefing note for workshop participants*, 20 October 2009, p. 19, in 2010 COWI Report, Exhibit JE-21, Annex 5.
[978] 2008 COWI Report, Exhibit JE-20, p. 102.
[979] *See* section VI.C.4.b above.

i. The EU Seal Regime is unnecessary as it does not contribute to animal welfare

677. The three sets of trade-restrictive requirements in the EU Seal Regime, whether considered individually or together, make no contribution to the EU's "overarching objective" of animal welfare. In fact, they *completely ignore* animal welfare requirements. They *allow* the placing on the EU market of products derived from many thousands of seals irrespective of whether those seals were killed using inhumane hunting methods. At the same time, they make no provision for allowing the importation of products that comply with animal welfare requirements. Thus, the three sets of requirements *run counter* to the stated animal welfare objective.

678. There are, at least, five different ways in which the EU Seal Regime, and the trade restrictions imposed, are rationally disconnected from the animal welfare objective purportedly pursued by the EU Seal Regime.

(1) The Indigenous Communities Requirements are rationally disconnected from the animal welfare objective

679. *First*, the Indigenous Communities Requirements are rationally disconnected from the alleged animal welfare objective. *None* of the conditions established under these requirements relate to animal welfare. In other words, under the Indigenous Communities Requirements, *animal welfare considerations are irrelevant to the European Union in determining whether seal products may be imported and sold in the European Union*.

680. The fact that the Indigenous Communities Requirements do not impose conditions relating to animal welfare does not merely have theoretical significance. This is because there is evidence that some of the traditional methods used in Inuit hunts may be particularly detrimental to animal welfare.[980] In Denmark (Greenland), one of the traditional Inuit hunting methods involves "netting" seals.[981] With respect to this killing method, EFSA has observed:

[980] Moreover, EFSA has found that "Generally, hunts considered as "subsistence" have few, if any, regulations and are poorly monitored." 2007 EFSA Scientific Opinion, Exhibit JE-22, p. 13. "Subsistence" is one of the requirements of the Indigenous Communities Requirements.
[981] 2007 EFSA Scientific Opinion, Exhibit JE-22, p. 48, section 3.4.8. *See* also, *ibid*., p. 46, section 3.4.1.

- "The basic purpose of netting is to restrain the seal in a submerged position long enough for it to exhaust its oxygen supply and to die from asphyxiation";[982]

- During a 1982 study, "it was observed that the trapped seals eventually struggled violently";[983]

- "Because of the diving adaptations of seals, the process leading to death will last tens of minutes, perhaps even more than an hour in extreme cases";[984]

- "We can conclude that these adaptations tend to extend the time from entrapment until death and therefore potentially also the time over which stress, pain or suffering could be experienced";[985]

- "It is likely that the denial of normal behavioural choices during diving will cause stress. In the face of declining tissue oxygen concentrations (or increasing carbon dioxide concentrations) and approaching asphyxiation (and/or drowning), initial stress is likely to lead to distress and suffering";[986]

- Most netting of seals involves the use of tangle nets, which will also likely cause stress;[987]

- "We can reasonably be sure that entanglement will cause protracted distress and suffering extending over many minutes and, possibly, tens of minutes";[988]

- Thus, death caused by netting "is clearly protracted, and suffering is likely to be prolonged";[989] or in the words of two scientists, "Netting is a very inhumane way of taking seals".[990]

681. Carsten Grondahl, a Danish veterinary scientist with expertise in animal sensory perception and who contributed to the COWI Report,[991] said, referring to drowning by netting, that "using drowning as a hunting method is a bestial form of animal cruelty".[992]

682. In addition to the fact that this traditional hunting method does not conform to animal welfare requirements, the struck and lost rate in Denmark (Greenland) is also reported to be

[982] 2007 EFSA Scientific Opinion, Exhibit JE-22, p. 46, section 3.4.2.
[983] 2007 EFSA Scientific Opinion, Exhibit JE-22, p. 46, section 3.4.2.
[984] 2007 EFSA Scientific Opinion, Exhibit JE-22, p. 46, section 3.4.2.
[985] 2007 EFSA Scientific Opinion, Exhibit JE-22, p. 46, section 3.4.2.
[986] 2007 EFSA Scientific Opinion, Exhibit JE-22, p. 47, section 3.4.2.
[987] 2007 EFSA Scientific Opinion, Exhibit JE-22, p. 47, section 3.4.2.
[988] 2007 EFSA Scientific Opinion, Exhibit JE-22, p. 47, section 3.4.2.
[989] 2007 EFSA Scientific Opinion, Exhibit JE-22, p. 47, section 3.4.4.
[990] 2007 EFSA Scientific Opinion, Exhibit JE-22, p. 48, section 3.4.8.
[991] COWI, *Feature*, Issue 18 (2008), available at http://www.publications.cowi.com/cowi/Feature18_GB/ (last checked 14 October 2012), pp. 26-31, ("COWI, *Feature*, Issue 18 (2008)"), Exhibit JE-32, p. 30.
[992] COWI, *Feature*, Issue 18 (2008), Exhibit JE-32, p. 30.

as high as 40 to 50 percent in spring and early summer.[993] In respect of these lost seals, it is impossible to verify that the seal did not escape injured, suffering a protracted and painful death from its injuries.

683. The absence of animal welfare conditions as part of the Indigenous Communities Requirements is significant also because of the large volume of seals hunted by Inuit communities. The volume of the seal catch in Denmark (Greenland) alone, all of which the European Union's consultant expects ultimately to qualify under the Indigenous Communities Requirements,[994] amounted to an average of 165,000 seals per year for the period between 1993 and 2009.[995] Hence, as European Parliament Rapporteur Wallis noted in January 2009,

> the Inuit exception could, on certain interpretations of its scope, apply to a *large majority* of the traded products, thus *defeating* the animal welfare intentions of the proposal.[996]

684. As a result, although the EU Seal Regime purports to pursue animal welfare objectives, it allows the importation of seal products resulting from seals caught using inhumane killing methods such as netting,[997] and with high struck and lost rates. Consequently, the EU Seal Regime *prejudices* the animal welfare objectives it purports to pursue. A trade-restrictive measure that *prejudices* the achievement of its objectives is clearly *not* necessary for the *fulfilment* of those objectives.

(2) The Sustainable Resource Management Requirements are rationally disconnected from the animal welfare objective

685. *Second*, the Sustainable Resource Management Requirements, too, contain *no provisions at all* relating to animal welfare, instead focusing on whether seals are being taken from the marine ecosystem for resource management purposes.[998] Again, seal products may

[993] 2007 EFSA Scientific Opinion, Exhibit JE-22, p. 66, section 4.4.2.
[994] 2010 COWI Report, Exhibit JE-21, section 3.1, p. 30.
[995] This figure reflects the average annual catch in Denmark (Greenland) over the period 1993-2009. The peak of seal catch was in 2005, with 191,000 seals hunted, whereas the nadir was touched in 1994, with 140,000 seals hunted. 2012 Management and Utilization of Seals in Greenland, Exhibit JE-26, p. 22.
[996] Rapporteur Wallis' Draft Explanatory Statement, in EU Parliament Draft Report on Trade in Seal Products, Exhibit JE-18, p. 33 (emphasis added).
[997] *See* the remarks of Carsten Grondahl in para. 681 above, quoted in COWI, *Feature*, Issue 18 (2008), Exhibit JE-32, p. 30.
[998] Basic Seal Regulation, Exhibit JE-1, Article 3(2)(b). *See* also Implementing Regulation, Exhibit JE-2, Article 5.

be placed on the EU market pursuant to these requirements whether or not they are derived from seals hunted consistently with animal welfare requirements.

686. Although there is a condition that seal hunts be "regulated by national law", there is no stipulation that such national law address animal welfare requirements. This means that if the relevant national law does not impose adequate animal welfare requirements, the Sustainable Resource Management Requirements would not block imports of seal products hunted using an inhumane killing technique. For instance, if national law tolerates the netting of seals, seal products meeting the conditions of the Sustainable Resource Management Requirements would be allowed to be placed on the EU market, even if they were derived from seals killed inhumanely through this method.[999]

687. Hence, under the EU Seal Regime, it is permissible for seal products to be placed on the market, pursuant to the Sustainable Resource Management Requirements, even if they are derived from seals hunted contrary to basic animal welfare requirements. Thus, in this way, too, the Sustainable Resource Management Requirements are rationally disconnected from the animal welfare objective.

(3) The Personal Use Requirements are rationally disconnected from the animal welfare objective

688. *Third*, the Personal Use Requirements contain no criterion relating to animal welfare. The basic requirement is that the seal products in question be imported "for the personal use of travellers or their families".[1000] Hence, seal products may be placed on the EU market for the personal use of the EU consumers whose concerns, according to the preamble, motivated the ban.[1001] Moreover, the European Union allows EU consumers to exercise their personal choice by importing and consuming seal products that may be derived from seals hunted in a manner that violates animal welfare requirements.

689. In other words, for those EU consumers that are willing to purchase seal products, the European Union supports that choice fully, allowing them to import and consume the seal products in the European Union without considering whether the seal products are derived

[999] *See* the remarks of Carsten Grondahl in para. 681 above, quoted in COWI, *Feature*, Issue 18 (2008), Exhibit JE-32, p. 30.
[1000] Basic Seal Regulation, Exhibit JE-1, Article 3(2)(a).
[1001] A Commission non-paper even referred to the products allowed under the Personal Use Requirements as "hunting trophies". European Commission Services, *Non-Paper on Possible Elements for a Commission Implementing Regulation*, COM-TSP 1/2 (15 January 2010), Exhibit NOR-33, Article 4(3).

from seals hunted contrary to animal welfare requirements. As a result, in promoting a personal choice objective under the Personal Use Requirements, the measure pays no regard to the animal welfare objective.

690. Thus, as summarized in a recent law review article, none of the three sets of requirements: "address[es] whether the seals were cruelly killed or humanely culled."[1002]

(4) The three sets of requirements prevent placing on the market of seal products produced with respect for animal welfare

691. *Fourth*, under the three sets of requirements, which are trade-restrictive gateways that govern market access, seal products resulting from hunts that are conducted in full respect of animal welfare requirements may be banned. Specifically, if seal products do not comply with one of the three sets of requirements, the products are banned, without any consideration of whether the hunt complied with animal welfare requirements.

692. Thus, because the regulatory conditions established to govern the placing of seal products on the EU market under the three sets of requirements bear no relationship whatsoever to animal welfare, these three trade-restrictive requirements, and the EU Seal Regime as a whole, are not apt to ensure respect for animal welfare. Seal products derived from seals harvested inhumanely are permitted, and seal products harvested humanely are banned.

693. During the legislative process, the Commission itself recognized that a prohibition on trade that was unrelated to animal welfare requirements "on its own would probably have limited or no impact on the killing practices, in particular in non-EU countries".[1003] Similarly, the Committee on Legal Affairs of the European Parliament observed that such a prohibition would provide "no incentive to adopt more humane killing methods".[1004] Indeed, the various marketing requirements comprising the EU Seal Regime ban the products of the commercial hunt, which EFSA has found to be "more regulated than traditional hunting".[1005] This is in complete contradiction with the conclusions reached in the reports preceding

[1002] P. Fitzgerald, "'Morality' May Not Be Enough to Justify the EU Seal Products Ban: Animal Welfare Meets International Trade Law", *Journal of International Wildlife Law and Policy* (2011), Vol. 14, pp. 85-136, Exhibit NOR-86, p. 128.
[1003] Commission Impact Assessment, Exhibit JE-16, section 7.2, p. 51 (emphasis removed).
[1004] Opinion of the EU Parliament Committee on Legal Affairs – Legal Basis, Exhibit NOR-76, p. 13.
[1005] 2007 EFSA Scientific Opinion, Exhibit JE-22, p. 87, Conclusion 1.1.3.

adoption of the EU Seal Regime, namely that an effective measure should have encouraged good practices and avoided bad practices.[1006]

(5) The three sets of requirements permit commercial and other activities in the European Union relating to seal products

694. *Fifth*, the three sets of requirements do not prohibit: (1) the production of seal products within the European Union for export to third countries (because these seal products for export are not, technically, "placed on the EU market"[1007]); (2) the importation of seal products for inward processing within the European Union for exportation (because these seal products for processing are not, technically, "placed on the EU market"); (3) the offering for sale of seal products at auction houses in the European Union, provided the goods are placed under the appropriate customs procedure and not ultimately destined for the EU market (again, because such products are not "placed on the EU market"); and (4) the hunting of seals within the European Union (because the Basic Seal Regulation expressly excludes the regulation of hunting[1008]).

695. These commercial activities are allowed within the European Union *without consideration* of whether the seal products in question were produced from seals hunted consistently with animal welfare requirements. Hence, under the terms of the EU Seal Regime, there are no restrictions on the killing of seals in the European Union, and no requirements are imposed on the manner of killing seals in the European Union; and several commercial activities may be undertaken in relation to seals killed in the European Union: they may be exported from the European Union, processed in the European Union, and offered for sale through auction houses in the European Union. The continued authorisation, in particular, of transit trade under the EU Seal Regime was consistent with EU economic interests, which, according to preliminary studies, would have been more significantly affected by a ban on transit trade.[1009] These elements also show a rational disconnect

[1006] 2008 COWI Report, Exhibit JE-20, section 7.2, p. 136, "Recommendations".
[1007] Article 1 of the Basic Seal Regulation provides that the EU Seal Regime applies to the "placing on the market" of seal products in the European Union, and Article 3 of the Basic Seal Regulation specifies that the conditions applying to placing on the market will also apply to imported goods at the time of import. In turn, Article 2 of the Basic Seal Regulation defines "placing on the market" and "import". Basic Seal Regulation, Exhibit JE-1.
[1008] *See* Basic Seal Regulation, Exhibit JE-1, Preamble, recital 15: "This Regulation … is … without prejudice to … Community or national rules regulating the hunting of seals".
[1009] *See, e.g.*Commission Impact Assessment, Exhibit JE-16, Section 1, p. 6: "A total prohibition of placing on the EU market of seal products is assessed to have minor economic impacts in EU Member States. This

between the terms of the EU Seals Regime and the purported objective of ensuring respect for animal welfare.

(6) Through the Indigenous Communities Requirements, the EU Seal Regime involves arbitrary or unjustifiable discrimination between countries where the same animal welfare conditions prevail

696. In addition to making no contribution to the EU's "overarching objective" of animal welfare, the Indigenous Communities Requirement also constitutes arbitrary or unjustifiable discrimination between countries where the same conditions prevail.

697. To recall,[1010] the sixth recital of the preamble of the *TBT Agreement* provides relevant context for the interpretation of Article 2.2 and, in particular, of the wording "fulfil a legitimate objective". The sixth recital sets forth that measures taken by Members to achieve legitimate objectives must not to be "applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade".

698. As noted above,[1011] the regulatory distinction introduced by the Indigenous Communities Requirements between conforming and non-conforming products does not bear any rational relationship with the animal welfare objective that the EU Seal Regime purports to pursue.[1012] Indeed, Norway has shown that the regulatory distinction in question *prejudices* animal welfare because seals products benefitting from market access may be produced using seals that are killed without regard to animal welfare considerations.[1013]

699. This "rational disconnect" between the EU Seal Regime and its stated animal welfare objective involves arbitrary and unjustifiable discrimination between countries where the same conditions prevail. In paragraphs 389 to 403 above, Norway has explained that the Indigenous Communities Requirements involve discrimination on grounds of origin, because

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assumes, however, that transhipment of sealskins and other seal products and imports of sealskins for further processing and exports can continue. The impacts are assessed to be slightly more significant for non-EU range state. […] [The] economic impacts […] could be significant for Finland and Germany, if such ban would also cover transit trade". (emphasis removed)

[1010] *See* paras. 568-576

[1011] *See* paras. 568-576 above.

[1012] *See* para. 149 above.

[1013] *See* paras. 679-684 above.

they favour products from Denmark (Greenland) to the detriment of products from other countries that are, in principle, denied market access.

700. In *all* countries – including Denmark (Greenland), Norway, and all others – seals are equally vulnerable to hunting that does not respect animal welfare. Hence, seals hunted in Denmark (Greenland) are not less vulnerable to unnecessary pain, distress and suffering than seals hunted elsewhere, including Norway. This same "condition" relating to the vulnerability of seals is, therefore, common to the circumstances of *all* countries.

701. By disregarding the animal welfare risks arising in connection with seal hunting in some countries, but giving decisive regulatory significance to these same risks in connection with seal hunting in other countries, the EU Seal Regime constitutes a means of arbitrary and unjustifiable discrimination between countries where the same conditions prevail.

702. Further, in failing to treat countries in an even-handed manner with respect to the basic vulnerability of seals to animal welfare concerns, the European Union has also failed to consider the differing regulatory "conditions" in the seal producing countries. As we have noted, in regulating the seal hunt, Norway enforces stringent regulation that ensures respect for animal welfare, for example, by not allowing killing of seals through netting and drowning. Denmark (Greenland), by contrast, does permit this practice. Nonetheless, seal products from the latter predominantly benefit from market access under the Indigenous Communities Requirements, whereas seal products from Norway do not. Again, therefore, the European Union fails to treat countries even-handedly in its purported pursuit of animal welfare concerns.

703. Thus, because it draws distinctions between countries where the same conditions prevail, the Indigenous Communities Requirement constitutes a means of arbitrary and unjustifiable discrimination and a disguised restriction on international trade.

(7) Conclusions on the EU seal regime's contribution to animal welfare

704. In sum, the European Union has adopted a measure that, in terms of design, structure, and expected operation, suffers in many significant respects from a rational disconnect between the purported "overarching"[1014] animal welfare objective and the chosen means of

[1014] Commission Impact Assessment, Exhibit JE-16, section 1, p. 7.

regulating trade in seal products. By paying no regard to animal welfare, the European Union permits trade in seal products that do not comply with animal welfare requirements, whereas it prevents trade in products that do comply with these requirements. On its face, the measure shows that a trade restriction is not necessary for animal welfare reasons, because trade in seal products is permitted without consideration of animal welfare. The measure is devoid of rational relationship between the regulatory treatment afforded to seal products and the objective of ensuring animal welfare. Indeed, it makes *no* contribution to this objective, and constitutes a means of arbitrary or unjustifiable discrimination between countries where the same animal welfare conditions prevail.

ii. The EU Seal Regime is unnecessary as it does not contribute to preventing consumer confusion

(1) The Indigenous Communities Requirements and the Sustainable Resource Management Requirements are rationally disconnected from the consumer confusion objective

705. According to the European Union, the EU Seal Regime is also intended to "restore consumer confidence",[1015] preventing the confusion that existed in the market between indistinguishable seal and non-seal products.[1016] However, the three sets of trade-restrictive requirements comprising the EU Seal Regime make no contribution to preventing consumer confusion.

706. The Indigenous Communities Requirements and the Sustainable Resource Management Requirements do not require that seal products placed on the EU market pursuant to these requirements bear any label or other marking that could inform consumers of the following: that the product in question is a seal product; and that it is derived from a seal hunted consistently (or not) with animal welfare requirements.

707. Thus, before making its purchasing decisions, the EU consumer is not informed of the seal content of seal products, and even less of compliance (or not) with animal welfare requirements.

708. The sole indication that the product contains seal is given by the certificate attesting conformity with the Indigenous Communities or Sustainable Resource Management

[1015] Basic Seal Regulation, Exhibit JE-1, Preamble, recital 10.
[1016] Basic Seal Regulation, Exhibit JE-1, Preamble, recitals 3, 7 and 8.

Requirements, which must accompany the seal product when first placed on the EU market (for imported products, at the time of importation).[1017] Yet, the European Union attaches so little importance to keeping the consumer properly informed that the seal product need not be accompanied by the certificate when further resold on the EU market, such as upon sale to a consumer in a retail outlet. The Implementing Regulation provides that it is sufficient to include "[a] reference to the *attesting document number* […] in any further invoice".[1018] The average consumer, even if it saw the reference *number* would not understand its significance. Moreover, the reference number need, in any event, only be provided in the *invoice*, *i.e.*, *once the purchase has already been made*, at a time, in other words, when the information – even if adequate – is no longer apt to inform the purchasing decision.[1019]

709. As a result, for example, a consumer purchasing omega-3 oil capsules from a retail store need not be given a conformity assessment certificate. All that this consumer will have, under the EU Seal Regime, is a reference number on the invoice it receives upon payment.[1020] The EU Seal Regime, thus, provides the consumer with no adequate means to distinguish between omega-3 oil capsules containing seal oil and omega-3 oil capsules containing oil from other sources, such as fish.

710. Moreover, neither the consumer nor anyone else, including the EU authorities, is *ever* informed whether the seal product is derived from seals killed consistently with animal welfare requirements.

711. Hence, under the EU Seal Regime, EU consumers could purchase unmarked seal products derived from seals hunted using hunting methods such as netting or similarly inhumane methods of killing.[1021] EU consumers could purchase such products in *complete ignorance* of their content.

712. Accordingly, the EU Seal Regime makes no contribution at all to dispelling consumer confusion regarding the possible presence of seal products on the market. Indeed, by inducing consumers to believe that a regulation has been adopted to safeguard the animal

[1017] Implementing Regulation, Exhibit JE-2, Article 7(3).
[1018] Implementing Regulation, Exhibit JE-2, Article 7(4).
[1019] Indeed, to the extent that a consumer is merely issued with a retail receipt, as opposed to an "invoice", upon completion of a transaction, he or she may not even be made aware of the attestation number unless it is printed on the receipt.
[1020] Implementing Regulation, Exhibit JE-2, Article 7(4).
[1021] *See* the remarks of Carsten Grondahl in para. 681 above, quoted in COWI, *Feature*, Issue 18 (2008), Exhibit JE-32, p. 30.

welfare of seals, the EU Seal Regime misleads consumers into believing that they may never be faced, on the EU market, with products derived from seals killed inhumanely.

(2) Through the Indigenous Communities Requirements and the Sustainable Resource Management Requirements, the EU Seal Regime involves arbitrary or unjustifiable discrimination between countries whose products pose the same risks of consumer confusion

713. In addition, the EU Seal Regime also involves arbitrary and unjustifiable discrimination between countries whose products pose the same risks of consumer confusion. Hence, 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.

714. 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. For example, an EU consumer faced with a bottle containing omega-3 capsules made with seal oil will not be able to discern that the bottle contains seal oil simply because the seal oil is derived from a seal originating in one country rather than another. Thus, products originating from Denmark (Greenland), marketed under the Indigenous Communities Requirements, and products from the European Union, marketed under the Sustainable Resource Management Requirements, pose the same risks of consumer confusion as products from other countries.

715. Yet, the EU Seal Regime, pursuant to the Indigenous Communities and Sustainable Resource Management Requirements, permits seal products from certain countries, banning them from other countries. By prohibiting products from certain origins in order to prevent consumer confusion, while allowing products from other countries that pose the same risks in relation to consumer confusion, the European Union fails to treat countries in an even-handed manner and its measure constitutes arbitrary and unjustifiable discrimination between countries where the same conditions prevail.

716. Therefore, also with regard to the objective of allowing consumer information, the restrictions in the EU Seal Regime violate Article 2.2 of the *TBT Agreement*.

iii. The EU Seal Regime partly contributes to, and partly undermines, the sustainable management of marine resources

717. Contrary to animal welfare and consumer information, which are entirely *absent* from the operative part of the EU Seal Regime, the objective of the sustainable management of marine resources is reflected in one of the three sets of requirements comprising the EU Seal Regime, namely, the Sustainable Management Requirements. However, the Sustainable Management Requirements include regulatory conditions that restrict trade, without contributing to, and even prejudicing, the achievement of this additional objective.

718. The Sustainable Resource Management Requirements allow the placing on the market of seal products with the objective of contributing to sustainable marine resource management. Norway accepts that certain of the conditions imposed under the requirements do contribute to the promotion of this objective.

719. The conditions contributing to the objective include the requirements that: the hunt be conducted as part of a plan for the sustainable management of marine resources that uses scientific population models of marine resources and applies an ecosystem-based approach ("Management Plan"); and that the catch not exceed a total allowable catch ("TAC") quota established in accordance with the relevant Management Plan. These requirements are rationally related to the objective of promoting the sustainable management of marine resources.

720. However, certain other conditions imposed under the Sustainable Resource Management Requirements bear no relationship to this objective and, therefore, impose trade restrictions that do not contribute to the achievement of that objective. These are the two conditions that the products be placed on the market in a *non-systematic* way and on a *non-profit* basis, and an apparently related requirement that the hunt be conducted for the "*sole purpose*" of sustainable marine resource management.[1022]

(1) Non-systematic sale is an unnecessary condition

721. The term "non-systematic"[1023] in the EU Seal Regime, and the requirements on the "nature and quantity"[1024] of products placed on the market, refer to the *volume* of seal

[1022] Basic Seal Regulation, Exhibit JE-1, Article 3(2)(b); and Implementing Regulation, Exhibit JE-2, Article 5.
[1023] Implementing Regulation, Exhibit JE-2, Article 5(1)(c).

products placed on the market as by-products of a hunt conducted pursuant to a Management Plan and the *frequency* with which these "legitimate" seal by-products are so placed. Norway is not aware of the precise threshold that the European Union has decided to use in determining that sales of legitimate seal by-products are placed on the EU market in a systematic manner.

722. If seals are hunted pursuant to a properly established scientific Management Plan, and the catch remains within the TAC quota and is, therefore, sustainable, there is no rational reason to prohibit trade in the resulting seal products simply because they are placed on the market in a "systematic" way. Indeed, limiting systematic sales of a natural resource that is exploited in accordance with a sustainable marine management plan bears no rational relationship to the objective of sustainable marine resource management.

723. Sustainable resource management seeks to ensure, among others, that the human exploitation of a natural resource, such as seals, does not result in the long-term decline of that resource. For that reason, for at least the past 40 years, the international community has consistently recognized that the sustainable management of natural resources *must include* strategies for addressing the commercial exploitation of resources, precisely to ensure that the human use of natural resources does not render the resource unsustainable in the long-term.[1025]

[1024] Basic Seal Regulation, Exhibit JE-1, Article 3(2)(b).

[1025] The *Convention on Biological Diversity*, for instance, defines "sustainable use" as: "the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations". Convention on Biological Diversity, Exhibit NOR-66, Article 2. The 1982 *World Charter for Nature* provides that resources "utilized by man shall be managed to achieve and maintain optimum sustainable productivity". United Nations General Assembly, *World Charter for Nature*, 42nd sess., A/RES/37/7 (28 October 1982), Exhibit NOR-87, para. 4 (emphasis added). The 1987 Report of the *Experts Group on Environmental Law by the World Commission on Environment and Development*, which found, *inter alia*, that "the ability to choose paths that are sustainable" requires that "the ecological dimensions of policy be considered at the same time as the economic, trade, energy, agricultural, industrial, and other dimensions". United Nations General Assembly, *Development and International Economic Cooperation: Environment – Annex: Report of the World Commission on Environment and Development "Our Common Future"*, A/42/427 (4 August 1987) ("Brundtland Report"), Exhibit NOR-88, p. 308, para. 23. The 2002 *Declaration of the World Summit on Sustainable Development* recognizes that "protecting and managing the natural resource base for economic and social development are overarching objectives of, and essential requirements for sustainable development". United Nations World Summit on Sustainable Development, *Declaration of the World Summit on Sustainable Development – Annex: Johannesburg Declaration on Sustainable Development*, A/CONF.199/20 (4 September 2002), Exhibit NOR-89, para. 11. "[A]llowing for the optimal use of the world's resources in accordance with the objective of sustainable development" is, of course, recognized in the first preambular paragraph of the *WTO Agreement*.

724. Indeed, the international community recognizes that human use of a resource is perfectly consistent with – indeed, part and parcel of – effective resource management if that use does not prejudice the sustainability of the resource. Thus, the *Convention on Biological Diversity* states that sustainable resource management has, as its goal, ensuring that resources have the potential "to meet the needs and aspirations of present and future generations". The *Convention on Biological Diversity* thus aims to regulate human activities in such a manner as to ensure the longer term preservation of all life in the biosphere, as exemplified, *inter alia*, by the concept of "ecosystem" management. The concept of sustainable marine resource management incorporates and further defines the aspects of protection and sustainable use of resources, on a species by species basis. The Brundtland Commission also recognized that, in formulating policies on sustainability, governments must strive to ensure that the ecological dimensions of policy are aligned with – and not divorced from – other policy dimensions, including economic development. This conception of the sustainable management of natural resources encompasses objectives both of preserving biological diversity of species in the ecosystem, as well as ensuring that humankind may benefit from these resources within sustainable limits.

725. These objectives lies at the heart of Norwegian policy and legislation regarding natural resources, including seals.[1026] They notably are reflected in Norway's Marine Resources Act.[1027] Section 7(e), for instance, requires, in the evaluation of management measures necessary to ensure sustainable management of wild marine living resources, that importance be attached to "optimal utilisation of resources adapted to marine value creation, markets and industries.".[1028] These objectives are also reflected in the European Union's Common Fisheries Policy, which covers the "available and accessible living marine aquatic species".[1029] Article 2 of Regulation 2371/2002 sets out, in particular, that: "The Common Fisheries Policy shall ensure exploitation of living aquatic resources that provides sustainable economic, environmental and social conditions."[1030] Thus it is clear, in both Norway and the European Union, that the basic concepts of conservation and utilisation are understood to go hand in hand.

[1026] *See* paras. 258 to 266 above. *See* also Landmark Statement, Exhibit NOR-8, para. 2.
[1027] *See* paras. 259 to 261 above.
[1028] Norwegian Marine Resources Act, Exhibit NOR-44, section 7(e).
[1029] Council of the European Union, *Regulation (EC) No 2371/2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy*, Official Journal of the European Union (2002) L 358/59 (20 December 2002), Exhibit NOR-90.
[1030] *Ibid.*

726. As the consistent statements of the international community show, imposing an arbitrary regulatory restriction on the "systematic" sale of natural resources is unnecessary to achieving sustainable resource management. Rather, achieving the goals of a sustainable resource management plan requires simply that a living resource be managed in a sustainable manner. If the TAC of the resource is properly established, according to *scientific principles* taking into account factors such as abundance, mortality, and reproductive rates, a *rational biological limit* is placed on the volume of the resource that may be placed on the market. This biological limit serves to ensure that the resource is managed sustainably, thereby achieving the goals of sustainable resource management.

727. Thus, under a scientific management plan, the volume of the resource that is available to be placed on the market, and the frequency of sales, is simply a logical consequence of the size of the *sustainable biological limits*. If the TAC – i.e. the maximum biological limit that ensures sustainable resource management – happens to be relatively large given the scientific parameters, the quantity of sustainably-derived products available to be placed on the market will also be relatively large, and sales will be made relatively frequently. In other words, there is a *rational relationship between the quantity of the legitimate seal by-products and the terms of the sustainable resource management plan*.

728. However, by requiring that sales of seal products be "non-systematic", irrespective of the biological limit established under the TAC, the EU Seal Regime imposes an arbitrary *regulatory limit* on the volume and frequency of the marketing of these products , which is an additional hurdle divorced from – and unnecessary to – the achievement of the sustainable resource management plan. As a result, if the biological limit on seal products is large, this regulatory limit will arbitrarily prohibit the efficient placing on the market of seal products resulting from the management plan.

729. Put slightly differently, there is no rational or necessary reason for the European Union to *permit* the import and sale of seal products if the size of the sustainable quota happens to be small, but to *prohibit* the import and sale of seal products if the size of the sustainable quota happens to be large, and leads to the systematic sale of seal products. In both cases, the seal products and their relationship to the goals of sustainable resource management are objectively very similar indeed: they are all seal products that result from hunts conducted pursuant to a sustainable resource management plan.

730. Norway also recalls that the sixth recital of the preamble to the *TBT Agreement* provides relevant context for interpreting Article 2.2.[1031] This recital recognizes that a Member's entitlement to adopt trade-restrictive measures in pursuit of legitimate objectives is subject to the requirement that such measures are not applied in a way that would constitute "arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade".

731. Norway notes that for purposes of the sustainable management of marine resources, two countries having sound, science-based marine resource management plans that establish a quota for seal hunting are countries "where the same conditions prevail". Under the "non-systematic" condition, one country may be able to place all of its seal products on the EU market because the permissible seal catch under a sustainable resource management plan is sufficiently small that sales are "non-systematic" (*e.g.*, Sweden or Finland);[1032] yet, the other country may not 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 with regard to maintaining the balance of the ecosystem is "arbitrary or unjustifiable", in violation of Article 2.2.

732. The "non-systematic" condition serves no rational purpose in the pursuit of sustainable resource management and, instead, serves only as a disguised block on international trade from countries with a relatively large catch of seals pursuant to an appropriate management plan, such as Norway. In contrast, trade originating in other countries, such as Sweden or Finland, which harvest small numbers of seals pursuant to such a plan, is not blocked.

733. In sum, the limitation on "non-systematic" sales of seal products is not necessary to the fulfilment of the objective of promoting sustainable marine resource management. The condition makes no contribution to the achievement of that objective and, instead, undermines its fulfilment; moreover, the condition gives rise to arbitrary and unjustifiable discrimination between countries where the same conditions prevail and constitutes a

[1031] *See* paras. 568 and 569 above.
[1032] *See* paras. 430 to 441 above. *See* also *e.g.*, European Parliament Debates, Exhibit JE-12, p. 67 (statement of MEP Hélène Goudin); and 2010 COWI Report, Exhibit JE-21, section 5.4.1, p. 58 ("Sweden and Finland […] have no commercial sealing industry and a very small-scale hunt altogether").

disguised restriction on international trade. This limitation, for all these reasons, is not consistent with Article 2.2 of the *TBT Agreement*.

(2) Not-for-profit sale is an unnecessary condition

734. A second objectionable condition under the Sustainable Resource Management Requirements is that the seal by-products must be sold on a not-for-profit basis. Under the EU Seal Regime:

> 'placing on the market on a non-profit basis' means placing on the market for a price *less than or equal to the recovery of the costs borne by the hunter* reduced by the amount of any subsidies received in relation to the hunt.[1033]

735. In other words, the sale price must be no greater than the hunter's costs net of subsidies.

736. To recall, the international community has repeatedly emphasized that sustainable resource management regulates the human exploitation of natural resources, provided that human exploitation is subject to scientifically-established biological limits on that use.[1034] If such biological limits are properly established to allow for sustainable use, it is not necessary to the achievement of sustainable resource management that the resource be sold at no more than a break-even price.

737. Given that the Sustainable Resource Management Requirements in the EU Seal Regime seek to allow sale in the *marketplace* of seal products if they result from a sustainable resource management plan, there is no logic to prohibiting *commercial prices* set between willing buyers and sellers, and, at the same time, compelling sellers to charge non-commercial, even loss-making, prices. There is no valid regulatory reason for the European Union to interfere in market pricing by preventing willing sellers and buyers from selling or purchasing legitimately traded, sustainable, seal products at market prices.

738. This condition prevents the costs of implementing a management plan from being redeemed through the sale of the seal by-products, removing any economic incentive for commercial actors to participate in the efficient implementation of such plans, incidentally depriving them of part of their livelihood. It also frustrates the efficient use of seals once

[1033] Implementing Regulation, Exhibit JE-2, Article 2(2).
[1034] *See* paras. 723 and 724 above.

they have been harvested. As the European Parliament Rapporteur for the Committee on Agriculture and Rural Development said in a slightly different context during the development of the EU Seal Regime, this "run[s] contrary to every measure in connection with the rational use of natural resources, which advises that maximum possible use should be made of an animal after it has been killed".[1035]

739. Bearing in mind that the sixth preambular recital of the *TBT Agreement* provides relevant context to the interpretation of Article 2.2,[1036] the rational disconnect – indeed, the conflict – between the purported objective of promoting the sustainable management of marine resources and the non-for-profit condition further indicates that the EU Seal Regime is designed in a manner constituting "arbitrary or unjustifiable discrimination" as well as a "disguised restriction on international trade". Specifically, by prohibiting any *profitable* international trade in seal products derived from seals harvested pursuant to a Management Plan, this condition is rationally disconnected from the conservation objectives it purports to pursue. Rather than pursue the conservation of marine resources, a ban of the *profitable* sale of seal products is a thinly disguised restriction on international trade, aimed at countries with sustainable resource management plans that involve larger seal hunts than the European Union's, and the systematic sale of the resulting seal products.[1037] It bears repeating that the human exploitation of natural resources forms part and parcel of the long-standing international conception of sustainable resource management, which seeks to ensure that present and future generations may both benefit economically and otherwise from natural resources in a sustainable manner.[1038]

740. The arbitrariness of the discrimination introduced by the "non-profit" requirement is all the more apparent when one observes that the only economic operators to whom the "non-profit" requirement applies are the hunters, *i.e.*, those that harvest the raw natural resource. Article 2(2) of the Implementing Regulation defines "non-profit" only in relation to the costs "borne by the hunter". Conversely, for example, those processing the raw natural resources into intermediate or final goods, or offering the products for sale at EU auction houses, may derive profits from their activities.

[1035] EU Parliament Final Report on Trade in Seal Products, Exhibit JE-4, p. 57. The comments of the Rapporteur of the AGRI Committee were made in response to the Commission Proposal (for discussion of which *see* paras. 112 to 117 above) rather than the EU Seal Regime, as adopted.
[1036] *See* para. 568 above.
[1037] *See* paras. 442 to 449 above.
[1038] *See* paras. 723 and 724 above.

741. The rational disconnect between the not-for-profit condition and the sustainable resource management objective is compounded by the introduction, in the definition of "profit", of a discriminatory rule relating to subsidies. The EU Seal Regime requires that, if "any subsidies [were] received in relation to the hunt",[1039] these must be added to the sales price in order to determine whether a profit was made.

742. As we describe in elsewhere in this submission,[1040] fishermen that hunt seals in the European Union do so because killing seals benefits other areas of the fishermen's fishing or aquaculture activities, for instance through preventing damage to fishing gear. Since these economic benefits to the fisherman arise irrespective of the direct economic returns derived from seal hunting, profit-making and/or subsidies for hunting seals may not be required in the European Union. By contrast, in order to allow the long-term viability of a sustainable seal hunt, consistent with the sustainable management of marine resources, and to maintain the professional capabilities necessary to carry out the hunt, Norway currently provides a subsidy to ensure hunters yield a positive return on their investment of time and resources.[1041] Nevertheless, seal products derived from hunting seals in both the European Union and Norway result from the implementation of a plan for the sustainable management of marine resources. Accordingly, by preventing the marketing of products that are profitable only because of a subsidy, the "net-of-subsidies" rule that is part of the "non-profit" condition also introduces arbitrary or unjustifiable discrimination between countries where seals are taken for resource management purposes

743. In sum, the not-for-profit limitation on trade in seal products is also not necessary to the fulfilment of the objective of promoting sustainable marine resource management and, instead, prejudices the fulfilment of that objective.

(3) Requiring that the hunt be conducted for the "sole purpose" of sustainable marine resource management is an unnecessary condition

744. A further unnecessary condition of the Sustainable Resource Management Requirements is that seal hunts be conducted for the "*sole purpose*" of sustainable management of marine resources and the corresponding requirement that seal products be

[1039] Implementing Regulation, Exhibit JE-2, Article 2(2).
[1040] *See* paras. 430 and 431 above.
[1041] The purpose of the subsidy is to ensure that the recommended TAC quotas are taken. *See*, *e.g.*, 2011-2012 Budget Proposal, Exhibit NOR-71, pp. 108 and 109. *See* also Landmark Statement, Exhibit NOR-8, para. 25.

"by-products" (that is, a secondary or incidental products) of the activity.[1042] This condition arbitrarily requires that the seal hunts have only one purpose and that this unique purpose be sustainable management.

745. Like the conditions requiring seal products to be placed on the market on a non-profit basis and a non-systematic way, this "sole purpose" condition effectively prevents the pursuit of commercial or any other legitimate purposes through participation in seal hunts that are part of the implementation of an appropriate, scientific Management Plan.

746. It is extremely rare for an activity, such as a seal hunt, to have one sole and unique purpose, particularly when considered from the perspective of the different participants in the activity. In the case of seal hunting conducted for purposes of sustainable management of marine resources, there are two obvious participants with different interests: the hunters that conduct the hunt, and the public authorities that regulate and support it. Even among the group of Norwegian hunters, there are the diverse interests of the ship owner, captain and crew.

747. It is odd even to suggest that all of these participants in a seal hunt conducted for purposes of sustainable management of marine resources would engage in the hunt with a "sole purpose". For instance, from the perspective of the group of hunters, the purposes of a hunt could include: employment; commercial gain; interest in nature; a commitment to conservation and ensuring the sustainable management of the environment; or a combination of these purposes.

748. From the perspective of a public authority, the purposes could include: implementing a plan to ensure the sustainable use of marine resources; ensuring that such a plan is implemented consistently with animal welfare requirements; supporting employment in remote areas; supporting the expression of tradition or culture; or, a combination of these purposes. In that regard, Norway recalls that the international community has long recognized that sustainable resource management calls for all policy dimensions to be considered holistically, and not in isolation. In 1987, the Brundtland Report found that sustainability policies require that "the ecological dimensions of policy be considered at the same time as the economic, trade, energy, agricultural, industrial, and other dimensions". In

[1042] Basic Seal Regulation, Exhibit JE-1, Article 3(2)(b).

other words,[1043] it is a contradiction in terms to maintain that sustainable resource management has – or should have – just one purpose.

749. In any event, from the perspective of sustainable resource management, it simply *does not matter* what the multiple *purposes* of a seal hunt might be, provided its *effect* is to remove seals from the marine ecosystem subject to the total allowable catch limit contemplated by an appropriately developed Management Plan.

750. Indeed, to the extent such a plan requires the removal of seals from the marine ecosystem, it is irrelevant whether those seals are taken in specially organized and government-mandated hunts, or whether they are taken through the combination of the activities of a diverse range of actors, including commercial hunters, indigenous communities, and sporting hunters.

751. By arbitrarily preventing the commercial marketing of the products of seal hunts undertaken consistently with a Management Plan, the "sole purpose" condition frustrates the objective of promoting sustainable management of marine resources, because it reduces efficiency and creates unnecessary disincentives in the implementation of Management Plans.

752. This condition, too, introduces an arbitrary or unjustifiable discrimination between countries where the hunt is conducted within the framework of a Management Plan, or a disguised restriction on international trade, by differentiating between countries in which seal hunting is conducted within the confines of a sustainable marine resource management plan. The condition makes no contribution to sustainable marine resource management, and serves simply to block international trade in seal products if a hunt has any purposes besides such management. For these reasons, requiring that the hunt be conducted for the "sole purpose" of sustainable marine resource management is an unnecessary condition.

(4) Conclusion on the degree of contribution to the sustainable management of marine resources

753. The conditions of the Sustainable Resource Management Requirements that seal products:

- be placed on the EU market on a *non-profit* basis;

[1043] Brundtland Report, Exhibit NOR-88, p. 308, para. 23.

- be placed on the EU market in a *non-systematic* way; and,
- be the by-product of seal hunts conducted for the *sole purpose* of sustainable resource management;

do not contribute to the objective of promoting sustainable management of marine resources. They effectively undermine this objective, by preventing the efficient use of the products of seal hunts conducted in accordance with appropriate Management Plans, and thereby impeding the implementation of such plans. The rational disconnect between the objective pursued by the Sustainable Resource Management Requirements and the challenged conditions show that these conditions – in their design, structure and expected operation – entail arbitrary or unjustifiable discrimination and a disguised restriction on international trade within the meaning of the sixth recital of the *TBT Agreement*. Therefore, these conditions violate Article 2.2 of the *TBT Agreement*.

[*Paragraphs 754 to 757 deliberately left blank to correct a clerical error during printing*]

iv. The EU Seal Regime partly contributes to, and partly undermines, the personal choice of EU consumers

758. One set of requirements in the EU Seal Regime (the Personal Use Requirements) contributes in part to the objective of allowing the personal choice of EU consumers. They do so by allowing EU consumers that travel abroad to choose for themselves whether to purchase seal products, and if they wish to purchase seal products, by allowing them to bring those products back into the European Union, for their personal use or that of their families.

759. However, the contribution to personal choice is only partial, for two reasons. *First*, if the European Union wishes to allow the personal choice of consumers, there is no reason why it should restrict freedom of choice to those consumers that travel abroad.

760. The current contradictions in the EU Seal Regime are absurd and demonstrate that the measure is more trade-restrictive than necessary. The following examples illustrate the operation of the restrictions:

- an EU consumer <u>could</u> purchase a limited quantity of omega-3 seal oil capsules outside the European Union, and import them into the European Union for personal use; but,
- the same EU consumer <u>could not</u> purchase an identical quantity of the same omega-3 oil capsules from the same foreign supplier (*e.g.*, by telephone or Internet), and ship the goods to the European Union for personal use;

- the same EU consumer could not purchase the same quantity of omega-3 capsules within the European Union for personal use;

- a trader could not import the same quantity of omega-3 capsules for individual sale to the same EU consumer for the personal use of that consumer; and,

- a trader could not import a larger quantity of omega-3 capsules for sale within the European Union to EU consumers for their personal use.

761. Hence, trade in seal products is permitted in some circumstances, but trade in *identical seal products* is denied in other circumstances, even though the products are destined for the same use by EU consumers.

762. Given that the EU legislator has already determined, under the Personal Use Requirements, that seal products may be placed on the EU market for personal use by EU consumers (irrespective of animal welfare considerations), there is no rational or necessary basis to exclude *identical seal products* from the EU market when the products are, ultimately, destined for personal use by the same EU consumers (or similar EU consumers that do not travel abroad to purchase seal products).

763. Moreover, the restrictions imposed under the Personal Use Requirements on the identity of the importer, the manner of importation, and the volume of imports do not make any contribution to the objectives the measure seeks to pursue – in particular the protection of animal welfare.

764. Again, this may be illustrated by an example:

- the importation of seal products (*e.g.*, omega-3 capsules) destined for the personal use of EU consumers may be ***permitted***, even though the products are derived from seals killed ***inconsistently*** with animal welfare requirements; and,

- yet, the importation of identical seal products, ***also*** destined for the personal use of EU consumers, may be ***prohibited*** (*e.g.*, because of the identity of the importer, manner of importation, or volume of imports), even though the products are derived from seals killed ***consistently*** with animal welfare requirements.

765. Thus, while allowing EU travellers to import seal products makes a limited contribution to personal choice, the restrictions on the identity of the importer, the manner of importation, and the volume of imports make no contribution to that objective. Specifically, for EU consumers wishing to use seal products, the restrictions compromise their ability to do

so, unless a consumer purchases the seal products abroad in limited quantities and imports them personally.

766. *Second*, the other two sets of requirements in the EU Seal Regime contradict the apparent objective of allowing the personal choice of EU consumers, by: (i) deciding in lieu of consumers the conditions under which products containing seal should be placed on the EU market; and, moreover, (ii) defining such conditions in a way that bears no rational relationship to the measure's "overarching objectives"; and (iii) including no labelling requirements for the products meeting such conditions.

v. Conclusion on the degree of contribution to the measure's legitimate objectives

767. In its incoherent pursuit of a patchwork of objectives, the European Union sacrifices the "overarching objectives" of protecting animal welfare and addressing consumer concerns on animal welfare that it invoked during the legislative process, making no contribution at all to them; and makes only a partial contribution to the additional legitimate objectives that emerged during the legislative process of promoting sustainable marine resource management and the personal choice of EU consumers.

768. Specifically, in relation it its legitimate objectives the EU Seal Regime:

- Makes no contribution to animal welfare: it allows the placing on the market of seal products derived from seals killed inhumanely, and makes no provision for allowing animal-welfare compliant products;
- Makes no contribution to consumer information: it allows retailers to sell seal products without labelling them as such, and without indicating whether they were obtained in compliance with animal welfare requirements;
- Partly contributes to, but partly undermines, the sustainable management of marine resources: while setting out requirements relating to the sustainable management of marine resources, it imposes additional requirements that prejudice the fulfilment of this objective; and
- Partly contributes to, but partly undermines, the personal choice of EU consumers: while allowing some consumers to exercise their choice, it conditions freedom of choice on these consumers' travelling abroad.

c. The risks non-fulfilment would create

769. As outlined above, through its lack of contribution to its animal welfare and consumer information objectives, and through its mixed contribution to its sustainable resource management and consumer choice objectives, the EU Seal Regime not only tolerates a high risk of non-fulfilment in relation to each of these legitimate objectives, but also actual non-fulfilment to a significant degree. Another feature of the "weighing and balancing" process that must be undertaken by the Panel to determine the necessity of a trade restriction is to "tak[e] account of the risks non-fulfilment would create".[1044] A panel must, therefore, ascertain "the nature of the risks at issue and the gravity of the consequences that would arise from non-fulfilment of the legitimate objective",[1045] in order to factor these matters into the "relational analysis" that evaluates whether or not the trade restrictiveness of the measure is greater than is necessary to fulfil a legitimate objective.

770. In this case, the risks created by non-fulfilment of the European Union's legitimate objectives relate to a number of important values, in particular: animal welfare; the sustainable management of natural resources; consumer information; and consumer choice. The nature of the risks that would arise from non-fulfilment of the legitimate objectives is that the pursuit of these values may be frustrated or undermined: animals may suffer unnecessarily; natural resources may not be managed sustainably; consumers may be confused; and consumers may be denied choice.

771. The consequences that would arise from non-fulfilment of each objective are in each case grave, in line with the importance of each objective. Norway notes, in particular, that in relation to the animal welfare objective, scientific and technical information available to the European Union in the form of the EFSA Scientific Opinion, indicates that some methods used to kill seals "should not be used to kill seals as they are inherently inhumane, *e.g.*, trapping seals underwater that causes death by suffocation",[1046] whereas use "of methods that aim to destroy sensory brain functions" can be used in order to cause death without avoidable pain.[1047] The risk created by non-fulfilment of the European Union's animal welfare

[1044] *TBT Agreement*, Article 2.2
[1045] Appellate Body Report, *US – Tuna II (Mexico)*, para. 321; and Appellate Body Report, *US – COOL*, para. 377.
[1046] 2007 EFSA Scientific Opinion, Exhibit JE-22, p. 95.
[1047] 2007 EFSA Scientific Opinion, Exhibit JE-22, p. 94.

objective would be grave indeed if "inherently inhumane" killing methods were used on seals when humane methods are available.

772. Despite the gravity of the risks at issue, the European Union has adopted a measure that opens the door to non-fulfilment: it does not condition marketing of seal products on compliance with animal welfare requirements;[1048] it includes conditions that run counter to sustainable resource management;[1049] it does not prevent consumer confusion;[1050] and it undermines consumer choice.[1051] One less trade restrictive alternatives proposed by Norway would give rise to the same risks of non-fulfilment,[1052] while the other two less trade restrictive alternatives proposed by Norway would give rise to *lower* risks of non-fulfilment.[1053]

d. Less trade-restrictive alternatives would fulfil the objectives to the same or a greater degree

773. As demonstrated in the previous sections, the EU Seal Regime, and in particular the trade-restrictions inherent in it, bears no rational relationship with the objectives of animal welfare and consumer information. For this reason alone, the trade-restrictions that the European Union justifies on the basis of these objectives are inconsistent with Article 2.2 of the *TBT Agreement*. Pursuant to Article 2.2 of the *TBT Agreement*, Norway need not present alternative measures that achieve these objectives. But although not required by WTO law, Norway in this submission does present a less trade-restrictive alternative that *would* contribute to animal welfare and consumer information, as well as contributing to the additional objectives invoked by the European Union. In other words, Norway presents a less trade-restrictive alternative that would meet these objectives invoked by the European Union to a far greater degree than the EU Seal Regime.

774. Norway has also established that the protection of the social and economic interests of a particular class of producers located in certain Members cannot, in itself, be a legitimate objective pursuant to Article 2.2. Likewise, Norway has established that harmonization of the EU market is not, in itself, a legitimate objective that would justify the imposition of a

[1048] *See* section VI.D.4.b.i above.
[1049] *See* section VI.D.4.b.iii above.
[1050] *See* section VI.D.4.b.iii above.
[1051] *See* section VI.D.4.b.iv above.
[1052] *See* section VI.D.4.d.i below.
[1053] *See* section VI.D.4.d.ii and VI.D.4.d.iii below.

trade restriction. Nonetheless, although it does not have to, Norway takes into account these objectives when outlining less trade-restrictive alternatives.

775. A number of alternative measures are reasonably available that are less trade-restrictive and would contribute to the EU objectives in the same or a greater degree than the EU Seal Regime, taking into account the risks non-fulfilment would create.[1054] Norway here describes two such alternatives to the EU Seal Regime taken as a whole.

776. *First*, the EU could adopt a measure that does not subject the placing on the market of seal products to the three sets of requirements comprising the EU Seal Regime, which bear no rational relationship to the measure's legitimate objectives. As discussed in section VI.D.4.d.i below, such an alternative would make at least the same contribution to the measure's objectives as the current EU Seal Regime. It is testament to the irrationality of the EU Seal Regime that the absence of the three sets of requirements would contribute to all of the various purported objectives to the same degree as their existence.

777. Specifically, in relation to the legitimate objectives of the EU Seal Regime, this alternative would:

- Make the same contribution as the EU Seal Regime to animal welfare, because the EU Seal Regime makes *no* contribution to animal welfare;
- Make the same contribution as the EU Seal Regime to preventing consumer confusion, because the EU Seal Regime makes *no* contribution to preventing consumer confusion;
- Make at least the same contribution to the sustainable management of marine resources, because seal products derived from the by-product of hunts for the sustainable management of marine resources could be marketed, *without* the unnecessary and counter-productive conditions posed by the Sustainable Resource Management Requirements; and
- Make a greater contribution to the personal choice of EU consumers by allowing all consumers to choose seal products, not just those with the means to travel abroad.

778. This measure would, additionally, serve to harmonize the internal market of the European Union, and would make at least the same contribution as the EU Seal Regime to the protection of the "fundamental economic and social interests" of indigenous communities.

[1054] *See* Appellate Body Report, *US – Tuna II (Mexico)*, paras. 320-323; and Appellate Body Report, *US – COOL*, para. 376.

779. *Second*, the European Union could adopt a measure that actually pursues the objectives it has invoked as "overarching": it could condition the placing of seal products on the EU market on compliance, subject to inspection of all seal hunting activities, with animal welfare requirements. In addition, the European Union could couple this alternative with labelling requirements. As discussed in section VI.D.4.d.ii below, such an alternative would make a greater contribution to the EU's legitimate objectives than the current EU Seal Regime

780. Specifically, this alternative would, in relation to the European Union's legitimate objectives:

- Make a greater contribution than the EU Seal Regime to animal welfare by actually conditioning access to the EU market on compliance, subject to inspection of all seal hunting activities, with animal welfare requirements ;
- Make a greater contribution than the EU Seal Regime to consumer information, since labels would provide consumers with information that prevent the confusion that arises under the current EU Seal Regime.
- Make at least the same contribution to the sustainable management of marine resources, because all seals harvested pursuant to a Management Plan could be placed on the EU market; and
- Make a greater contribution the personal choice of EU consumers, by allowing all consumers to choose seal products, not just those with the means to travel abroad.

781. This measure would, additionally, serve to harmonize the internal market of the European Union, and would make at least the same contribution as the EU Seal Regime to protecting the "fundamental economic and social interests" of indigenous communities..

782. In addition to presenting two less trade-restrictive alternatives to the EU Seal Regime as a whole, Norway also discusses a less trade-restrictive alternative to the current formulation of the Sustainable Resource Management Requirements. As described in section VI.D.4.b.iii above, certain conditions that the European Union has included among these requirements undermine the objective of the sustainable management of marine resources. As set out in section I.D.7(c), the European Union could make a greater contribution to such an objective by simply removing such additional conditions from these Requirements.

i. Removal of the three sets of requirements would not diminish the degree of contribution to the EU's objectives

783. As set out above,[1055] the three sets of requirements in the EU Seal Regime, as they stand, bear no relationship with animal welfare and consumer information. The only legitimate objectives to which they partially contribute are: sustainable resource management (to which the measure contributes only to a limited degree, given arbitrary additional conditions); and personal choice (to which the measure contributes only to a limited degree, given the internal contradictions of the measure).

784. To the extent that the three sets of requirements make a limited contribution to these objectives, the *absence* of the requirements would make at least the same contribution – further demonstrating the irrationality of the EU Seal Regime, *i.e.*, the disconnect between the stated objectives and the measure adopted to pursue them.

785. In relation to the European Union's legitimate objectives, *first*, in the absence of the three sets of requirements, it would be possible to pursue the sustainable management of marine resources, without such efforts being hampered by conditions that are not rationally related to that objective.[1056] *Second*, in the absence of the three sets of requirements, consumers would still be allowed to exercise their personal choice, but without being forced to travel abroad to exercise that choice.[1057]

786. Further, in relation to the European Union's other objectives, Norway also observes, *first*, that, in the absence of the three sets of requirements, indigenous communities would still be allowed to place seal products on the market. As Norway has explained, the objective of protecting the "economic and social interests" of one particular set of producers located in a closed list of countries is not one that justifies trade restrictions for purposes of Article 2.2 of the *TBT Agreement*. But even disregarding this point, the *absence* of the discriminatory trade restrictions established under the EU Seal Regime would make an equivalent contribution to protecting the "fundamental economic and social interests" of relevant indigenous communities. Just like the EU Seal Regime, the absence of the requirements

[1055] *See* paras. 677 to 716 above.
[1056] *See* paras. 717 to 753 above.
[1057] *See* paras. 758 to 766 above.

would allow the products of seal hunts by indigenous communities to be placed on the market.

787. *Second*, and similarly, in the absence of the three sets of requirements, the permissive clause set out in Article 3 of the Basic Seal Regulation would still apply throughout the internal market, achieving the harmonization envisaged in Article 1 of the Basic Seal Regulation. Thus, although harmonization in itself is not a legitimate objective that would justify a trade restriction, the alternative of dispensing with the restrictive requirements for access to the EU market would fulfil the European Union's harmonization objective.

788. Norway recalls that measures taken in "related product areas"[1058] provide guidance on which alternatives are reasonably available. In particular, the Appellate Body has observed that the regulatory treatment applicable to:

> like, or at least similar, products […] may provide useful input in the course of determining whether an alternative measure which could 'reasonably be expected' to be utilized, is available or not.[1059]

789. Currently, under the three sets of requirements: products from seals hunted by indigenous communities may be placed on the EU market, *whether or not* the products derive from a seal killed in an inhumane manner; products from seals hunted pursuant to certain resource management plans and marketing conditions may be placed on the EU market, *whether or not* the products derive from a seal killed in an inhumane manner; and products purchased by EU travellers for their personal consumption or that of their families may be imported into the EU, *whether or not* the products derive from a seal killed in an inhumane manner.

790. Norway's proposed alternative approach – allowing trade in seal products from *all* sources – is premised on a simple extension of the regulatory treatment currently afforded to identical products, namely, seal products that may be imported and sold under the three sets of requirements. There is therefore no question about its reasonable availability.

791. Such an alternative approach, however, does not promote the animal welfare of seals, *because the EU Seal Regime does not promote the animal welfare of seals.* In the following

[1058] Appellate Body Report, *Korea – Beef*, para. 169.
[1059] Appellate Body Report, *Korea – Beef*, para. 170.

section, Norway discusses an alternative measure that, *unlike the EU Seal Regime*, does promote the animal welfare of seals.

792. Finally, in connection with this alternative approach, Norway observes that the risks created by non-fulfilment of the European Union's objectives are not different in nature or gravity as between the alternative and the EU Seal Regime. Just like the EU Seal Regime, this alternative does not address, and therefore accepts, risks to animal welfare; and it does not address, and therefore accepts, risks of consumer confusion. Nevertheless, because the alternative makes a greater contribution to the European Union's objectives of promoting the sustainable management of marine resources and consumer choice, the likelihood that risks would be created by non-fulfilment of these objectives is lower than under the current EU Seal Regime.

ii. A system conditioning the placing on the market on compliance with animal welfare requirement would achieve the European Union's objectives to a greater degree

793. In this section, Norway outlines a second less trade-restrictive, and more effective, alternative, comprising the following elements:

- *first*, establishing animal welfare requirements relating to the manner in which seal hunts are conducted;
- *second*, certifying conformity with these requirements, in a practical manner, as a condition for placing seal products derived from such hunts on the EU market; and,
- *third*, labelling seal products placed on the EU market in a manner indicating: (i) that the product contains seal; and (ii) that the seal input is certified to conform with animal welfare requirements.

794. This alternative measure is reasonably available to the European Union. It would meet the various legitimate objectives of the EU Seal Regime to a *greater* extent than that regime. In addition, this alternative measure would *lower* the likelihood that risks would be created by non-fulfilment of the objectives of ensuring animal welfare and preventing consumer confusion.

(1) The less trade restrictive alternative measure is reasonably available

795. As discussed above,[1060] a less trade restrictive measure must be reasonably available in order to demonstrate that the impugned measure is "more trade-restrictive than necessary" in the sense of Article 2.2 of the *TBT Agreement*. Norway recalls that an alternative measure will tend *not* to be reasonably available if its adoption and implementation is not feasible in the circumstances, for example because it is merely theoretical or where it would impose an undue burden on a Member through expense or technical difficulty.[1061] As the Appellate Body has held, measures taken in related product areas may shed light on whether alternatives could reasonably be expected to be utilized.[1062]

796. The comprehensive alternative put forward by Norway comprises three elements, namely: (1) the prescription of animal welfare requirements; (2) the certification of compliance with animal welfare requirements; and (3) product labelling. In the sections that follow, therefore, Norway will set out, in turn, why each of these elements is feasible, and why a measure incorporating these three elements is an alternative reasonably available to the European Union.

797. Indeed, Norway observes that, after an extensive analysis of the evidence, the European Commission concluded, during the EU legislative process, that a system including: (1) the prescription of animal welfare requirements backed by (2) certification of conformity and (3) product labelling was not only reasonably available to the Union, but was the "best" policy option.[1063] Such a alternative regulatory approach formed the basis for its Proposed Regulation. At the outset, therefore, Norway briefly reviews the Commission's conclusions, while at the same time observing that the specific parameters set by the Commission is but one of several ways of implementing a system that takes account of sustainable resource management and animal welfare considerations, as well as conformity certification and labelling.

[1060] *See* paras.584 to 587 above.
[1061] *See* paras. 584 to 587 above.
[1062] Appellate Body Report, *Korea – Beef*, para. 170.
[1063] *See*, *e.g.*Commission Impact Assessment, Exhibit JE-16, section 7.3, p. 51.

(a) The Commission had proposed a system of animal welfare requirements backed by certification of conformity and product labelling

798. In its Proposed Regulation, the European Commission envisaged allowing the marketing of seal products, if these were obtained "from seals killed and skinned in a country where, or by persons to whom", adequate requirements ensuring animal welfare applied. Compliance with these requirements would be ensured through certification, and, where necessary, certification would be accompanied by labelling.[1064]

799. The main elements of this system, as drawn up by the European Commission, were the following:

- seal products could be placed on the EU market if derived from seals hunted in a country where, or by persons to whom, adequate animal welfare requirements applied and were effectively enforced by the relevant authorities;[1065]
- the system would operate through a certification scheme, coupled, where necessary, with labelling or marking;[1066]
- the European Commission would "appraise the fulfilment" of the market access conditions;[1067]
- the criteria "for appraising the adequacy" of the animal welfare requirements applying in the country, or to the person, seeking certification, were set out in an Annex to the Proposed Regulation.[1068]

800. In the view of the European Commission, this would be:

> … the best way to meet the overarching objectives, *i.e.*
>
> protect seals from acts that cause them avoidable pain, distress, fear and other forms of suffering during the killing and skinning process
>
> address the concerns of the general public with regard to the killing and skinning of seals
>
> [and]

[1064] Proposed Regulation. Exhibit JE-9, Articles 3(1) and 4(1).
[1065] Proposed Regulation, Exhibit JE-9, Article 4.
[1066] Proposed Regulation, Exhibit JE-9, Articles 4(c), 4(d), 6 and 7.
[1067] Proposed Regulation, Exhibit JE-9, Article 5.
[1068] Proposed Regulation, Exhibit JE-9, Annex II.

> This would help to ensure that the general public is not confronted anymore with those seal products derived from seals killed and skinned with avoidable pain, distress or other form of suffering and would seek to provide incentives for the use of killing and skinning methods of seals which do not cause avoidable pain, distress or other forms of suffering. In this way, the option would have a direct impact can be made [sic] on the application in practice of animal welfare friendly hunting techniques and thus protect the animals from unnecessary suffering.[1069]

801. Thus, after analysis of all the evidence collected, and consideration of different policy options, the European Commission concluded that a system including (1) the prescription of animal welfare requirements backed by (2) the certification of compliance and (3) product labelling was not only reasonably available, but was the *best* policy option for the European Union.

(b) Prescribing requirements for animal welfare is feasible

802. It is perfectly feasible to prescribe animal welfare requirements for hunting seals. Drawing from existing literature and scientific expertise, it is possible to compile a list of criteria compliance with which would ensure that animal welfare is respected in the seal hunt. It is also possible to monitor compliance, through inspection during the seal hunt, to ensure that animal welfare is respected. Indeed, Norway's seal hunting regulations do precisely this.

(i) Scientific evidence already exists on the criteria to ensure respect for the animal welfare of seals

803. Prescribing animal welfare requirements for the hunting of seals would require, as an initial step, the proper identification of scientific criteria to ensure that the animal welfare of seals is respected. Such identification is not only *feasible*, but was undertaken by the European Commission during the EU legislative process, when it compiled a list of animal welfare criteria that it deemed adequate.[1070]

804. By way of background to the next section, Norway recalls that, in section II.D, it has described, in detail, the animal welfare considerations surrounding seal hunting, such as the appropriateness of the a process including, first, stunning, and, second, killing. Stunning shall

[1069] Commission Impact Assessment, Exhibit JE-16, section 7.3, p. 51.
[1070] *See* paras. 106 to 111 above.

ensure immediate loss of consciousness which lasts until death.[1071] In the same section, Norway has also reviewed the killing methods used in different countries.

805. Also by way of background, Norway notes that it identifies animal welfare requirements in the next section on the basis of scientific evidence drawn from the 2007 EFSA Scientific Opinion and the American Veterinary Medical Association Guidelines, as well as a study conducted in relation to seals, and the testimony of veterinary scientists with expertise in seals.

1) The animal welfare criteria recommended by the European Food Safety Authority

806. As part of the legislative process, the Commission mandated EFSA to review the animal welfare aspects of the killing and skinning of seals.[1072] EFSA reviewed: the seal species being hunted;[1073] the seal hunt as conducted in the countries that practice it;[1074] by way of comparison, the practices used to kill animals in abattoirs and in the wild;[1075] and, the different seal killing methods used.[1076]

807. Based on the available evidence, EFSA provided: an evaluation from an animal welfare perspective of each of the seal killing methods used in different countries;[1077] an evaluation of the neurophysiological aspects of the killing of seals;[1078] observations on the competence and training of sealers and inspectors;[1079] an assessment of the risks of adverse animal welfare effects resulting from seal hunting in different scenarios, including the use of different killing methods.[1080] On this basis, EFSA offered a detailed set of conclusions and

[1071] *See* paras. 231 to 257 above.
[1072] This work resulted in the 2007 EFSA Scientific Opinion, Exhibit JE-22. In 2004 EFSA had also produced a scientific report on "Welfare Aspects of Animal Stunning and Killing Methods", relating to killing "inside and outside slaughterhouses, and […] for the purpose of disease control", also on a mandate from the Commission. 2004 EFSA Scientific Report, Exhibit NOR-40.
[1073] 2007 EFSA Scientific Opinion, Exhibit JE-22, sections 1.1 and 1.2.
[1074] 2007 EFSA Scientific Opinion, Exhibit JE-22, section 1.3.
[1075] 2007 EFSA Scientific Opinion, Exhibit JE-22, section 2.
[1076] 2007 EFSA Scientific Opinion, Exhibit JE-22, section 3.
[1077] 2007 EFSA Scientific Opinion, Exhibit JE-22, section 4.
[1078] 2007 EFSA Scientific Opinion, Exhibit JE-22, section 5.
[1079] 2007 EFSA Scientific Opinion, Exhibit JE-22, section 6.
[1080] 2007 EFSA Scientific Opinion, Exhibit JE-22, section 7.

recommendations, addressing each element of the seal hunt, and a general set of conclusions and recommendations.[1081]

808. The EFSA conclusions and recommendations, both detailed and general, provide a useful basis for the identification of appropriate animal welfare criteria to underlie a measure prescribing animal welfare requirements. Indeed, these conclusions and recommendations provided the basis for the European Commission's decision to propose a measure that allowed trade in seal products that were produced in compliance with prescribed animal welfare requirements.

809. EFSA's general recommendations are worth repeating in full:

> 1. Seals should be killed without causing avoidable pain, distress, fear and other forms of suffering.
>
> 2. Seals should be killed and skinned in a way that meets the three steps of effective stunning or killing, effective monitoring and effective bleeding out, before being skinned.
>
> 3. When killing seals using firearms, this should only be done with appropriate guns and ammunition, and at appropriate distances.
>
> 4. When killing seals using hakapiks or other forms of club this should only be done on young animals (not adults), with instruments of an appropriate design and used with adequate force and accuracy.
>
> 5. After an attempted kill, each seal should be effectively monitored to ensure death or unconsciousness before bleeding-out and before skinning.
>
> 6. Unless death is absolutely certain, death should be ensured before skinning by bleeding out.
>
> 7. Hunters should be trained and competent in the procedures they use, including killing methods, monitoring death, unconsciousness and consciousness, and in rapid bleeding and skinning.
>
> 8. Attempts should not be made to kill seals that cannot be adequately visualised (*e.g.* harpooning through the snow), or that do not pose a stable target or where the sealer may be

[1081] 2007 EFSA Scientific Opinion, Exhibit JE-22, "Conclusions and Recommendations", pp. 87-95. EFSA's mandate, reflected in its conclusions, unusually, covered an aspect of processing seal carcasses (skinning) in addition to killing methods.

> unbalanced (*e.g.* in adverse weather conditions, moving substrates) as it can cause avoidable pain, distress, fear and other forms of suffering.
>
> 9. Some methods should not be used to kill seals as they are inherently inhumane *e.g.* trapping seals underwater that causes death by suffocation.
>
> 10. Adequate time should be ensured for effective killing, monitoring and bleeding, and practices that reduce such necessary time should be avoided.
>
> 11. Independent monitoring of hunts (without commercial/industry and NGO links) to provide certain critical information on seal killing and stunning from a welfare perspective should be instigated.
>
> 12. Hunts should be opened up to inspections without undue interference.[1082]

810. In this context Norway notes, that virtually all these elements are regulated by Norwegian seal hunting legislation. In particular, it is worth highlighting that Norway's legislation provides that inspectors under certain conditions may stop the hunt based on the inspector's assessment in real time, whether animal welfare or other factors influencing the hunt are in violation of applicable regulations, of which animal welfare constitutes the overriding consideration.

2) The animal welfare criteria recommended by the American Veterinary Medical Association

811. As reflected by the EFSA report, additional scientific literature exists on the humane killing of animals in general, as well as the humane killing of seals in particular. For example, in the first category, some guidance may be derived from the American Veterinary Medical Association ("AVMA") Guidelines on Euthanasia,[1083] which the AVMA defines as "the act of inducing humane death in an animal".[1084] Because they are guidelines published by an authoritative body on the humane killing of animals, Norway considers them to be relevant in the present context.

[1082] 2007 EFSA Scientific Opinion, Exhibit JE-22, pp. 94-95.
[1083] AVMA, *Guidelines on Euthanasia* (June 2007), available at https://www.avma.org/KB/Policies/Documents/euthanasia.pdf (last checked 14 October 2012) ("AVMA Guidelines"), Exhibit NOR-91.
[1084] AVMA Guidelines, Exhibit NOR-91, p. 1.

812. The AVMA begins by framing the issue, and explains that "humane death" in that context is one that is "as painless and distress free as possible".[1085] To achieve this,

> Euthanasia techniques should result in *rapid loss of consciousness* followed by *cardiac or respiratory arrest* and the ultimate loss of brain function. In addition, the technique should *minimize distress and anxiety experienced by the animal prior to loss of consciousness*.[1086]

813. The purpose of loss of consciousness is to preclude the sensation of pain. "Pain is that sensation (perception) that results from nerve impulses reaching the cerebral cortex via ascending neural pathways".[1087] Thus, if "the cerebral cortex is nonfunctional because of […] concussion, pain is not experienced".[1088]

814. To achieve effective euthanasia, it is essential that those performing it have "appropriate certification and training, experience with the techniques to be used, […] familiarity with the normal behavior of the species, [and] demonstrated proficiency in the use of the technique in a closely supervised environment".[1089]

815. To minimize distress and pain *prior to* loss of consciousness, "animal behavioral considerations" must be taken into account.[1090] For example, wild animals must not be handled in the same manner as domestic animals, as they are not equally accustomed to contact with humans.[1091] As a result, "gunshot may at times be the most practical and logical method of euthanasia of wild or free-ranging species".[1092]

816. The impact of euthanasia on *human observers* of animal killing is sometimes considered relevant.[1093] However, the AVMA emphasizes that the emotional concerns of human observes "should not outweigh the primary responsibility of using the most rapid and painless euthanasia method possible under the circumstances."[1094] For example, despite the

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[1085] AVMA Guidelines, Exhibit NOR-91, p. 1.
[1086] AVMA Guidelines, Exhibit NOR-91, p. 1 (emphasis added).
[1087] AVMA Guidelines, Exhibit NOR-91, p. 1.
[1088] AVMA Guidelines, Exhibit NOR-91, p. 2.
[1089] AVMA Guidelines, Exhibit NOR-91, p. 3. *See* also, *ibid*., p. 13: "Personnel performing physical methods of euthanasia must be well trained and monitored for each type of physical technique performed"; and "Skill and experience of personnel is essential."
[1090] AVMA Guidelines, Exhibit NOR-91, p. 4. *See* also, *ibid*., p. 1.
[1091] AVMA Guidelines, Exhibit NOR-91, p. 4.
[1092] AVMA Guidelines, Exhibit NOR-91, p. 14.
[1093] AVMA Guidelines, Exhibit NOR-91, p. 5.
[1094] AVMA Guidelines, Exhibit NOR-91, p. 5.

fact that killing methods "that preclude movement of animals are more *aesthetically* acceptable" to human viewers, "lack of movement is not an adequate criterion for evaluating euthanasia techniques."[1095]

817. Physical methods of inducing euthanasia rapidly include "a blow to the head" and "gunshot".[1096] With respect to physical methods of euthanasia, the AVMA explains:

> When properly used by skilled personnel with well-maintained equipment, physical methods of euthanasia may result in less fear and anxiety and be more rapid, painless, humane, and practical than other forms of euthanasia. […] Some consider physical methods of euthanasia aesthetically displeasing. There are occasions, however, when what is perceived as aesthetic and what is most humane are in conflict.[1097]

818. The AVMA panel reviewed various physical methods of inducing euthanasia, and concluded that when "done appropriately", "most physical methods [were] conditionally acceptable for euthanasia".[1098] In particular, it found that:

- "Euthanasia by a <u>blow to the head</u> must be evaluated in terms of the anatomic features of the species on which it is to be performed"; such a method "can be a humane method of euthanasia" for animals with thin craniums, "if a single sharp blow delivered to the central skull bones with sufficient force can produce immediate depression of the central nervous system and destruction of brain tissue";[1099]

- "A properly placed <u>gunshot</u> can cause immediate insensibility and humane death. […] Shooting should only be performed by highly skilled personnel trained in the use of firearms […]. For wildlife […] the preferred target area should be the head. The appropriate firearm should be selected for the situation, with the goal being penetration and destruction of brain tissue without emergence from the contralateral side of the head. […] In the case of wild animals, gunshots should be delivered with the least amount of prior human contact necessary."[1100]

- <u>Stunning</u> must not be used as a sole killing method; instead, it can be used as an "adjunct" to other methods, and "must be followed immediately by a method that ensures death";[1101]

[1095] AVMA Guidelines, Exhibit NOR-91, p. 5.
[1096] AVMA Guidelines, Exhibit NOR-91, pp. 12-13.
[1097] AVMA Guidelines, Exhibit NOR-91, p. 13 (emphasis added).
[1098] AVMA Guidelines, Exhibit NOR-91, p. 13.
[1099] AVMA Guidelines, Exhibit NOR-91, p. 13 (underlining added).
[1100] AVMA Guidelines, Exhibit NOR-91, pp. 13-14 (underlining added, footnotes omitted).
[1101] AVMA Guidelines, Exhibit NOR-91, pp. 13 and 14 (underlining added).

- Exsanguination must not be used as a sole killing method; instead, it can be used as an "adjunctive" method, "to ensure death subsequent to stunning, or in otherwise unconscious animals".[1102]

819. The general principles on euthanasia apply differently depending on the species and, therefore, experience with the species in question is necessary when applying them.[1103] The appropriate killing methods also vary depending, *e.g.*, on the age of the animal and surrounding conditions.[1104]

820. For example, the AVMA explains that for free-ranging animals in the wild, the methods chosen will often be gunshot, and must be:

> … as age-, species-, or taxonomic/class-specific as possible. The firearm and ammunition should be appropriate for the species and purpose. Personnel should be sufficiently skilled to be accurate, and they should be experienced in the proper and safe use of firearms.[1105]

821. The AVMA briefly discusses marine mammals. Among other observations, it notes that an "accurately placed gunshot" may be "a conditionally acceptable method of euthanasia for some species and sizes of stranded marine mammals".[1106]

3) Scientific expert assessment of the animal welfare aspects of seal hunting

822. Scientific literature also discusses humane killing specifically in the specific context of the seal hunt. By way of example, in a paper relied upon by EFSA, Dr. Egil Ole Øen discusses humane killing methods with specific reference to seals and the seal hunt in Norway.[1107] Dr. Øen held the position of Associate Professor at the Norwegian School of Veterinary Science, Section of Arctic Veterinary Medicine, in Tromsø, Norway.

823. Dr. Øen begins by reiterating that humane killing implies "that the death is as painless as possible".[1108] Like the AVMA, Dr. Øen, therefore, turns to an examination of the pain

[1102] AVMA Guidelines, Exhibit NOR-91, p. 17 (underlining added).
[1103] AVMA Guidelines, Exhibit NOR-91, p. 1.
[1104] *See* AVMA Guidelines, Exhibit NOR-91, *e.g.* pp. 3, 4 and 18.
[1105] AVMA Guidelines, Exhibit NOR-91, p. 19.
[1106] AVMA Guidelines, Exhibit NOR-91, p. 21.
[1107] Øen, "Norwegian Sealing", Exhibit NOR-36, p. 1.
[1108] Øen, "Norwegian Sealing", Exhibit NOR-36, p. 1.

mechanism, and explains that "[a]ny killing method should therefore always be designed to terminate or block the functioning of the cerebral cortex as soon as possible":[1109]

> The first step in the killing of an animal is therefore to bring the animal as quickly as possible into a state of unconsciousness and insensitivity to pain. As a second step, the method should lead fairly quickly to the death of the animal before it has regained consciousness.[1110]

824. Also like the AVMA,[1111] Dr. Øen observes that:

> Although the feelings of anyone who is emotionally attached to an animal should be taken into consideration, it would be unethical to allow such considerations to tip the balance if it meant that the best and quickest method of killing an animal was excluded or a painful condition was permitted to continue for longer than necessary out of consideration for "public opinion".[1112]

825. Thus, like the AVMA, Dr. Øen explains that the most important consideration from an animal welfare perspective must be the effectiveness of the killing process from the perspective of minimizing pain and distress, and not the effect that the process may have on human viewers.

826. Dr. Øen then reviews the available evidence on the effectiveness of the rifle and the hakapik and slagkrok, which are the weapons used in the Norwegian hunt to *stun* a seal,[1113] and he also briefly reviews alternative stunning methods.[1114] The essential consideration, in Dr. Øen's view, is the effectiveness of the chosen weapons in causing immediate unconsciousness; because alternative stunning methods would be less effective in causing immediate unconsciousness,[1115] Dr. Øen takes the view that rifles "accompanied by adequate ammunition", and the hakapik and slagkrok, are acceptable stunning methods.[1116]

[1109] Øen, "Norwegian Sealing", Exhibit NOR-36, p. 1.
[1110] Øen, "Norwegian Sealing", Exhibit NOR-36, p. 1.
[1111] *See* also VKM Report, Exhibit JE-31, p. 10.
[1112] Øen, "Norwegian Sealing", Exhibit NOR-36, p. 3.
[1113] For discussion, *see* paras. 172 to 247 above. Norwegian regulations require a process of stunning, but shooting and then striking with a hakapik or slagkrok, followed by killing by bleeding out.
[1114] Øen, "Norwegian Sealing", Exhibit NOR-36, pp. 3-4.
[1115] Øen, "Norwegian Sealing", Exhibit NOR-36, pp. 3-4.
[1116] Øen, "Norwegian Sealing", Exhibit NOR-36, p. 4.

827. Dr. Øen also comments on: the need to verify that unconsciousness has effectively been achieved;[1117] the need to avoid stress also prior to the loss of consciousness;[1118] and, by way of comparison, on the stunning process and "pre-kill" stress in slaughterhouses.[1119]

828. In addition, the opinion of scientific experts can be sought. For example, Norway has sought the opinion of veterinary expert and former seal hunt observer Professor Siri Knudsen, and of veterinary experts and current seal hunt inspectors Jan Danielsson and Anne Moustgaard, whose expert statements Norway is submitting to the Panel as Exhibits NOR-5, NOR-4, and NOR-6, respectively.

829. Jan Danielsson is a veterinary scientist currently employed as Veterinary Inspector for the Department of Animal Welfare and Health of the Swedish Board of Agriculture and, for the past 9 years, has been a seal hunting inspector for the Norwegian Directorate of Fisheries. In his expert statement, Mr. Danielsson first reiterates the core principles of humane killing, namely "avoiding all unnecessary pain and distress at the time of killing an animal".[1120] Mr. Danielsson then outlines how this may be achieved, in particular in the context of the Norwegian seal hunt:

- The animal must be stunned, that is, immediately rendered unconscious, to ensure "that it is not able to feel pain";[1121]
- To ensure that the animal is immediately rendered unconscious, requirements must be laid out regarding: (i) the appropriate arm and ammunition for each animal species and age;[1122] (ii) the part of the body that must be hit;[1123] and (iii) the skills of the marksmen;[1124]
- Steps must be taken "to ensure beyond a doubt that a seal is unconscious and brain dead before being bled out";[1125]
- After the seal has been rendered unconscious, it must be bled out;[1126]
- To ensure that each step is performed as required, the skills of the hunters must be proven;[1127] and

[1117] Øen, "Norwegian Sealing", Exhibit NOR-36, p. 5.
[1118] Øen, "Norwegian Sealing", Exhibit NOR-36, pp. 2 and 5-6.
[1119] Øen, "Norwegian Sealing", Exhibit NOR-36, p. 2.
[1120] Danielsson Statement, Exhibit NOR-4, para. 13.
[1121] Danielsson Statement, Exhibit NOR-4, paras. 13 and 63 (first bullet-point).
[1122] Danielsson Statement, Exhibit NOR-4, paras. 41-45.
[1123] Danielsson Statement, Exhibit NOR-4, paras. 14, 23 and 63 (first bullet-point).
[1124] Danielsson Statement, Exhibit NOR-4, paras. 46, 47 and 63 (second bullet-point).
[1125] Danielsson Statement, Exhibit NOR-4, paras. 24 and 50-52.
[1126] Danielsson Statement, Exhibit NOR-4, paras. 13, 22, 51 and 52.

- The hunt must be subject to external control.[1128]

830. Anne Moustgaard has been an inspector on the Norwegian seal hunt for fifteen seasons. She also has considerable experience as a meat inspector in slaughterhouses in Denmark as well as for the Norwegian Food Safety Authority. Ms. Moustgaard outlines similar considerations. Ms Moustgaard states her opinion that following the process mandated by Norway's regulation of the seal hunt provides "a series of fail-safes that ensure the animals do not suffer unnecessarily".[1129]

831. Professor Knudsen is Associate Professor and Head of Comparative Medicine at the Faculty of Health Sciences, at the University of Tromsø. For 8 years, she served as an official inspector of the Norwegian whale hunt for the Directorate of Fisheries. Professor Knudsen also confirms that the "key principle of humane killing is that an animal should not feel unnecessary pain, fear or distress at the time of its death".[1130] Her recommendations for this to be achieved, with particular reference to the seal hunt, include:

- A killing method that ensures the animal is first stunned, so as to render it unconscious or dead and then bled out.[1131] Stunning is defined as causing immediate loss of consciousness;[1132] for example, in the context of the seal hunt, the initial stunning step "involves a massive impact to the seal's brain … designed to cause immediate unconsciousness" but which "may also lead to brain death";[1133]
- Bleeding out after stunning;[1134]
- Mandatory training and testing of all seal hunt participants;[1135]
- Not subjecting the animal to stress prior to stunning;[1136]
- Specifically prescribing the hunting methods to be used;[1137]
- Requiring the presence of independent veterinary inspectors during the hunt.[1138]

[1127] Danielsson Statement, Exhibit NOR-4, paras. 41, 46, 48 and 63 (second bullet-point).
[1128] Danielsson Statement, Exhibit NOR-4, paras. 4, 17, 35-39, 54-55 and 63 (third bullet-point).
[1129] Moustgaard Statement, Exhibit NOR-6, para. 9.
[1130] Knudsen Statement, Exhibit NOR-5, para. 11.
[1131] Knudsen Statement, Exhibit NOR-5, para. 52 (third bullet-point).
[1132] Knudsen Statement, Exhibit NOR-5, para. 16
[1133] Knudsen Statement, Exhibit NOR-5, para. 22. *See* also, *ibid*. para. 23.
[1134] Knudsen Statement, Exhibit NOR-5, paras. 24 and 52 (third bullet-point).
[1135] Knudsen Statement, Exhibit NOR-5, paras. 25 and 52 (first and second bullet-points).
[1136] Knudsen Statement, Exhibit NOR-5, paras. 11 and 47.
[1137] Knudsen Statement, Exhibit NOR-5, paras. 25 and 52 (third bullet-point).

832. In summary, drawing from existing literature and scientific expertise, of which Norway has provided examples, it is feasible to compile a list of criteria compliance with which would ensure that animal welfare is respected in the seal hunt.

(ii) It is feasible to monitor and enforce compliance with animal welfare requirements

833. A further consideration in assessing the feasibility of prescribing animal welfare requirements for the hunting of seals is whether compliance with the requirements can be effectively monitored and enforced. In short, effective monitoring and enforcement of animal welfare requirements is perfectly possible during the seal hunt. Indeed, systems for effective monitoring of seal hunting already exist, and could be drawn upon by the European Union.

834. In Norway, it is mandatory for each seal hunting vessel to carry an independent inspector, who must be [a] qualified veterinarian.[1139] The Directorate of Fisheries requires that an inspector be present on each vessel throughout the hunt, to monitor all hunting activities.[1140] In discharging his/her duties, the inspector is employed by, and reports to, the Norwegian Directorate of Fisheries.

835. A sealing vessel may catch between 300 and 400 seals per day, under the constant supervision of an inspector.[1141] By way of comparison, an inspector in a slaughterhouse in the European Union might have to inspect the slaughter of a much larger number of animals a day and cannot be simultaneously present in all parts of the slaughterhouse.[1142] Hence, whereas the seal hunt is subject to constant supervision, killing in a slaughterhouse is not.

[1138] Knudsen Statement, Exhibit NOR-5, paras. 46 and 52 (fourth bullet-point).
[1139] 2007 EFSA Scientific Opinion, Exhibit JE-22, p. 74.
[1140] *See* 2012 Management and Participation Regulation, Exhibit NOR-13, section 10; and Landmark Statement, Exhibit NOR-8, para. 34.
[1141] *See* Kvernmo Statement, Exhibit NOR-7, para. 23.
[1142] The situation is particularly striking in relation to poultry slaughter, in relation to which it "is not uncommon that automated electrical water-bath stunning lines have speeds up to 8-10,000 birds per hour (>150 birds/minute). Practical assessment of unconsciousness and insensibility to pain of each individual bird is not easy on the high-speed processing line and consequently stress and pain do occur during slaughter of poultry." *See* Knudsen Statement, Exhibit NOR-5, para. 30.

836. Norway has described its system of inspection at paragraphs 252 to 257 above, and has provided expert statements from veterinary inspectors Jan Danielsson and Anne Moustgaard, who describe the role and activities of inspectors.[1143]

837. In practice, inspectors are veterinarians with experience in maintaining animal welfare in a variety of contexts, and who are trained specifically for purposes of the seal hunt.[1144] The inspectors are "constantly on the lookout for circumstances indicating that animal welfare might be prejudiced".[1145] They "observe all aspects of the hunting process as it takes place" from positions of good vantage.[1146] Inspectors are authorized to take action if required, and "can stop the hunting activity if they consider it necessary".[1147] Indeed, "if a breach of the regulations is observed, the captain and crew can be subject to criminal proceedings".[1148]

838. Inspectors Danielsson and Moustgaard both report that, in their experience, the application of the killing process mandated under Norway's regulation of the seal hunt (stunning, followed by bleeding out) demonstrates that it is possible to establish and comply with practices to ensure respect for animal welfare.[1149] Adopting the killing technique mandated by the Norwegian regulations consistently results in animals being rendered unconscious and unable to feel pain[1150] in conditions in which "the seal is not being caused stress in the moments before its death".[1151]

839. International systems of observers also exist. For example, the North Atlantic Marine Mammal Commission ("NAMMCO") has an international scheme for the observation of seal hunting in member countries.[1152] NAMMCO is an intergovernmental body for cooperation

[1143] Moreover, for example, the VKM Report, Exhibit JE-31 outlines the Norwegian inspection system. VKM Report, Exhibit JE-31, pp. 40-42.
[1144] *See* Danielsson Statement, Exhibit NOR-4, paras. 17-20. As to the qualifications of the inspectors whose statements are provided: *see* Danielsson Statement, Exhibit NOR-4, paras. 6 *ff*; and Moustgaard Statement, Exhibit NOR-6, paras. 1 *ff*.
[1145] Danielsson Statement, Exhibit NOR-4, para. 35
[1146] Moustgaard Statement, Exhibit NOR-6, para. 26; Danielsson Statement, Exhibit NOR-4, paras. 35-39.
[1147] Danielsson Statement, Exhibit NOR-4, para 39.
[1148] Danielsson Statement, Exhibit NOR-4, para 39.
[1149] Moustgaard Statement, Exhibit NOR-6, para 3; Danielsson Statement, Exhibit NOR-4, para. 61.
[1150] Moustgaard Statement, Exhibit NOR-6, paras. 9-23; Danielsson Statement, Exhibit NOR-4, paras. 61-63.
[1151] Danielsson Statement, Exhibit NOR-4, para. 58
[1152] *See, e.g.*, NAMMCO, *Observer's Report to the 24th Annual meeting of the NEAFC, London* (14-18 November 2005), available at http://archive.neafc.org/reports/annual-meeting/am_2005/docs/2005-31_nammco-neafc-report_2005.pdf (last checked 14 October 2012), Exhibit NOR-92, p. 2.

on the conservation, management and study of marine mammals in the North Atlantic, and its members are Norway, Iceland, Greenland and the Faroe Islands.[1153]

840. The NAMMCO observation scheme is governed by the Provisions of the Joint NAMMCO Control Scheme for the Hunting of Marine Mammals.[1154] Its purpose is "to provide a mechanism for NAMMCO to monitor whether decisions made by the Commission are respected".[1155] Observation by NAMMCO is not comprehensive: different countries and hunts are inspected each year.[1156]

841. The existence of effective inspection systems further confirms that a certification system is a reasonably available alternative and that inspection could be mandated to verify compliance with the animal welfare requirements as part of an alternative measure. In this context Norway notes that its system provides for real time inspection of the hunt in order to monitor compliance with animal welfare requirements.

(iii) The reasons given in the Basic Seal Regulation for ruling out the prescription of animal welfare requirements are ill-founded

842. The preamble to the Basic Seal Regulation accepts that it may be possible to kill seals consistently with animal welfare requirements. However, it rejects the prescription of animal welfare requirements as a less trade-restrictive option, preferring to restrict the marketing of seal products to those products that conform to one of the three sets of requirements. Specifically, recital 11 of the preamble states:

> Although it might be possible to kill and skin seals in such a way as to avoid unnecessary pain, distress, fear or other forms of suffering, given the conditions in which seal hunting occurs, consistent verification and control of hunters' compliance with animal welfare requirements is not feasible in practice or, at least, is very difficult to achieve in an effective way, as concluded by the European Food Safety Authority on 6 December 2007.

[1153] NAMMCO web site, *Welcome to the North Atlantic Marine Mammal Commission*, available at http://www.nammco.no/ (last checked 14 October 2012), Exhibit NOR-93.
[1154] NAMMCO, *Provisions of the Joint Control Scheme for the Hunting of Marine Mammals*, available at http://www.nammco.no/webcronize/images/Nammco/750.pdf (last checked 14 October 2012) ("NAMMCO Joint Control Scheme"), Exhibit NOR-94.
[1155] NAMMCO Joint Control Scheme, Exhibit NOR-94, section B.1.
[1156] *See, e.g.*, VKM Report, Exhibit JE-31, p. 41: NAMMCO inspection "is on a random basis".

843. The first clause of this statement is correct: it is possible to kill seals consistently with animal welfare requirements. However, the remainder of this clause is inaccurate.

844. *First*, it is revealing that the European Commission reached a different conclusion in its Proposed Regulation on the feasibility of consistent control and verification of animal welfare requirements. In the Proposed Regulation, the Commission proposed that the EU legislator prescribe animal welfare requirements, and couple them with a system of certification of conformity with these requirements. Hence, the European Commission's Proposed Regulation must, logically, have been based on the conclusion that consistent verification and control of hunters' compliance with animal welfare requirements *are* feasible in practice.

845. *Second*, in claiming that consistent control and verification are not feasible, the EU legislator purports to rely on the conclusions of the EFSA Scientific Opinion of 6 December 2007.[1157] However, EFSA did not conclude that verification of compliance with animal welfare requirements was not feasible. To the contrary, after concluding that seal hunting may be conducted consistently with animal welfare requirements (which recital 11 accurately states), EFSA noted that the monitoring of seal hunts is not consistent from country to country. Accordingly, *it recommended that independent monitoring and inspections be introduced to ensure compliance with animal welfare requirements*.[1158] Thus, far from dismissing consistent control and verification as "not feasible", EFSA recommended that it be introduced as a feature of the EU Seal Regime.

846. The timing of events also shows that the European Commission did not conclude that the EFSA Scientific Opinion rejected consistent control and verification as "not feasible". The EFSA Scientific Opinion was produced on a request from the Commission as part of the Commission's assessment of regulatory options. The Opinion was issued on 6 December 2007, more than seven months before the Commission's *original* proposal, which set out a system of based on compliance with animal welfare requirements, including conformity assessment.

847. The Commission's Explanatory Memorandum of 23 July 2007 refers repeatedly to the EFSA Scientific Opinion, stating that the Commission's assessment is based on "expertise"

[1157] Basic Seal Regulation, Exhibit JE-1, Preamble, recital 11.
[1158] 2007 EFSA Scientific Opinion, Exhibit JE-22, pp. 13 and 95.

obtained from "[EFSA's] independent scientific opinion".[1159] It cites explicitly to EFSA's conclusion that "*it is possible to kill seals rapidly and effectively without causing them avoidable pain or distress*", although EFSA recognized that this does not always occur.[1160]

848. Strikingly, in the third recital to the Proposed Regulation, the Commission narrated:

> The hunting of seals has led to expressions of serious concerns by members of the public, governments as well as the European Parliament sensitive to animal welfare considerations since there are indications that seals may not be killed and skinned without causing avoidable pain, distress and other forms of suffering. The European Food Safety Authority concluded, in its scientific opinion on the Animal Welfare aspects of the killing and skinning of seals, that it is possible to kill seals rapidly and effectively without causing them avoidable pain or distress, whilst also reporting that in practice, effective and humane killing does not always happen.[1161]

849. In the final Basic Seal Regulation this preambular language was dropped by the EU legislator and, in its place, recital 11 was added, with a quite different assessment of the EFSA Scientific Opinion. Rather than stating that EFSA concluded that effective and humane killing "does not always happen" (as in the original version), the preamble was amended to state that EFSA concluded effective and humane killing "is not feasible in practice". This is a quite different description of the *same* EFSA Scientific Opinion. It is, therefore, not clear what motivated this change of assessment by the EU legislator. To recall, "substantial, but unexplained" changes in conclusions about how to contribute to an objective may be an indicator of a disguised restrictions on international trade.[1162]

850. *Third*, it is possible to prescribe animal welfare requirements for seal hunting and to monitor and enforce them in practice. Norway, for example, does precisely this. As noted above, in Norway, a public inspector must be present on each sealing vessel at all times to ensure compliance with, and enforcement of, the animal welfare requirements.[1163] Jan Danielsson and Anne Moustgaard, who are experienced seal hunting inspectors, both testify

[1159] Proposed Regulation, Exhibit JE-9, Explanatory Memorandum, p. 9.
[1160] Proposed Regulation, Exhibit JE-9, Explanatory Memorandum, p. 9.
[1161] Proposed Regulation, Exhibit JE-9, Explanatory Memorandum, p. 9 (underlining added).
[1162] Appellate Body Report, *Australia – Salmon*, paras. 170-172.
[1163] *See* para. 834 above.

that the Norwegian system of inspection ensures consistent control and verification of animal welfare requirements.[1164]

851. Finally, under the proposed alternative, if it proved not to be possible to control and verify that a seal hunt complied with animal welfare requirements, the European Union would not be required to certify the seal products resulting from the hunt. Thus, in adopting a scheme based on animal welfare requirements coupled with conformity assessment, the European Union would not be renouncing the ability to verify compliance with animal welfare requirements. However, contrary to the current system, operators would have the *opportunity* to demonstrate compliance, which is now denied to them because of an unwarranted conclusion – that is not substantiated – that effective control and verification is impossible.

(c) A system of certification of conformity with animal welfare requirements is feasible

852. The second element of the alternative measure put forward by Norway is a system of *certification of conformity with animal welfare requirements*. Such a requirement is reasonably available, as shown by the fact that: (1) the EU Seal Regime already envisages a system of certification of conformity, albeit not with animal welfare requirements; and (2) certification schemes exist for other products. Norway addresses these points in turn below.

(i) The EU Seal Regime already envisages a system of certification

853. The current EU Seal Regime provides for a system of certification for seal products, based not on animal welfare but on the conditions imposed under the Indigenous Communities and Sustainable Resource Management Requirements, respectively.[1165] Parties wishing to market seal products under the Indigenous Communities and Sustainable Resource Management Requirements must obtain a certificate to prove that the conditions set out in the requirements are met,[1166] and the certificates must accompany the seal product when first

[1164] *See* Moustgaard statement, Exhibit NOR-6, paras. 25-30; and Danielsson Statement, Exhibit NOR-4, paras. 35-39
[1165] *See* paras. 167 to 170 above.
[1166] Implementing Regulation, Exhibit JE-2, Article 8(3) to 8(6).

placed on the EU market.[1167] These certificates may be issued only by certification bodies recognized for this purpose by the European Union.[1168] Entities that wish to be recognized for this purpose must demonstrate, among others, that they have "the capacity to ascertain"[1169] and "the ability to monitor"[1170] compliance with the Indigenous Communities and Sustainable Resource Management Requirements, and that they operate "at national or regional level".[1171] Competent authorities designated by the Member States may verify the certificates accompanying imported products, and control the issuing of certificates by recognized bodies established in their territory.[1172]

854. Accordingly, the EU Seal Regime itself indicates that certification of conformity is a reasonably available element of a measure regulating seal products. Indeed, as Norway discusses above,[1173] during the EU legislative process, the European Commission took the view that a system of certification based on animal welfare criteria was reasonably available to the European Union, proposing just such a system in the Proposed Regulation.[1174]

(ii) Existing certification schemes also support the view that certification is feasible

855. Certification systems established for other product also provide guidance on the reasonably availability of certification as part of an alternatives measure.[1175] Several certification schemes exist that could be drawn upon in establishing a system of certification of compliance with animal welfare requirements in the seal hunt, some of which combine certification and labelling. The existence of such schemes, in which the EU industry or the European Union itself participates, is a further indication that a system of certification based on the stated objectives of the EU Seal Regime is a feasible and reasonably available alternative.

856. In this section, Norway will briefly describe a number of such schemes, namely: the dolphin-safe scheme for tuna under the Agreement on the International Dolphin Conservation

[1167] Implementing Regulation, Exhibit JE-2, Article 6(3). *See also id.*, Article 6(4).
[1168] Implementing Regulation, Exhibit JE-2, Article 6.
[1169] Implementing Regulation, Exhibit JE-2, Article 6(1)(b).
[1170] Implementing Regulation, Exhibit JE-2, Article 6(1)(e).
[1171] Implementing Regulation, Exhibit JE-2, Article 6(1)(h)
[1172] Implementing Regulation, Exhibit JE-2, Article 9(1).
[1173] *See* paras. 798 to 801 above.
[1174] Proposed Regulation, Exhibit JE-9, Articles 4-7 and Annex II.
[1175] Appellate Body Report, *Korea – Beef*, para. 169.

Programme ("AIDCP"); the Friend of the Sea scheme for wild catch fisheries; the Marine Stewardship Council ("MSC") scheme for fisheries; and the leghold trap regime for certain wild animals and products derived therefrom. Of these: the AIDCP is an intergovernmental scheme; the Friends of the Sea and MSC schemes are private certification systems; and the leghold trap scheme began as a unilateral EU legislative measure, though the European Union has since negotiated related agreements with a number of countries.

4) AIDCP dolphin-safe tuna

857. A system of inspection and certification of dolphin-safe tuna exists under the AIDCP. The aim of this system is to verify that tuna is "captured in sets in which there is no mortality or serious injury of dolphins".[1176]

858. Under the AIDCP system, an observer must be present onboard each fishing vessel. The observer monitors each set:

> At sack-up during each set, and prior to brailing or loading of tuna aboard the vessel and into wells, the observer determines whether or not dolphin mortality or serious injury has occurred in the set and notifies the captain immediately of his determination.
>
> On the basis of the observer's determination, the tuna is designated either dolphin safe or non-dolphin safe.[1177]

859. Detailed requirements apply thereafter to track the tuna determined to be dolphin-safe and keep it separate from any non-dolphin-safe tuna, onboard the vessel and through the further steps of the supply chain.[1178] Governments monitor dolphin-safe tuna after it is unloaded from the vessel and may provide a dolphin-safe certificate, in part on the basis of the determination made by the observer at the time the tuna was fished.[1179]

[1176] IDCP, *System for Tracking and Verifying Tuna*, last amended 11 October 2003, available at http://www.iattc.org/PDFFiles/AIDCP%20Tuna%20Tracking%20System%20_amended%20Oct%202003_.pdf (last checked 14 October 2012) ("IDCP System for Tracking and Verifying Tuna"), Exhibit NOR-95, section 1.
[1177] IDCP System for Tracking and Verifying Tuna, Exhibit NOR-95, sections 4.1 and 4.2.
[1178] IDCP System for Tracking and Verifying Tuna, Exhibit NOR-95, sections 4.2 *ff*.
[1179] *See* the Leaflet on the AIDCP, available at http://www.iattc.org/PDFFiles2/AIDCP-poster4-2005.pdf (last checked 14 October 2012), Exhibit NOR-96.

5) MSC

860. The MSC, which is a private organisation, runs a system of certification and labelling that, in its view, "recognise and reward sustainable fishing".[1180] Certification relates to: (i) each fishery covered by the scheme;[1181] and (ii) the chain of custody for compliant products from such fisheries. Compliant products may display the MSC label for "certified sustainable food".

861. MSC certification of a fishery is based on the following three principles:

> Principle 1: Sustainable fish stocks
>
> The fishing activity must be at a level which is sustainable for the fish population. Any certified fishery must operate so that fishing can continue indefinitely and is not overexploiting the resources.
>
> Principle 2: Minimising environmental impact
>
> Fishing operations should be managed to maintain the structure, productivity, function and diversity of the ecosystem on which the fishery depends.
>
> Principle 3: Effective management
>
> The fishery must meet all local, national and international laws and must have a management system in place to respond to changing circumstances and maintain sustainability.[1182]

862. Compliance with these principles is verified by conformity assessment bodies accredited by the MSC, on the basis of detailed process and substantive requirements.[1183] In particular, to verify compliance, the conformity assessment bodies review documentation and conduct site visits and interviews.[1184]

[1180] MSC, *Ecolabel User Guidelines* (August 2011), Exhibit NOR-97, p. 1.
[1181] The MSC defines "fishery" as a "unit determined by an authority or other entity that is engaged in raising and/or harvesting fish. Typically, the unit is defined in terms of some or all of the following: people involved, species or type of fish, area of water or seabed, method of fishing, class of boats and purpose of the activities". MSC, *Certification Requirements – Version 1.0* (15 August 2011), Exhibit NOR-98, p. A15.
[1182] MSC, *Certification Requirements – Version 1.0* (15 August 2011), Exhibit NOR-98, p. A5.
[1183] *See*, in particular, MSC, *Certification Requirements – Version 1.0* (15 August 2011), Exhibit NOR-98, Part C; and MSC, *Fishery Standard – Principles and Criteria for Sustainable Fishing – Version 1.1* (1 May 2010), Exhibit NOR-99. *See* also, *e.g.*, MSC, *A Stakeholder's Guide to the Marine Stewardship Council* (December 2010), Exhibit NOR-100, pp. 4-11.
[1184] *See*, in particular, MSC, *Certification Requirements – Version 1.0* (15 August 2011), Exhibit NOR-98, pp. C12-C41.

863. For a product to be able to display the MSC label, the product's "chain of custody" – from its maritime extraction to its sale to the final consumer – must be MSC certified.[1185] To achieve chain of custody certification, it must be possible to track adequately the products from MSC certified fisheries throughout the supply chain. This requires, in particular, that the MSC certified products be segregated from non-certified products at all times.[1186]

6) Friend of the Sea

864. A similar scheme, certifying the sustainability of fisheries, is operated by Friend of the Sea, which also includes labelling of conforming products. For wild catch fishery, Friend of the Sea verifies whether:

- the target stock is not overexploited
- the fishery does not generate more than 8% discards;
- there is no bycatch of endangered species;
- there is no impact on the seabed;
- a number of regulations are complied with, including on illegal and unreported fishing, total allowable catches, etc.;
- the fishery is socially accountable; and
- the fishery gradually reduces its carbon footprint.[1187]

865. To verify whether these requirements are met, inspectors from an accredited certification body rate each fishery against a number of detailed criteria.[1188] Verifications are carried out onboard the vessels in the ports and, to verify traceability, "through the production and distribution chain sites".[1189]

[1185] *See* MSC, *Certification Requirements – Version 1.0* (15 August 2011), Exhibit NOR-98, Part B. *See* also MSC, *Chain of Custody Certification Methodology – Version 7* (1 July 2010), Exhibit NOR-101.
[1186] *See, e.g.*, MSC, *Chain of Custody Certification Methodology – Version 7* (1 July 2010), Exhibit NOR-101, p. 17, point 5.4.3.
[1187] Friend of the Sea web site, *Fisheries – Introduction*, available at http://www.friendofthesea.org/fisheries.asp (last checked 14 October 2012), Exhibit NOR-102.
[1188] Friend of the Sea, *Certification Criteria Checklist for Wild Catch Fisheries*, last updated 11 May 2010, available at http://www.friendofthesea.org/public/page/Checklist%20FoS%20Wild%20Catch%20Fisheries.pdf (last checked 14 October 2012), Exhibit NOR-103.
[1189] Friend of the Sea, *Getting Ready Information – Inspection of Product from Wild-catch Fisheries*, available at http://www.friendofthesea.org/public/page/getting%20ready%20information%20-%20inspection%20of%20products%20from%20wild-catch%20fisheries%20%20-%20annex%202%20-%2006082009%20v1.pdf (last checked 14 October 2012), Exhibit NOR-104, p. 2.

7) The leghold trap certification scheme

866. Another example, quite different in its operation from those just outlined, is provided by the European Union's leghold trap regime. Leghold traps may be used to ensnare wild terrestrial animals, including badger, beaver, bobcat, coyote, ermine, fisher, otter, lynx, marten, muskrat, racoon, sable, and wolf.[1190]

867. The current regime is based on Council Regulation (EEC) No. 3254/91 (the "Leghold Trap Regulation"), accompanied by a number of Commission measures.[1191] The Leghold Trap Regulation comprises two main elements. On the one hand, it prohibits the use of leghold traps within the European Union.[1192] On the other hand, it prohibits the importation of goods derived from the animals listed above, unless they are produced by a country that the European Union has determined either: has "adequate administrative or legislative provisions in force to prohibit the use of the leghold trap"; or uses trapping methods that "meet internationally agreed humane trapping standards".[1193] The list of countries meeting either of these requirements is published in the EU Official Journal.[1194] Thus, the EU leghold trap regime involves recognition by the European Union, on a country-by-country basis, that the necessary animal welfare standards are met in the country of production.

868. After adopting of the Leghold Trap Regulation, the European Union has negotiated and concluded international agreements with a number of countries on humane trapping standards. These are not yet in force.[1195]

[1190] Council of the European Union, *Regulation (EEC) No. 3254/91 prohibiting the use of leghold traps in the Community and the introduction into the Community of pelts and manufactured goods of certain wild animal species originating in countries which catch them by means of leghold traps or trapping methods which do not meet international humane trapping standards*, Official Journal of the European Communities (1991) L 308/34 (4 November 1991) ("Leghold Trap Regulation"), Exhibit NOR-105, Article 3(1) and Annex 1.

[1191] *See* European Commission, *Regulation (EC) No. 35/97 laying down provisions on the certification of pelts and goods covered by Council Regulation (EEC) no. 3254/91*, Official Journal of the European Union (1997) L 8/2 (10 January 1997), Exhibit NOR-111; and European Commission, *Decision No. 98/596/EC amending Council Decision 97/602/EC concerning the list referred to in the second subparagraph of Article 3(1) of Regulation (EEC) No 3254/91 and in Article 1(1)(a) of Commission Regulation (EC) No 35/97 Commission Decision 98/596/EC*, Official Journal of the European Union (1998) L 286/56 (14 October 1998), Exhibit NOR-80.

[1192] Leghold Trap Regulation, Exhibit NOR-105, Article 2.

[1193] Leghold Trap Regulation, Exhibit NOR-105, Article 3(1).

[1194] Leghold Trap Regulation, Exhibit NOR-105, Article 3(1). *See* also Commission Decision 98/956/EC, Exhibit NOR-80.

[1195] European Commission web site, *Implementation of Humane Trapping Standard in the EU*, available at http://ec.europa.eu/environment/biodiversity/animal_welfare/hts/index_en.htm (last checked 14 October 2012), ("European Commission - Implementation of Humane Trapping Statndard in the EU"), Exhibit JE-8.

(d) Labelling of seal products is feasible

869. A further element of the proposed alternative would consist of the labelling of seal products to indicate to EU consumers that they contain seal and that the seal inputs are derived from a seal hunted consistently with animal welfare requirements.

870. In the Proposed Regulation, the European Commission proposed a labelling scheme for seal products permitted on the EU market, showing that it considered labelling to be feasible. In addition, Norway notes that labelling is a feature of the AIDCP dolphin-safe tuna, and the MSC and the Friend of the Sea schemes, again illustrating that labelling is perfectly feasible.

871. However, in the preamble to the Basic Seal Regulation, the European Union argues that labelling was not reasonably available in light of the costs it would impose on "manufacturers, distributors or retailers".[1196] The European Union stated:

> … requiring manufacturers, distributors or retailers to label products that derive wholly or partially from seals would impose a significant burden on those economic operators, and would also be disproportionately costly in cases where seal products represent only a minor part of the product concerned.[1197]

872. This reasoning – which directly contradicts the European Commission's position in the Proposed Regulation – is fundamentally flawed. The European Union effectively asserts that to relieve economic operators of the need to label certain products, it had to prohibit the placing on the market of the same products. In other words, because of the asserted labelling cost that economic operators would bear, the European Union deprives them of any opportunity to trade. In doing so, the European Union fails to take account of several crucial factors that are pertinent to the regulatory choice it made.

873. *First*, the European Union fails to take into account that imposing a ban is likely *more costly* to economic operators in terms of lost investments, sales revenues, and employment, than a labelling requirement would be. Indeed, COWI had explained that measures such as labelling would imply "*lower trade-offs* across the environmental, economic and social

[1196] Basic Seal Regulation, Exhibit JE-1, Preamble, recital 12.
[1197] Basic Seal Regulation, Exhibit JE-1, Preamble, recital 12.

dimensions."[1198] Thus, the *absolute* cost of labelling is not the decisive factor, because it must be assessed in comparison with the cost of the ban on non-conforming seal products. The European Union's assessment is, therefore, incomplete.

874. *Second*, the decision that labelling is too costly for economic operators is not one that the EU regulator is well positioned to make. Whether a labelling cost is too high depends on the relationship between the cost that a *specific operator* incurs to label seal products and *that operator's* overall costs of production and/or sale; its profit margin; its capacity to raise prices; and no doubt numerous other factors. Norway does not understand how the European Union was able to assess these economic factors for *each individual operator* that produces and/or sells seal products (or might do so). Indeed, in rejecting the European Commission's proposed labelling scheme, and concluding that labelling was too costly, the European Union does not appear to have examined any of these elements.

875. *Third*, the EU Seal Regime envisages a system of certification for seal products permitted under the Indigenous People and Sustainable Resource Management Requirements. In establishing this system of certification, the European Union does not seem to have considered its cost for economic operators and whether, because of such costs, it would be preferable to extend the ban to the conforming seal products. Instead, it has left economic operators to decide for themselves whether market access for seal products is too costly.

876. Finally, it is worth noting that, during the legislative process, the Commission took the position that, because of its impact on consumer behaviour, "those [operators] who pursue the label *might benefit [from the label] more than it costs*".[1199]

877. Thus, the European Union's objection based on cost is ill-founded. Instead, as the European Commission itself concluded in the Proposed Regulation, labelling is a feasible regulatory option.

[1198] 2008 COWI Report, Exhibit JE-20, section 4.1, p. 98 (emphasis added). On labelling, COWI also observed: "It is envisaged that benefits from a labelling system might include a price markup on the consumer market and at the same time help to increase the image of seal hunting in general. If the system is voluntary it might encourage a natural self-selection process regarding compliance and thus maintain the balance between the environmental, economic and social dimension - *i.e.* those who pursue the label might benefit more than it costs, and the welfare of the seals is enhanced. Furthermore, it is assessed that the impact will be largest if it is a widespread international labelling system rather than a specific EU system." *Ibid.*, p. 4.
[1199] Commission Impact Assessment, Exhibit JE-16, section 6.5, p. 47.

(e) The EU's policy in related product areas confirms that less trade restrictive alternatives are reasonably available

878. In *Korea – Various Measures on Beef*, the Appellate Body indicated that measures taken in "related product areas" might provide guidance on what alternatives are reasonably available.[1200] The European Union's policy in relation to the welfare of farmed animals also substantiates that Norway's proposed alternative measures are reasonably available to address the objective of promoting animal welfare.

879. The European Union faces considerable animal welfare problems as regards farmed animals,[1201] notably in relation to pigs,[1202] dairy cows,[1203] and in relation to animals slaughtered through methods required by certain religious rites. [1204] For example, according to an Impact Assessment on animal welfare published by the European Commission in January 2012, problems include:

- "Piglets (young pigs) from one week of age often have their tails cut off (tail docking) without anaesthesia and their teeth clipped. Most EU producers do this as a routine practice."[1205]
- "80% of male piglets are in the EU castrated without anaesthesia. Female pigs (sows) used for breeding will often be kept for almost all their life in individual stalls where they do not have the freedom to move."[1206]
- In the case of hens, "parts of the beak are routinely removed without anaesthesia (beak trimming). This has been documented to be painful for the hens both during and after the trimming."[1207]
- "… the majority of animals will be transported at one time or another. […] These journeys often last for several days. Animals have little space to move. When drivers stop to rest and sleep, animals will often stay in the truck without the ability to rest. Animals that do not know each other are placed together and this can result in conflicts. Access to water is limited, due to lack of space. Feed is rarely provided to animals during transport. Furthermore, the trucks seldom have straw or other bedding to absorb faeces and urine." [1208]

[1200] Appellate Body Report, *Korea – Beef*, paras. 169 and 170.
[1201] *See*, *e.g.*, "Animal welfare is still at risk across EU Member States." 2012 Animal Welfare Assessment, Exhibit JE-17, p. 14.
[1202] 2012 Animal Welfare Assessment, Exhibit JE-17, p. 14.
[1203] 2012 Animal Welfare Assessment, Exhibit JE-17, p. 16.
[1204] 2012 Animal Welfare Assessment, Exhibit JE-17, pp. 15-16.
[1205] 2012 Animal Welfare Assessment, Exhibit JE-17, p. 14.
[1206] 2012 Animal Welfare Assessment, Exhibit JE-17, p. 14.
[1207] 2012 Animal Welfare Assessment, Exhibit JE-17, p. 15.
[1208] 2012 Animal Welfare Assessment, Exhibit JE-17, p. 15.

- "According to EU legislation, animals shall be stunned before they are slaughtered. However, there is a possibility to derogate from this requirement where animals are subjected to methods of slaughter required by certain religious rites. The Commission has received evidence that certain slaughterhouse operators excessively use the derogation from stunning to streamline their production process."[1209]

880. The European Union has found that an important factor in causing these problems is lack of appropriate enforcement,[1210] and also that a majority of consumers is concerned about animal welfare, but not properly informed on the products on the market.[1211] Thus, the set of concerns faced by the European Union in the area of farmed animals is similar to that allegedly faced in relation to sealing, namely: animal welfare concerns, coupled with alleged enforcement difficulties; concerns harboured by consumers in relation to animal welfare; and, a lack of sufficient information regarding products placed on the EU market.

881. In order to address this set of concerns, the European Union has examined a number of policy options,[1212] concluding that the best "option will […] be a policy mix, including some of the components of several options", namely:

> 1. To explore the possibility of a simplified EU legislative framework that will include:
>
> – a framework to improve transparency and adequacy of information to consumers on animal welfare,
>
> – the establishment of a network of reference centres [for research and dissemination of research],
>
> – the integration of requirement for competence [of staff handling animals] in a single text (with a transitional period to decrease compliance costs),
>
> – the possibility to use outcome based *animal welfare indicators*.
>
> 2. Develop tools for strengthening Member States' compliance with EU rules;
>
> 3. Support international cooperation;

[1209] 2012 Animal Welfare Assessment, Exhibit JE-17, pp. 15-16.
[1210] 2012 Animal Welfare Assessment, Exhibit JE-17, p. 17 *ff.*
[1211] 2012 Animal Welfare Assessment, Exhibit JE-17, p. 21.
[1212] 2012 Animal Welfare Assessment, Exhibit JE-17, p. 32 *ff.*

> 4. Provide consumers and the public with appropriate information;
>
> 5. Investigate on the welfare of animals not covered by specific EU rules.[1213]

882. Thus, the tools being explored by the European Union to address proven and severe animal welfare problems are: ensuring transparency and adequacy of information to consumers (including through a framework for voluntary certification schemes[1214]); promoting research; requiring that staff handling animals have the necessary preparation; reliance on animal welfare "indicators"; developing tools to strengthen enforcement by Member States (including audit missions, inter-governmental cooperation, workshops with stakeholders and EU guidelines[1215]); and international cooperation.

883. The fact that the European Union considers such measures to be a viable approach to animal welfare issues relating to farmed animals supports Norway's position on the reasonable availability of the proposed alternative in relation to seals. To recall, this alternative comprises the prescription of animal welfare requirements (and not just "indicators"), backed by the certification of compliance with animal welfare requirements and product labelling, both of which "improve transparency and adequacy of information to consumers on animal welfare".

(f) Together the three elements comprise a reasonably available alternative

884. In the preceding sections, Norway has demonstrated that it is perfectly feasible to adopt each of the elements proposed by Norway as a reasonably available and less trade restrictive alternative measure to the EU Seal Regime. Combining each of these distinct elements into a single measure would present no additional impediment or burden to the adoption of the less trade restrictive alternative. Accordingly, just as the adoption of each individual element of the proposed alternative is feasible, so too is the proposed measure as a whole a *reasonably available* alternative measure to the EU Seal Regime. The feasibility of this alternative is confirmed by the European Commission's proposed regulation of farm animals for animal welfare reasons.

[1213] 2012 Animal Welfare Assessment, Exhibit JE-17, pp. 59-60.
[1214] 2012 Animal Welfare Assessment, Exhibit JE-17, *e.g.* p. 34.
[1215] 2012 Animal Welfare Assessment, Exhibit JE-17, p. 33.

(2) The less trade restrictive alternative would fulfil the European Union's objectives to a greater degree than the EU Seal Regime

885. As Norway explains below, the suggested alternative measure would fulfil the European Union's objectives to a greater degree than the EU Seal Regime. *Unlike* the EU Seal Regime, it would make a material contribution to fulfilment of the objectives of protecting animal welfare and addressing the public's concerns in this regard, and dispelling consumer confusion. *Like* the EU Seal Regime, it would also allow trade in indigenous products, the products of a sustainable marine resource management plan, and promote the personal choice of consumers, provided animal welfare requirements are complied with. It would also fulfil the objective of harmonizing the internal market.

(a) Addressing animal welfare explicitly and consistently is the best way to address the European Union's animal welfare objective

886. The requirements under which seal products may be placed on the EU market under the EU Seal Regime fail to address animal welfare.[1216]

887. Indeed, as demonstrated above, in relation to each of the Indigenous Communities, Sustainable Resource Management and Personal Use Requirements, the EU Seal Regime permits seal products to be placed on the market *irrespective* of whether or not the seals from which such products are derived were treated with respect for animal welfare, with the result that seal products are prohibited or allowed *regardless* of whether they are obtained in compliance with animal welfare considerations. Hence, seal products obtained through killing methods, such as netting, that have been described as a "bestial form of animal cruelty" are allowed.[1217] The EU Seal Regime also allows the placing on the market of seal products where the seals have been caught with the aim of managing marine resources, without imposing any requirement having even a faint bearing on animal welfare.[1218] Further, the EU Seal Regime allows the importation into the EU of seal products that EU travellers choose to buy for their "personal use", again without imposing any condition

[1216] *See* section VI.D.4.b.i above.
[1217] *See* the remarks of Carsten Grondahl in para. 681 above, quoted in COWI, *Feature*, Issue 18 (2008), Exhibit JE-32, p. 30.
[1218] *See* paras. 685 to 687 above.

relating to animal welfare.[1219] The European Union thus tolerates non-fulfilment of the objectives of the EU Seal Regime on a routine basis.

888. It is self evident that an alternative measure that *explicitly* lays down animal welfare requirements and applies such requirements *consistently* to all permitted trade is considerably more apt to promote animal welfare than the EU Seal Regime. This is because such a measure would, unlike the EU Seal Regime, *prevent* access for seal products that do not comply with animal welfare requirements, *permitting* it *solely* for those that do. It would simultaneously establish an incentive to comply with animal welfare requirements as a condition of access to the EU market.

889. This targeting of the measure directly to the animal welfare objective pursued is in line with the recommendations contained in the studies commissioned by the European Union in the context of the legislative process. As already noted, EFSA reviewed seal hunting methods worldwide and provided a series of recommendations aimed at ensuring that seals "be killed without causing avoidable pain, distress, fear and other forms of suffering".[1220] Based, among others, on the EFSA scientific opinion", COWI recommended that any measures taken by the European Union "aim to pursue good practices and avoid bad practices" and "be targeted".[1221]

890. Contrary to these recommendations, the EU Seal Regime bears no relationship to animal welfare, allowing the sale of products obtained without respecting animal welfare requirements, and banning the sale of animal-welfare-compliant products.

891. Thus, the alternative would contribute to the European Union's objective of protecting animal welfare, thereby addressing consumer concerns on animal welfare, to a much greater degree than the EU Seal Regime itself. In short, animal welfare considerations would lie at the heart of the measure, *always* constituting the *decisive* criterion in determining market access.

[1219] *See* paras. 688 to 690 above.
[1220] 2007 EFSA Scientific Opinion, Exhibit JE-22, p. 94.
[1221] 2008 COWI Report, Exhibit JE-20, section 7.2, pp. 136-137 "Recommendations" (underlining original).

(b) Certification would meet the European Union's objective of ensuring animal welfare

892. An alternative measure including *certification* of compliance with animal welfare requirements would fulfil the European Union's objectives to the same or a greater degree than the EU Seal Regime.

893. In particular, animal-welfare-based certification would *directly* address animal welfare, and consumers' concerns on animal welfare. Products not obtained in compliance with animal welfare requirements would *not obtain certification,* and products not certified to conform with animal welfare requirements would have no access to the EU market.

894. The European Commission has explained that a system of certification based on animal welfare would be:

> the best way to meet the overarching objectives, i.e.
>
> protect seals from acts that cause them avoidable pain, distress, fear and other forms of suffering during the killing and skinning process
>
> address the concerns of the general public with regard to the killing and skinning of seals[1222]

(3) Labelling would meet the European Union's objectives of ensuring animal welfare and preventing consumer confusion

895. Since Norway's proposed alternative contemplates *labelling* as an element to complement and augment a measure based on animal welfare requirements and certification, the alternative would – in addition to contributing to the European Union's animal welfare and harmonization objectives – fulfil the European Union's objective of dispelling consumer confusion. In contrast, because it admits unmarked seal products to the EU market, the EU Seal Regime *creates* the very confusion it seeks to dispel.

896. In addition, such labelling as proposed by Norway would address consumers' alleged concerns regarding seal products in general, and regarding animal welfare aspects of sealing in particular. Specifically, because seal products would be adequately labelled, informed consumers could adjust their consumption behaviour precisely to address any concerns that

[1222] Commission Impact Assessment, Exhibit JE-16, section 7.3, p. 51.

they may have regarding seal products or animal welfare aspects of sealing. If they did not wish to consume seal products, they would have the information necessary to avoid doing so. However, if they were willing to buy seal products compliant with animal welfare requirements, they would again have information necessary to do so.

897. A label could also address the alleged problem, stated in recital 17 of the Basic Seal Regulation, that consumers are being discouraged from buying certain non-seal products that are not "easily distinguishable from similar goods made from seal". Norway understands this statement to reflect a reluctance among some consumers to buy non-seal products because they may inadvertently buy seal products.

898. Of course, under the EU Seal Regime, consumer confusion remains because the European Union admits unmarked seal products to the EU market. A product may contain seal – it may even contain seal derived from an animal that was trapped underwater and died with considerable suffering – and the consumer may well be given *no* notice of this. In contrast, under the proposed labelling alternative, consumers could easily distinguish seal and non-seal products through the terms of the label.

899. The fact that labelling fulfils the European Union's objectives of ensuring animal welfare and preventing consumer confusion was amply recognized during the legislative process. [*Redacted due to withdrawal of evidence*], and the European Parliament's Rapporteur Wallis all expressed the view that a labelling scheme would best achieve the protection of animal welfare and best address the public's concern on animal welfare.

900. [*Redacted due to withdrawal of evidence*] [1223]

901. In July 2008, the Commission explained that labelling "could directly contribute to an improvement of the welfare of seals":

> ... the [labelling] system might encourage a natural self-selection process regarding compliance and thus maintain the balance between the animal welfare, economic and social dimension – *i.e.*, those who pursue the label might benefit more than it costs, and the welfare of the seals is enhanced
>
> The impact will be best if it is a widespread international labelling system rather than a specific EU system ...[1224]

[1223] [*Redacted due to withdrawal of evidence*]

902. Some months later, the European Parliament's Rapporteur Wallis also took the view that a labelling system would "have more chance" of achieving the European Union's objectives than the measure as proposed:

> Your Rapporteur ... considers that an appropriately and robustly constructed mandatory labelling system would have more chance of achieving both of Parliaments policy goals ["those of animal welfare and of respecting and minimising the impact on Inuit communities"], allowing public opinion - through informed consumers - much more effectively to assist in guaranteeing high animal welfare standards, whilst equally assisting Inuit communities.[1225]

903. In contrast, the current EU Seal Regime neither protects animal welfare nor responds to the consumers' concerns on animal welfare. It does not inform the consumer of whether he or she is buying a seal product and it gives no information on whether the seal product was obtained in compliance with animal welfare requirements. Thus, the proposed labelling scheme would prevent the risk of consumer confusion, whereas the EU Seal Regime, by allowing seal products to be placed on the market without providing information to consumers, *creates* a risk that consumers will be confused by the absence of information.

(a) The alternative measure would not prejudice the additional objectives pursued by the three sets of requirements

904. The proposed alternative measure would be equally apt to achieve the additional objectives of the EU Seal Regime, including not only the sustainable management of marine resources, but also the objective of protecting the "fundamental economic and social interests" of indigenous communities, which, as seen, would not in itself justify the introduction of trade-restrictions vis-à-vis other sources under Article 2.2.

905. Under the proposed alternative measure, provided seal products meet relevant animal welfare requirements, they would have access to the EU market. This alternative thus contributes to the objective of protecting the "fundamental economic and social interests" of indigenous communities by allowing indigenous communities to place seal products on the EU market in the same way as the EU Seal Regime.

[1224] Commision Impact Assessment, Exhibit JE-16, p. 47.
[1225] Rapporteur Wallis' Draft Explanatory Statement, in EU Parliament Draft Report on Trade in Seal Products, Exhibit JE-18, p. 34.

906. The proposed alternative measure would also be apt to attain the objective of promoting freedom of choice for consumers, and would reduce the risk that consumer choice would be curtailed. This is not only because it would allow wider choice for EU consumers in the acquisition of seal products, but also because it would *inform* EU consumers as to whether products contain seal and about compliance with animal welfare requirements.

907. Finally, as with virtually any EU-level measure, it would fulfil the objective of harmonization of the internal market of the European Union to the same degree as the EU Seal Regime.

908. Therefore, not only would the alternative measure serve as an incentive to adopt robust animal welfare requirements and enforcement systems where these are currently lacking, but also it would attain the European Union's other objectives the same or a greater degree than the current EU Seal Regime.

(4) The less trade-restrictive alternative would carry lower risks of non-fulfilment than the EU Seal Regime

909. As seen above,[1226] the EU Seal Regime contains no requirement related to animal welfare, and no requirement related to consumer information; in other words, the European Union accepts the risk, or the rather the reality, that seal products may be derived from seals hunted inhumanely, and that consumers will not be informed in that regard. The European Union has judged that these risks of non-fulfilment are wholly acceptable, and has adopted a measure that opens the way to considerable non-fulfilment.

910. By contrast, the alternative that Norway has outlined in this section would condition the placing on the market on compliance with animal welfare requirements. Moreover, it would make it mandatory to inform the consumer as to a product's seal content and compliance with animal welfare requirements. Therefore, the alternative would *lower* the likelihood that risks would arise from non-fulfilment of these objectives compared to the EU Seal Regime.

[1226] Paras. 677 to 712 above.

911. Also, as described in the previous section, it would make the same or a greater contribution to the other objectives of the EU Seal Regime, thus carrying an equal or lower likelihood that risk of non-fulfilment would be created in regard to those objectives.

iii. A less trade-restrictive alternative would allow the sustainable management of marine resources to a greater degree

912. In addition to the above less trade-restrictive alternative measures, Norway wishes to address a point relating to one of the European Union's objectives, namely, the sustainable management of marine resources reflected in the Sustainable Resource Management Requirements.

913. As demonstrated in paragraphs 717 to 753 above, the Sustainable Resource Management Requirements comprise: (i) trade-restrictive conditions that purport to contribute to the objective of the sustainable management of marine resources; and, (ii) trade restrictive conditions that are arbitrary and, in fact, *detract from* the objective of the sustainable management of marine resources.

914. To recall, on the one hand, the requirements that the hunt be conducted as part of a plan for the sustainable management of marine resources that uses scientific population models of marine resources and applies an ecosystem-based approach, and that the catch not exceed a total allowable catch quota established in accordance with the Management Plan, are rationally related to the objective of promoting the sustainable management of marine resources.

915. However, on the other hand, the requirements that the products be placed on the market in a "*non-systematic*" way and on a "*non-profit*" basis, and that the hunt be conducted for the "*sole purpose*" of sustainable marine resource management, impose trade restrictions that do not contribute to the achievement of that objective and, indeed, heighten the risk that efforts to sustainably manage marine resources may be undermined. This is because these additional requirements heavily restrict the efficient implementation of sustainable resource management programmes, by restricting market access for the use of seal products derived from seal hunts carried out under such programmes.

916. Therefore, a measure that maintained the requirements that contribute to the sustainable management objective,[1227] without including the requirements that undermine this objective,[1228] would be a reasonably available less trade-restrictive alternative that would make a greater contribution to the sustainable management of marine resources.

917. Such an alternative would also lower the likelihood of risks arising from non-fulfilment of the objective of managing marine resources sustainably, by eliminating arbitrary requirements that frustrate the pursuit of this an objective.

e. Conclusions on the necessity of the EU Seal Regime

918. Examining, as directed by Article 2.2 and the Appellate Body, the relation among the measure's trade-restrictiveness, the degree to which it contributes to its objectives, and the risks non-fulfilment would create, Norway submits that:

- The three sets of requirements in the measure restrict trade in products containing seal, by limiting it to: seal products hunted by persons of a particular origin; seal products hunted under resource management plans, provided they are placed on the market in a non-systematic way, and no profit is derived from them; seal products purchased the EU residents while travelling abroad, provided they are purchased "on site" and destined for personal consumption;

- These trade restrictive requirements bear no relationship to animal welfare; bear no relationship to consumer information; partly fulfil but partly undermine the sustainable management of marine resources; partly fulfil but partly undermine the personal choice of consumers;

- The trade restrictive requirements are rationally disconnected from the stated objectives, and introduce arbitrary or unjustifiable discrimination between countries where the same conditions prevail and disguised restrictions on international trade;

- The EU Seal Regime accepts non-fulfilment of its objectives on a routine basis, suggesting that the European Union attaches little importance to non-fulfilment;

- One less-trade restrictive alternative (eliminating the three sets of marketing requirements) would achieve the European Union's objectives to the same degree as the current EU Seal Regime, but without restricting trade;

[1227] Summarized *e.g.* at para. 914.
[1228] Summarized *e.g.* at para. 915.

- A second less trade-restrictive alternative (a system conditioning market access on compliance with animal welfare requirements) would achieve the European Union's objectives to a far greater degree than the current EU Seal Regime; in particular, *unlike the EU Seal Regime, it would contribute to the animal welfare of seals,* and to consumer information;

- A third less trade-restrictive alternative (a system requiring the sustainable management of marine resources, without at the same time requiring compliance with conditions that undermine sustainable management), would encourage the sustainable management of marine resources, without at the same time hindering it as instead does the current EU Seal Regime; and,

- The risks of non-fulfilment under the proposed less trade-restrictive alternative would be in some cases equal to, but in most cases lower than, under the current EU Seal Regime; moreover,

- The proposed less trade-restrictive alternatives even allow the fulfilment of an objective that is unable to justify trade restrictions pursuant to Article 2.2 of the *TBT Agreement*.

919. In view of all these elements, which Norway has substantiated in this submission, the EU Seal Regime is not "necessary" within the meaning of Article 2.2 of the *TBT Agreement.* Most strikingly, the EU Seal Regime does not contribute to its stated objectives of promoting animal welfare and thus genuinely responding to consumer concerns relating to animal welfare. Instead, the European Union could adopt, as set out above, measures that *actually* contribute to such objectives.

E. Overall conclusion under Article 2.2

920. For all the reasons set out in this section, the EU Seal Regime is inconsistent with Article 2.2 of the *TBT Agreement*.

921. In pursuing a patchwork of objectives through incoherent and often competing trade permissions and restrictions, the EU Seal Regime:

- restricts international trade;

- resorts to trade restrictions to pursue the social and economic interests of a particular class of producers, contrary to the requirements of Article 2.2 of the *TBT Agreement*;

- seeks to justify trade restrictions invoking the need to harmonize the EU internal market, contrary to the requirements of Article 2.2 of the *TBT Agreement*;

- as a whole, and through each of the Indigenous Communities, Sustainable Resource Management and Personal Use Requirements, imposes conditions that, in particular: bear no relationship to animal welfare; bear no relationship to consumer information; and detract from the sustainable management of marine resources;

- in relation to all of its various apparent objectives, the measure could be removed or replaced by a less trade-restrictive measure that is at least as capable, but in many respects more capable, to fulfil the objectives of the Regime as the existing measure; and

- the likelihood of risks arising from non-fulfilment would be lower were the EU Seal Regime to be removed or replaced by a less-trade restrictive alternative measure.

On this basis, Norway asks the Panel to find that the EU Seal Regime is inconsistent with Article 2.2 of the *TBT Agreement*.

VII. THE EU SEAL REGIME VIOLATES ARTICLE 5 OF THE *TBT AGREEMENT*

A. Introduction

922. Under the EU Seal Regime, seal products may be placed on the market, pursuant to the Indigenous Communities and Sustainable Resource Management Requirements, if they are accompanied by a certificate attesting conformity with the EU Seal Regime ("conforming seal products").[1229] However, the EU has failed to take the action necessary to implement this conformity assessment system, and to enable conforming seal products to be imported and sold. Specifically, as of the date of this submission, Norway is not aware that the European Union has designated "recognised bodies" under its conformity assessment procedures that are competent to carry out the necessary conformity assessment for all seal products, and to issue a certificate of conformity for conforming products.

923. As a result, in the preparation, adoption and application of the relevant conformity assessment procedures, the European Union has created unnecessary obstacles to trade, in violation of Article 5.1.2 of the *TBT Agreement*. Furthermore, it has failed to ensure that conformity assessment procedures are undertaken and completed as expeditiously as possible, in violation of Article 5.2.1 of the *TBT Agreement*.

[1229] *See* paragraph 924 below.

B. Overview of facts

924. The EU Seal Regime provides that seal products conforming to the terms of the Indigenous Communities or the Sustainable Resource Management Requirements may be placed on the EU market. On 10 August 2010, pursuant to legislative powers conferred under Article 3(4) of the Basic Seal Regulation,[1230] the European Commission adopted detailed provisions for assessing the conformity of seal products with the terms of these two sets of Requirements. These provisions are laid out in the Implementing Regulation.

925. To be placed on the EU market, conforming seal products must be accompanied by a certificate attesting conformity with one of these two sets of Requirements.[1231] Article 7(1) provides that only bodies that the Commission has recognized for this purpose ("recognised bodies") may issue conformity certificates.[1232] Article 6(1) of the Implementing Regulation sets out the conditions for recognition, which include: having "the capacity to ascertain"[1233] that the Indigenous Communities or Sustainable Resource Management Requirements are met; having "the ability to monitor compliance with [these] requirements";[1234] and operating "at national or regional level".[1235] The European Commission decides whether to recognize conformity assessment bodies, based on an application that must contain evidence that the entity applying for recognition fulfils these conditions.[1236]

926. Article 7(1) of the Implementing Regulation provides that a conformity certificate is to be issued by a recognized body to a trader upon request, where the Indigenous Communities or Sustainable Resource Management Requirements are met.[1237] Such a certificate must provide the following information: the name of the recognized body issuing the certificate; the certificate number; the country "of [the] taking" of the seal; the country "of placing on the market"; the scientific name of the seal species; the relevant HS heading;

[1230] These legislative powers were conferred on the Commission pursuant to Article 202 of the Treaty establishing the European Community ("EC Treaty"). For conferrals of power on or after 1st December 2009, Article 291 of the Treaty on the functioning on the European Union has replaced, in modified form, the relevant portion (third indent) of Article 202 of the Treaty establishing the European Community, together with Article 290 of the Treaty on the functioning of the European Union. TFEU Articles 290 and 291, Exhibit NOR-73. The Commission's delegated legislative powers were exercised within the legislative framework of Council Decision 1999/468, Exhibit NOR-74. *See* footnote 253 above.
[1231] Implementing Regulation, Exhibit JE-2, Articles 3(2), 5(2) and 7(6).
[1232] Implementing Regulation, Exhibit JE-2, Article 7(1).
[1233] Implementing Regulation, Exhibit JE-2, Article 6(1)(b).
[1234] Implementing Regulation, Exhibit JE-2, Article 6(1)(e).
[1235] Implementing Regulation, Exhibit JE-2, Article 6(1)(h).
[1236] Implementing Regulation, Exhibit JE-2, Article 6(2).
[1237] Implementing Regulation, Exhibit JE-2, Article 7(1).

the weight and number of units of the goods; whether they bear any distinguishing mark; and whether they conform with the Indigenous Communities or Sustainable Resource Management Requirements.[1238]

927. Article 9(1) of the Implementing Regulation sets forth that Member States of the European Union must each designate "one or several competent authorities",[1239] both to control the issuance of conformity assessment certificates, and to control conformity assessment certificates that have been already issued and on which "enforcement officers" have doubts.[1240]

928. To date, the Commission has not published, notified, or otherwise informed Norway of the designation of any recognized body competent to issue conformity certificates. Norway is aware of requests for entities to be included in the list of recognized bodies.[1241] In the absence of information from the European Union, Norway contacted the countries that, in its understanding, have made a request but, as of 5 November 2012, had not been informed of whether any bodies had been recognized.[1242] Hence, although the EU Seal Regime mandates that recognized bodies assess the conformity of seal products with the Requirements as a precondition for permitting the import of conforming seal products, the European Union has failed to take necessary action to ensure that such an assessment can occur.

929. Instead, as noted, the European Union has merely laid down qualifying requirements that must be met for an "entity" to be "included in a list of recognised bodies";[1243] and envisaged that entities desiring recognition submit a request to the Commission.[1244]

930. As a result, the ability of foreign traders to trade in conforming seal products depends wholly on a third party "entity" desiring to seek, and securing, approval from the European Union to act as a recognized body with competence to assess the conformity of those seal

[1238] Implementing Regulation, Exhibit JE-2, Annex, incorporated by reference into Article 7(1).
[1239] Implementing Regulation, Exhibit JE-2, Article 9(1).
[1240] Implementing Regulation, Exhibit JE-2, Articles 7(7) and 9(1).
[1241] Norway understands that, on 23 February 2011, the Danish Ministry of Foreign Affairs submitted a request for the Greenland Department for Fisheries, Hunting and Agriculture (APNN) to be included: *see* email of 23 February 2011 from Caspar Stenger Jensen, Head of Section, Department for Northern Europe, Ministry of Foreign Affairs of Denmark, Exhibit NOR-106. Norway also understands that Sweden has made a request for recognition.
[1242] In the event of existence of recognized bodies, Norway reserves its right to present evidence and arguments in relation to the relevant claims set out in its request for the establishment of a panel (WT/DS401/5).
[1243] Implementing Regulation, Exhibit JE-2, Article 6(1).
[1244] Implementing Regulation, Exhibit JE-2, Article 6(2).

products. For its part, besides "allowing" a third party to express interest in becoming a recognized body, the European Union has *not* designated any recognized body that is competent to assess conformity for all seal products and, if applicable, issue conformity certificates.

931. The consequence of the European Union's conformity assessment procedures is, therefore, that conforming seal products cannot be placed on the EU market because of the European Union's failure to designate recognized bodies. The omission to designate a recognized body creates an unnecessary obstacle to international trade.

C. The legal standard under Article 5.1.2 of the *TBT Agreement*

932. The *chapeau* of Article 5.1 and its second subparagraph together read:

> 5.1 *Members shall ensure that*, in cases where a positive assurance of conformity with technical regulations or standards is required, *their central government bodies apply the following provisions to products originating in the territories of other Members*:
>
> […]
>
> 5.1.2 *conformity assessment procedures are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade*. This means, *inter alia*, that conformity assessment procedures shall not be more strict or be applied more strictly than is necessary to give the importing Member adequate confidence that products conform with the applicable technical regulations or standards, taking account of the risks non-conformity would create. (emphasis added)

933. Thus, the *chapeau* of Article 5.1 begins by setting out the scope of application of the provision. Article 5.1 applies "where a positive assurance of conformity with technical regulations or standards is required". Next, the *chapeau* provides that in such cases, the Member requiring certification must ensure that its central government bodies "apply [a number of] provisions to products originating in the territories of other Members". In other words, Members must ensure that their central government bodies honour the obligations set forth in these provisions.

934. Article 5.1.2 specifies one such obligation, namely that "conformity assessment procedures are not *prepared, adopted or applied* with a view to or with the effect of creating

unnecessary obstacles to international trade". This obligation has broad scope, covering the *preparation, adoption and application* of conformity assessment procedures by any central government bodies. In accordance with Article 31(1) of the *Vienna Convention on the Law of Treaties* ("VCLT"), the ordinary meaning to be given to these terms must be determined in light of their text, context and the object and purpose of the *TBT Agreement*.

935. As acknowledged by the Appellate Body, dictionary definitions are a useful starting point in determining ordinary meaning.[1245] The *Oxford English Dictionary* defines the three terms italicised above as follows:

> To "prepare": to bring into a suitable condition for some future action or purpose; to make ready in advance; to fit out, equip.[1246]
>
> To "adopt": to approve or accept (a report, proposal, resolution, etc.) formally; to ratify.[1247]
>
> To "apply": to bring (a rule, a test, a principle, etc.) into contact with facts; to bring to bear practically, to put into practical operation.[1248]

936. Read jointly, the above definitions show that the scope of application of the obligation in Article 5.1.2 of the *TBT Agreement* covers the entire lifetime of conformity assessment procedures, starting with their *conception and design* ("preparation"), extending through their *promulgation* ("adoption"), and encompassing their *administration* ("application").

937. As also stated by Article 5.1.2, conformity assessment procedures must not be prepared, adopted and applied "with a view to or *with the effect of* creating unnecessary obstacles to international trade." In other words, the preparation, adoption and application of conformity assessment procedures may not be conducted in a manner that *brings about the result* ("with the effect") of unnecessary obstacles to international trade.

938. The purpose of ensuring that technical regulations, and the procedures for assessing conformity with them, do not create unnecessary obstacles to international trade, lies at the

[1245] *See, e.g.,* Appellate Body Report, *EC – Chicken Cuts*, paras. 175-176.
[1246] The Oxford English Dictionary, OED Online, Oxford University Press, accessed 8 November 2012, http://www.oed.com/view/Entry/150447?result=2&rskey=BYaOKG&, *prepare*, Exhibit NOR-107.
[1247] The Oxford English Dictionary, OED Online, Oxford University Press, accessed 8 November 2012, http://www.oed.com/view/Entry/2665?redirectedFrom=adopt&, *adopt*, Exhibit NOR-108.
[1248] The Oxford English Dictionary, OED Online, Oxford University Press, accessed 8 November 2012, http://www.oed.com/view/Entry/9724?isAdvanced=false&result=2&rskey=ajdctG&, *apply*, Exhibit NOR-109.

heart of the *TBT Agreement*. This purpose is stated in the fifth recital of the Preamble,[1249] and is reflected in the disciplines on technical regulations (Article 2.2), standards (Annex 3, paragraph E) and conformity assessment (Article 5.1.2, incorporated by reference into Articles 7.1, 7.4, 8.1, 8.2, 9.2 and 9.3), as well as in special and differential treatment provisions for developing country Members (Articles 12.3 and 12.7), each of which forms part of the relevant context.

939. In the phrase "unnecessary obstacle to international trade", the word "obstacle" refers to a "hindrance, impediment, or obstruction".[1250] Creating an obstacle is "unnecessary" when the obstacle could be eliminated without prejudicing the legitimate interests and objectives of the Member concerned.

D. The EU Seal Regime violates Article 5.1.2 of the *TBT Agreement*

940. As noted, under Article 3 of the Basic Seal Regulation and Articles 3(2) and 5(2) of the Implementing Regulation, trade in conforming seal products is, in principle, permitted, *provided that* the products are accompanied by a conformity certificate issued by a recognized body. Thus, through these certificates, the EU Seal Regime requires "a positive assurance of conformity with technical regulations", within the meaning of Article 5.1.

941. Under Article 5.1.2, the European Union was (and is) obliged to ensure that, when preparing, adopting and applying the conformity assessment procedures, its central government bodies did not create any unnecessary obstacles to international trade.

942. Under Article 3(4) of the Basic Seal Regulation, the EU legislator conferred authority on the Commission to prepare and adopt conformity assessment procedures, and to administer those procedures. For purposes of Article 5 of the *TBT Agreement*, the Commission is a "central government body" of the European Union, given that it serves as

[1249] *See* also, *e.g.*, Panel Report, *US – Tuna II (Mexico)*, para. 7.225: "As expressed in the preamble of the *TBT Agreement*, this Agreement reflects the intention of the negotiators to: '[E]nsure that technical regulations and standards, including packaging, marking and labelling requirements, and procedures for assessment of conformity with technical regulations and standards do not create unnecessary obstacles to trade.'"
[1250] The Oxford English Dictionary, OED Online, Oxford University Press, accessed 8 November 2012, http://www.oed.com/view/Entry/129940?isAdvanced=false&result=1&rskey=JZQw0w&, *obstacle*, Exhibit NOR-110.

the central executive agency of the European Union under the Treaty on the European Union.[1251]

943. The European Union has violated Article 5.1.2 because the Commission has prepared, adopted and applied conformity assessment procedures in a way that unnecessarily obstructs international trade.

944. Specifically, the Commission has prepared and adopted conformity assessment procedures that lack an essential element needed to enable trade to occur. That lacuna is the Commission's failure to designate a recognized body competent to assess conformity and to issue conformity certificates for conforming seal products. Hence, there is no recognized body available to traders to certify conforming seal products.

945. Instead, if a third party is willing to assume the responsibility of being a recognized body, the Commission has permitted it to apply to become a recognized body, and will decide if it meets the criteria for being such a body. Unless and until such an application is made and approved, no trade in conforming seal products is possible, because there is no body competent to assess and certify conformity. As noted in paragraph 928 above, as far as Norway is aware, recognition has been sought in relation to some entities, with requests dating back to at least February 2011; however, more than twenty months later, Norway is not aware that the recognition process has been completed.[1252]

946. Furthermore, even if a third party were approved as a recognized body, that body could decide at any time to cease fulfilling that role, or the Commission could withdraw its approval, again leaving an institutional lacuna in the conformity assessment procedures.

947. As a result, the Commission has made the effectiveness of its conformity assessment procedures depend entirely on the extent of the willingness of third parties to act as recognized bodies. Traders in conforming seal products have no control whatsoever over whether they will be able to trade in those products, but are reliant on a third party

[1251] *See* Article 17 of the Treaty on European Union, Exhibit NOR-48.
[1252] *See* para. 928 above.

successfully seeking to become a recognized body. A Member cannot make third parties responsible for the performance of its WTO obligations.[1253]

948. Consequently, the Commission's conformity assessment procedures are ineffective due to an institutional lacuna. Whereas the procedures must *facilitate* trade by enabling trade in conforming seal products, the procedures have been prepared and adopted, and are applied, in a manner that makes trade *impossible*. The certification that traders require to trade in conforming seal products cannot even be requested, much less secured, because there is no body competent to receive, examine, or approve applications for certification.

949. Hence, the institutional lacuna in the conformity assessment procedures prepared, adopted, and applied by the Commission creates an effective ban on trade in these products. A ban on the importation of conforming seal products is, of course, the most trade-restrictive obstacle to trade in these products that can be envisaged.[1254]

950. This ban is unnecessary because the Commission could have designated a "default" recognized body that would be competent, at all times, to assess and certify conformity. This body could have been designated at the level of the European Union – it could even have been the Commission itself – or the Commission could have established a series of regional bodies within the European Union. Such a system would ensure that the Commission's 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.

951. Such a system would facilitate, and not ban, trade in conforming seal products. At the same time, the Commission could retain the flexibility of allowing third party entities to apply to become recognized bodies, which could function alongside the Commission's designated body.

E. The legal standard under Article 5.2.1 of the *TBT Agreement*

952. Article 5.2.1 of the *TBT Agreement* provides:

[1253] *See, e.g.*, Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 117; and Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, paras. 7.309-7.310.
[1254] Panel Report, *Brazil – Tyres*, para. 7.114.

> 5.2 When implementing the provisions of paragraph 1, Members shall ensure that:
>
> 5.2.1 conformity assessment procedures are undertaken and completed *as expeditiously as possible* and in a no less favourable order for products originating in the territories of other Members than for like domestic products (emphasis added)

953. Thus, Article 5.2.1 requires Members to ensure that conformity assessment procedures are "undertaken and completed as *expeditiously as possible*" and in a non-discriminatory manner.

954. The ordinary meaning of the term "expeditiously" refers to action taken as speedily as possible, without compromising the quality or effectiveness of the action at issue. Hence, the obligation that conformity assessment procedures be undertaken and completed as expeditiously as possible does not require exaggerated haste. At the same time, the phrase does not allow any unjustified delay.

955. In this way, the provisions of Article 5.2.1 of the *TBT Agreement* are similar to those of Annex C(1)(a) of the *SPS Agreement*, which require control, inspection and approval procedures to be undertaken and completed without "undue delay". The panel in *EC – Approval and Marketing of Biotech Products* held that assessing compliance with this timeliness requirement calls for consideration whether a delay is reasonable in the circumstances, having regard to what is required to be assessed under the relevant procedure. Thus, the time taken to commence and complete an approval procedure may include the time "reasonably needed to check and ensure fulfilment of its relevant SPS requirements"; however, taking more time than reasonably needed to conduct an approval process would cause "undue delay".[1255]

956. The same holds true under the *TBT Agreement*. Under Article 5.2.1, a conformity assessment procedure may be permitted to take the time needed reasonably to check and ensure that relevant requirements of a technical regulation are fulfilled. However, a Member would fail in its duty under Article 5.2.1 to ensure that conformity assessment procedures "are undertaken and completed as expeditiously as possible" if, through the Member's inaction, the procedure is prevented from being undertaken and completed at all, or is

[1255] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1499.

otherwise slowed beyond what is necessary reasonably to check and ensure the conformity of particular products with relevant requirements.

957. Indeed, in order to honour the obligation set forth in Article 5.2.1, it is not sufficient that the procedures be *commenced* as expeditiously as possible; they must also be *completed* as expeditiously as possible, thus creating legal security for the traders of products subject to conformity assessment procedures.

F. The EU Seal Regime violates Article 5.2.1 of the *TBT Agreement*

958. As already explained, the Commission's conformity assessment procedures suffer from an institutional lacuna because no "default" recognized body has been designated to receive, examine, or approve applications for certification. As a result of this institutional lacuna, there is no legal mechanism to ensure that the conformity assessment procedures can be "undertaken" or "completed".

959. Procedures that can *never be commenced* due to an institutional lacuna 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.

960. 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". As noted, it would be perfectly "possible" for the European Union to conduct its procedures more rapidly than by imposing infinite delay. Specifically, the Commission could enable the conformity assessment procedures to be undertaken, and completed, by designating a recognized 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.

961. Consequently, through failing to designate any recognized body capable of assessing conformity with the Indigenous Communities and Sustainable Resource Management Requirements, the European Union fails to ensure that conformity assessment procedures can be undertaken and completed at all. 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.

VIII. THE APPLICATION BY THE EUROPEAN UNION OF THE EU SEAL REGIME NULLIFIES OR IMPAIRS BENEFITS ACCRUING TO NORWAY UNDER THE GATT 1994

A. Introduction

962. Pursuant to Article XXIII:1(b) of the GATT 1994, Norway claims that the application of the EU Seal Regime nullifies or impairs benefits accruing to Norway under the GATT 1994 with respect to seal products not permitted to be sold on the EU market, whether or not the EU Seal Regime conflicts with the GATT 1994. Such claims are commonly referred to as "non-violation" complaints, although, as the Appellate Body has noted, the term "non-violation" is not treaty language.[1256]

B. Overview of facts

963. Norway pursues claims under Article XXIII:1(b) with respect to all products containing seal. These include: seal meat and meat offal; seal blubber; seal oil; seal oil capsules; food preparations containing seal; feed preparations containing seal; pharmaceutical and nutraceutical products containing seal; miscellaneous chemical products containing seal; seal heart valves; seal skins, with or without fur; seal leather; articles of clothing, accessories, jewelry and other apparel containing seal; and souvenir articles containing seal.

964. The range of products concerned is vast. Pursuant to the Basic Seal Regulation, the Commission has published an indicative list of "those CN codes with the greatest likelihood of covering products subject to" the EU Seal Regime. This list spans 22 Chapters of the European Union's tariff nomenclature.[1257]

965. With respect to these products, the European Union has granted market access concessions to Norway in the last two rounds of trade negotiations. The market access concessions that the European Union has granted for these products in the Tokyo Round and the Uruguay Round are set out in Exhibit JE-42.

966. The adoption of the EU Seal Regime, which restricts the importation of seal products solely to products that meet the Indigenous Communities, Sustainable Resource Management, or Personal Use Requirements, has nullified the value of these market access concessions with regard to seal products. As a result, since 20 August 2010, Norway has

[1256] Appellate Body Report, *EC – Asbestos*, para. 185.
[1257] Technical Guidance Note, Exhibit JE-3.

been unable to benefit from the market access concessions that the European Union granted Norway for seal products.

C. Claims for nullification or impairment of benefits under Article XXIII:1(b) of the GATT 1994

967. In this section, we outline the legal standard under Article XXIII:1(b) of the GATT 1994 relating to claims that benefits accruing under the covered agreements have been nullified or impaired.

1. Overview of the non-violation nullification or impairment claim

968. Article XXIII:1(b) of the GATT 1994 reads as follows:

> If any Member should consider that any *benefit* accruing to it directly or indirectly under this Agreement is being *nullified or impaired* ... as the result of
>
> ...
>
> (b) the *application* by another Member of any *measure*, whether or not it conflicts with the provisions of this Agreement ... (emphasis added)

969. The purpose of Article XXIII of the GATT 1994 was eloquently expressed by the negotiators of the Havana Charter in the following statement:

> We shall achieve ..., if our negotiations are successful, *a careful balance of the interests* of the contracting parties. This balance rests upon certain assumptions as to the character of the underlying situation in the years to come. And it involves a mutuality of obligations and benefits. *If, with the passage of time, the underlying situation should change or the benefits accorded any contracting party should be impaired, the balance would be destroyed. It is the purpose of Article XXIII to restore this balance by providing for a compensatory adjustment in the obligations which the contracting party has assumed. What we have really provided, in the last analysis, is not that retaliation shall be invited or sanctions invoked, but that a balance of interest, once established, shall be maintained.*[1258]

[1258] GATT Negotiating Group on Dispute Settlement, *Non-Violation Complaints under GATT Article XXIII:2 – Note by the Secretariat*, MTN.GNG/NG13/W/31 (14 July 1989), ("MTN.GNG/NG13/W/31"), Exhibit JE-41, p. 6.

970. Echoing these sentiments, and referring to the negotiating history, the GATT panel in *EEC – Citrus* noted that:

> … the basic purpose of Article XXIII:1(b) was to provide for offsetting or compensatory adjustment in situations in which the balance of rights and obligations of the contracting parties had been disturbed (see page 5 of document E/PC/T/A/PV/6 of 2 June 1947). *One of the fundamental benefits accruing to the contracting parties under the General Agreement, therefore, was the right to such adjustment in situations in which the balance of their rights and obligations had been upset to their disadvantage*.

971. The WTO's adjudicative bodies have similarly said that:

> The idea underlying [Article XXIII:1(b)] is that the improved competitive opportunities that can legitimately be expected from a tariff concession can be frustrated not only by measures proscribed by the General Agreement but also by measures consistent with that Agreement. *In order to encourage contracting parties to make tariff concessions they must therefore be given a right of redress when a reciprocal concession is impaired by another contracting party as a result of the application of any measure*, whether or not it conflicts with the General Agreement.[1259]

972. With a particular focus on the benefits of tariff concessions, WTO panels and the Appellate Body have said that:

> A basic object and purpose of the GATT 1994, as reflected in Article II, is to *preserve the value of tariff concessions negotiated by a Member with its trading partners, and bound in that Member's Schedule*.[1260]

973. In the same vein, the panel in *Japan – Film* observed that "safeguarding the process and the results of negotiating reciprocal concessions under Article II is fundamental to the balance of rights and obligations to which all WTO Members subscribe".[1261]

974. Article XXIII:1(b) is a crucial element in "safeguarding" tariff concessions, ensuring that, if one Member adopts a measure disturbing the "careful balance of interests" of rights

[1259] GATT Panel Report, *EEC – Oilseeds I*, para. 144, cited with approval in Appellate Body Report, *EC – Asbestos*, para. 185; and Panel Report, *Japan – Film*, para. 10.35.
[1260] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 47; Panel Report, *US – Certain EC Products*, para. 6.57; and Panel Report, *China – Auto Parts*, para. 7.201.
[1261] Panel Report, *Japan – Film*, para. 10.35.

and obligations under the GATT 1994, other Members are able to seek an adjustment to rectify that imbalance.

975. The panel in *Japan – Film* held that the legal standard under Article XXIII:1(b) involves three elements that a complainant must demonstrate in order to prevail in a non-violation claim:

> (1) application of a measure by a WTO Member; (2) a benefit accruing under the relevant agreement; and (3) nullification or impairment of the benefit as the result of the application of the measure.[1262]

976. We elaborate, in turn, on each element of the claim.

2. Application of a measure

977. The first element that a complainant must establish under Article XXIII:1(b) is "the application of [a] measure". In *Japan – Film* the panel noted that the "ordinary meaning of measure as it is used in Article XXIII:1(b) certainly encompasses a law or regulation enacted by a government".[1263] In *EC – Asbestos*, the relevant measure was a French Decree that established "an import and marketing ban".[1264]

3. Benefit accruing under the GATT 1994

a. Ordinary meaning of the word "benefit" as an advantage

978. A claim under Article XXIII:1(b) concerns particular "benefits" accruing to the complainant under the GATT 1994. In *Canada – Aircraft*, the Appellate Body noted that the dictionary meanings of the word "benefit" include "advantage", "good", "gift", "profit", or, more generally, "a favourable or helpful factor or circumstance".[1265] The Appellate Body also endorsed the panel's conclusion that "the ordinary meaning of 'benefit' clearly encompasses *some form of advantage*".[1266]

979. Although these findings were made in the context of Article 1.1(b) of the *Agreement on Subsidies and Countervailing Measures* ("*SCM Agreement*"), the word "benefit" in Article

[1262] Panel Report, *Japan – Film*, para. 10.41.
[1263] Panel Report, *Japan – Film*, para. 10.43.
[1264] Panel Report, *EC – Asbestos*, para. 8.284.
[1265] Appellate Body Report, *Canada – Aircraft*, para. 153.
[1266] Appellate Body Report, *Canada – Aircraft*, para. 153.

XXIII of the GATT 1994 has a similar meaning, referring to the "advantage" conferred on a WTO Member as a result of the operation of a particular provision of the GATT 1994.

b. The "benefit" of market access opportunities

980. In all but one of the GATT and WTO disputes under Article XXIII:1(b), the "benefits" at issue were alleged to accrue to the complainant pursuant to tariff concessions granted by the respondent under Article II:1 of the GATT.[1267] In this dispute, Norway relies on the nullification or impairment of its benefits under this provision.

981. Under Article II:1, Members have made specific market access commitments regarding virtually all traded goods in the form of tariff concessions. Pursuant to these commitments, Members agree that they will not impose tariffs on imports in excess of the rate bound in their Schedule of Commitments. The nature and purpose of this commitment has been addressed by several GATT and WTO panels and the Appellate Body.

982. In *EC – Information Technology Products*, the panel interpreted tariff concessions under Article II:1 of the GATT 1994 in light of the treaty's object and purpose. The panel recalled that:

> As stated in the preamble of the *WTO Agreement*, one of the purposes [of the multilateral trading system] is to "expand[] … trade in goods and services". Members should contribute to this objective "by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade".[1268]

983. The panel in *EC – Information Technology Products* further described tariff concessions as "*important market access guarantees*".[1269] The GATT panel in *EEC – Oilseeds I* referred to "the improved c*ompetitive opportunities* that can legitimately be expected from a tariff concession",[1270] and observed that "the main value of a tariff

[1267] Panel Report, *Japan – Film*, para. 10.61, including the GATT panel reports cited in footnote 1528. One GATT panel examined whether a measure nullified or impaired benefits accruing under Article I:1 of the GATT 1994 (GATT Panel Report, *EC – Citrus*, para. 4.36).
[1268] Panel Report, *EC – Information Technology Products*, para. 7.543.
[1269] Panel Report, *EC – Information Technology Products*, para. 7.757.
[1270] GATT Panel Report, *EEC – Oilseeds I*, para. 144, cited with approval in Appellate Body Report, *EC – Asbestos*, para. 185; and Panel Report, *Japan – Film*, para. 10.35.

concession is that it provides *an assurance of better market access* through improved price competition".[1271]

984. In sum, tariff concessions are legitimately expected to confer the benefit of improved *market access and competitive opportunities* on the *g*oods of exporting Members.

c. Establishing that the measure at issue was not reasonably anticipated

985. In demonstrating the nullification or impairment of the anticipated benefits of a tariff concession under Article XXIII:1(b), panels have examined *whether the complainant should reasonably have anticipated that the respondent would adopt the measure(s) at issue*. If the respondent should have anticipated the adoption of the measure, it could not legitimately have expected continuing market access benefits from the tariff concession.

986. The issue is not merely whether the complainant should have expected the adoption of "*any*" measure affecting market access under the relevant concessions, but whether it should have anticipated *a measure of the type that was adopted*.[1272]

987. The reasonableness of the respondent's anticipation is judged by reference to the *moment at which the relevant tariff negotiations were concluded* – for example, 15 December 1993 for the Uruguay Round negotiations.[1273] The choice of this point in time as the relevant reference underscores the vital importance of the reciprocal exchange of concessions among Members in the multilateral negotiating dynamic.

988. The exchange by Members of reciprocal concessions has constituted a cornerstone of the multilateral trading system since the negotiation of the Havana Charter. Through a series of eight multilateral rounds of tariff negotiations culminating in the Uruguay Round, Members have progressively committed to reducing and, in some cases, eliminating tariffs on goods. The premise for these tariff negotiations is that each Member guarantees market access opportunities to the products of its trading partners in return for reciprocal guarantees from its trading partners for access to their respective markets. The products for which each

[1271] GATT Panel Report, *EEC – Oilseeds I*, para. 144, cited with approval in Appellate Body Report, *EC – Asbestos*, para. 185; and Panel Report, *Japan – Film*, para. 10.35.
[1272] Panel Report, *Japan – Film*, paras. 10.79, 10.124 and 10.125; Panel Report, *EC – Asbestos*, para. 8.291(a); and Panel Report, *EEC – Oilseeds I*, para. 14.
[1273] Panel Report, *Japan – Film*, para. 10.81.

Member benefits may differ from Member to Member, but the spirit of the exchange underlying the negotiations is always the same.

989. At the conclusion of the negotiations, in deciding whether to accept the results of the round, the negotiating parties must weigh the relative value of the market access offers they have made and received. At that crucial moment in time, negotiating proposals are transformed into binding legal commitments. The parties agree to transform negotiating proposals into such commitments on the basis of the value that they ascribe, at that moment, to the concessions they will secure and cede. Hence, the respondent's anticipation must be assessed at the time it secured a tariff concession and ceded reciprocal concessions in return.

990. In assessing whether a measure was anticipated, panels have relied on a rebuttable presumption that a respondent does *not* anticipate the adoption of measures introduced after the conclusion of the tariff negotiations at issue. In *Japan – Film*, the panel held:

> ... in the case of measures shown by the [complainant] to have been introduced ***subsequent*** to the conclusion of the tariff negotiations at issue, it is our view that ***the [complainant] has raised a presumption*** that it should not be held to have anticipated these measures and it is then ***for [the respondent] to rebut that presumption***. …[1274]

991. Again, this presumption reflects the vital importance of reciprocal concessions in the give and take of the multilateral negotiating dynamic. In the negotiations, when being offered tariff concessions, each party must be able to rely, in good faith, on an expectation that the concessions being offered by its trading partners will confer market access opportunities, and that these concessions will not be rendered worthless by subsequent countervailing regulatory action on the part of the offering Member.

992. Equally, when offering tariff concessions of its own, a party must do so in good faith, expecting that its trading partners will reasonably anticipate that the proposed concessions will confer market access opportunities.

993. In other words, the negotiations *necessarily* proceed on the *basic presumption* that all negotiating parties reasonably rely on the tariff concessions proposed by their trading partners having market access value. This presumption is not only entirely reasonable, but *essential* to

[1274] Panel Report, *Japan – Film*, para. 10.79. (emphasis and underlining added)

the proper functioning of the negotiations. To facilitate the exchange of concessions, Members must be able to presume, in good faith, that concessions will confer market access.

994. This presumption is carried over to Article XXIII:1(b): a tariff concession made by a Member is presumed to confer market access "benefits", unless the party making the concession shows that its trading partners, as the intended beneficiaries of this concession, should reasonably have anticipated, during the negotiations, that the concession would be nullified by a measure like the one at issue.

995. For example, during the negotiations, an offering party might warn its trading partners of its intent to adopt a measure that will nullify the concessions being offered. Or, in a dispute, it may be able to point to circumstances known to its trading partners, at the time of the negotiations, that reasonably enabled the complainant to anticipate the adoption of the measure at issue.

996. In *Japan – Film*, the panel considered how a respondent might rebut the presumption of reasonable reliance on the benefit of proposed tariff concessions:

> Such a *rebuttal* might be made, for example, by establishing that the measure at issue is *so clearly contemplated* in an earlier measure that the [complainant] should be held to have anticipated it. However, there must be a clear connection shown. In our view, it is *not sufficient* to claim that a specific measure should have been anticipated because it is consistent with or a continuation of a past *general* government policy. … [W]e do not believe that it would be appropriate to charge the [complainant] with having reasonably anticipated all GATT-consistent measures … . Nor do we consider that as a general rule the [complainant] should have reasonably anticipated [] measures [adopted by the respondent] that are similar to measures in other Members' markets. In each such instance, the issue of reasonable anticipation needs to be addressed on a case-by-case basis.[1275]

d. Benefits accruing under successive rounds of negotiations

997. Tariff concessions with respect to any given product have typically been made by WTO Members in a series of eight successive rounds of multilateral negotiations. A complainant is entitled to make claims under Article XXIII:1(b) of the GATT 1994 regarding

[1275] Panel Report, *Japan – Film*, para. 10.79. (emphasis added)

the nullification or impairment of benefits accruing under successive tariff concessions regarding a particular product.

998. The legal content of the GATT 1994 is determined by the so-called GATT Incorporation Clause, which provides in paragraph 1(b)(i) that the GATT 1994 incorporates both "protocols and certifications relating to tariff concessions", without temporal limitation. As a result, as the panel in *Japan – Film* held:

> … all protocols relating to tariff concessions, both those predating the Uruguay Round and the Marrakesh Protocol to GATT 1994, are incorporated into GATT 1994 and continue to have legal existence under the WTO Agreement.[1276]

999. The continued legal effect of an earlier tariff concession for a good would only be in doubt if a subsequent tariff concession were in conflict, making it impossible for a Member to comply simultaneously with its obligations under the two tariff concessions. However, if a subsequent concession is the same as, or improves upon, an earlier concession, a Member can perfectly well comply with its obligations under both concessions, and no conflict arises.

4. Nullification or impairment of the benefit as a result of the application of the measure

1000. Under Article XXIII:1(b), the complainant must show that the nullification or impairment of the tariff concession is caused, at least in part, by the challenged measure. In *Japan – Film*, the panel held that, to satisfy this requirement, the measure at issue must make a "more than *de minimis* contribution to nullification or impairment".[1277]

1001. The manner in which a measure may be shown to nullify or impair a benefit depends on the facts of the case, including the type of measure at issue. In *EC – Asbestos*, the measure at issue imposed a ban, with a limited exception, on the sale and marketing of a product that benefitted from a tariff concession. On the question of nullification or impairment, the panel observed simply that a ban, "[b]y its very nature … constitutes a denial of any opportunity for competition".[1278]

1002. In other cases, panels have explored whether:

[1276] Panel Report, *Japan – Film*, para. 10.64.
[1277] Panel Report, *Japan – Film*, paras. 10.84.
[1278] Panel Report, *EC – Asbestos*, para. 8.289.

> the competitive position of the imported products subject to and benefitting from a relevant market access (tariff) concession is being upset by ("nullified or impaired ... as the result of") the application of a measure not reasonably anticipated.[1279]

1003. Such instances of "upsetting"[1280] of the competitive relationship have been found to occur where measures are introduced that favour domestic over imported products, contrary to the reasonable expectations of the exporting Member at the time of a tariff concession.[1281] The competitive relationship would equally be upset by measures favouring imports from one source over imports from another. In both cases, the relative competitive situation of products in the marketplace is disturbed, and the benefit of market access impaired, as a result of the preferential treatment accorded to products from other sources.

D. The European Union nullifies or impairs benefits accruing in respect of seal products

1004. Norway makes claims under Article XXIII:1(b) of the GATT 1994 regarding the nullification or impairment of tariff concessions in respect of the seal products listed in Exhibit JE-42, granted in the Tokyo Round and Uruguay Round of multilateral trade negotiations. The relevant tariff concessions, per tariff line and negotiating round, are also listed in Exhibit JE-42.

1005. As Norway details below, the application of the EU Seal Regime nullifies or impairs the benefits accruing to Norway, pursuant to Article II:1 of the GATT 1994, under these tariff concessions, and Norway could not have reasonably anticipated, at the time of agreeing the concessions, that the EU Seal Regime would be introduced.

1. The application of the EU Seal Regime

1006. As noted by the panel in *Japan – Film*, a law or regulation enacted by a government is "certainly" a measure within the meaning of Article XXIII:1(b).[1282]

[1279] Panel Report, *Japan – Film*, para. 10.82, citing with approval GATT Panel Report, *EEC – Oilseeds I*; GATT Working Party Report, *Australian Subsidy on Ammonium Sulphate*; and GATT Panel Report, *Germany – Sardines*.

[1280] GATT Panel Report, *Germany – Sardines*, para. 16.

[1281] *See, e.g.*, GATT Panel Report, *EEC – Oilseeds I*; GATT Working Party Report, *Australian Subsidy on Ammonium Sulphate* ; and GATT Panel Report, *Germany – Sardines*.

[1282] Panel Report, *Japan – Film*, para. 10.43.

1007. Norway's claims under Article XXIII:1(b) concern the application of the EU Seal Regime, in particular the restriction on importation of seal products only to products that meet the Indigenous Communities, Sustainable Resource Management or Personal Use Requirements. These requirements effectively *prevent* importation of seal products from Norway. The EU Seal Regime comprises the Basic Seal Regulation and the Implementing Regulation, both of which are legislative enactments of the European Union. The Basic Seal Regulation was adopted by the European Parliament and Council together, pursuant to the legislative powers conferred on them under Articles 95 and 251 of the Treaty establishing the European Community ("EC Treaty").[1283] The Implementing Regulation was adopted by the Commission, pursuant to legislative powers conferred on that institution under Article 3(4) of the Basic Seal Regulation, pursuant to Article 202 of the EC Treaty.[1284]

1008. Therefore, Norway's claim under Article XXIII:1(b) concerns the application of measures attributable to the European Union.

2. The benefits accruing to Norway with regard to seal products pursuant to Article II:1 of the GATT 1994

a. The tariff concessions for seal products confer benefits on Norway

1009. For all the seal products listed in Exhibit JE-42, the European Union has, through successive rounds of negotiations, committed to providing access to its market, at tariff rates not exceeding those bound pursuant to Article II:1 of the GATT 1994. Thus, a benefit accrues to Norway under Article II:1, in the form of "market access guarantees"[1285] for these products. As noted in past cases, the benefit relates not to actual trade flows, but to "opportunities", or "conditions", for competition.[1286]

[1283] Basic Seal Regulation, Exhibit JE-1, Preamble. On 1st December 2009, these provisions have been replaced by Articles 114 and 294 of the Treaty on the Functioning of the European Union.
[1284] For conferrals of power on or after 1st December 2009, Article 291 of the Treaty on the functioning on the European Union has replaced, in modified form, the relevant portion (third indent) of Article 202 of the Treaty establishing the European Community, together with Article 290 of the Treaty on the functioning of the European Union. TFEU Articles 290 and 291, Exhibit NOR-73. The Commission's implementing powers were exercised within the framework of Council Decision 1999/468, Exhibit NOR-74. *See* footnote 253 above.
[1285] *See* Panel Report, *EC – Information Technology Products*, para. 7.757.
[1286] *See, e.g.*, Follow-up on the Panel Report, *EEC – Oilseeds I*, BISD 39S/91, 114-115, para. 77, cited with approval in Panel Report, *Japan – Film*, para. 10.82; Panel Report, *Japan – Film*, para. 10.38; Panel Report, *EC – Asbestos*, para. 8.289.

b. The EU Seal Regime was not reasonably anticipated by Norway

i. Introduction

1010. In paragraphs 985 to 996, we outlined the legal standard for assessing whether a challenged measure was reasonably anticipated by a complainant. In short, there are three key points: (1) the complainant must have reasonably anticipated the adoption of a measure like the *particular measure at issue*; (2) the complainant's reasonable anticipation must be assessed at the *time of the conclusion of the negotiations* resulting in the relevant tariff concession; and (3) there is a *rebuttable presumption* that the complainant did not reasonably anticipate the adoption of the measure if it was adopted subsequent to the conclusion of the negotiations. We begin with the latter point.

ii. There is a presumption that Norway did not reasonably anticipate the adoption of the EU Seal Regime

1011. In terms of timing, the conclusion of the Tokyo Round was 12 April 1979,[1287] and the Uruguay Round tariff negotiations "were substantially completed" on 15 December 1993.[1288] The EU Seal Regime was adopted on 16 September 2009, which is more than 30 years after the conclusion of the Tokyo Round, and 18 years after the conclusion of the Uruguay Round.

1012. In these circumstances, it is presumed that, when Norway accepted the European Union's proposed concessions for the seal products at issue, it did *not* anticipate the adoption many years later of the EU Seal Regime. As a result, the European Union bears the burden of rebutting that presumption, by bringing forth facts to show that, during the relevant negotiations, Norway should reasonably have anticipated the adoption of a measure like the EU Seal Regime.

1013. The application of this presumption accords perfectly with the facts at issue. The European Union certainly never disclosed, during the negotiations, that it anticipated adopting a measure, like the EU Seal Regime, nullifying the proposed concession. Norway also had no reason to foresee, at the relevant times, that the European Union would eliminate the proposed concessions for seal products.

[1287] *See* Panel Report, *Japan – Film*, para. 10.81.
[1288] Panel Report, *Japan – Film*, para. 10.81.

1014. In short, there is no evidence to suggest that, 18 and 30 years ahead of the adoption of the EU Seals Regime, *any* of the parties – whether the European Union or Norway – possessed sufficient foresight to anticipate that the European Union would ban the import and sale of seal products.

iii. The circumstances surrounding the adoption of the EU Seal Regime show that Norway did not reasonably anticipate the EU Seal Regime

1015. The evidence from the legislative process leading to the EU Seal Regime shows that the adoption of the measure could not reasonably have been anticipated by the European Union's trading partners many years earlier, when the tariff concessions were being negotiated.

1016. *First*, the European Commission, which has the exclusive power to propose EU legislation and to negotiate tariff concessions on behalf of the European Union, recognized, during the legislative process, that its Proposed Regulation was "significantly different" from previous EU policy. When tabling its Proposed Regulation, in 2008, the European Commission explained that its proposal was different from all earlier EU measures relating to seals, because it pursued a novel policy:

> … the scope and rationale of [existing Community provisions and of the Proposed Regulation] are … *significantly different*.[1289]

1017. Hence, the Commission itself considered that, even by reference to legislative standards in 2008, the Proposed Regulation occupied novel policy territory, because it focused "on animal welfare considerations" whereas "other existing Community legislation … addresses conservation issues".[1290] In making this assessment, the European Commission specifically reviewed existing EU legislation that had a bearing on seal products, finding that:

- Council Directive 83/129/EEC, prohibiting "the commercial importation into Member States of skins of certain seal pups and products derived therefrom […] was adopted further to various studies which had have [sic] raised doubts concerning *the population status* of the harp and hooded seals";[1291]

[1289] Proposed Regulation, Exhibit JE-9, Explanatory Memorandum, p. 6.
[1290] Proposed Regulation, Exhibit JE-9, Explanatory Memorandum, p. 8.
[1291] Proposed Regulation, Exhibit JE-9, Explanatory Memorandum, p. 6 (emphasis added, footnotes omitted).

- Council Directive 92/43/EEC, "on the conservation of natural habitats and of wild fauna and flora", has as its "overall aim […] to maintain or restore a favourable *conservation status* with regard to the seal species occurring in the Community";[1292]

- Council Directive (EC) No. 338/97, implementing the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), has as its "aim […] to guarantee the *conservation* of species of wild fauna and flora by regulating trade therein".[1293]

1018. Thus, the Commission stated that earlier EU legislation regarding seals was motivated by conservation concerns,[1294] which were extraneous to the Proposed Regulation and are extraneous to the final EU Seal Regime.

1019. [*Redacted due to withdrawal of evidence*] [1295]

1020. [*Redacted due to withdrawal of evidence*] [1296] [1297] [1298]

1021. *Third*, the legislative process shows that not even the Commission anticipated that the final measure would prohibit seal products derived from seals that had been *humanely* killed. To recall, the Commission proposed a measure that would *permit* trade in seal products, if the products were "obtained from seals killed and skinned in a country where, or by persons to whom" requirements ensuring the protection of animal welfare applied.[1299] As the European Union's own legislative materials show, Norway is a country in which seals are killed humanely, consistent with stringent animal welfare requirements.[1300]

[1292] Proposed Regulation, Exhibit JE-9, Explanatory Memorandum, p. 6 (emphasis added, footnote omitted).
[1293] Proposed Regulation, Exhibit JE-9, Explanatory Memorandum, p. 7 (emphasis added).
[1294] Norway notes that conservation concerns are at the heart of its legislation governing the seal hunt. *See* section II.F, paras. 258 to 266 above.
[1295] [*Redacted due to withdrawal of evidence*]
[1296] [*Redacted due to withdrawal of evidence*]
[1297] [*Redacted due to withdrawal of evidence*]
[1298] [*Redacted due to withdrawal of evidence*]
[1299] Commission proposal for a regulation concerning trade in seal products, 23 July 2008, Articles 3 – 5.
[1300] *See, e.g.*, Commission Impact Assessment, Exhibit JE-16, section 3.1.2, p. 15 ("Some range states have implemented comprehensive management systems aimed at minimising the conflict between production and animal welfare […] Seal hunting is comprehensively regulated in Norway and it has the most developed management system.") and 72 ("Animal welfare principles […] Clearly stated in the regulation on the execution of seal hunt […] Legislation in practice (implementation and application) - The fact that there is an inspector on board the vessel induces the hunters to follow the legislation and the procedures prescribed. Adults are shot and pups are clubbed; and if the procedures are followed, the animal will obviously be dead before being bleeding-out. Enforcement in practice - Norway has one of the strictest systems for enforcement of seal hunt, requiring an inspector to be present on every vessel. The inspector is observing the hunt and responsible for controlling that all requirements are complied with, regarding training, equipment and killing methods. NAMMCO observes the seal hunt, though mainly from the shores.")

1022. However, during the legislative process, the decision was made to carry the novel policy development significantly further, amending the proposal to *prohibit* trade in seal products that have been *humanely* killed.[1301] Consequently, the prohibition in the final EU Seal Regime is considerably broader than the Commission's initial proposal, a proposal that even the Commission considered was "significantly different" from previous EU policy in this area.[1302]

1023. These three circumstances show that, *even in its own time*, the adoption of the EU Seal Regime was a ground-breaking development in the European Union's legislative policy. The Commission and Council Legal Service regarded the measure as "significantly different" from previous measures affecting seals; the Council Legal Service considered that the adoption of the measure was not within the European Union's legislative competence; and, the final measure ultimately went far *beyond* the Commission's *already novel proposal*.

1024. In these circumstances, it is far-fetched to consider that, 18 and 30 years ago, Norway was, or should reasonably have been, aware that the European Union would adopt such a measure. Indeed, given these facts, not even the European Union could, at the relevant times, reasonably have foreseen these policy developments.

iv. The design, structure, and operation of the EU Seal Regime show that Norway could not reasonably anticipate its adoption

1025. The design, structure, and operation of the EU Seal Regime also show that there is no basis to consider that Norway was, or should reasonably have been, aware, at the relevant times, that the European Union's proposed tariff concessions on seal products would be nullified by a measure like the EU Seal Regime.

1026. To recall, with the stated objective of promoting animal welfare, the European Union *prevents* the sale of Norwegian seal products, which are *derived from seals killed in a humane manner, pursuant to stringent animal welfare rules*. Simultaneously, the European Union has adopted the Indigenous Communities and Sustainable Resource Management exceptions, which *permit* the sale of seal products from other sources, *irrespective of whether they are derived from seals killed in humane manner*.

[1301] *See* paras. 677 to 703 above.
[1302] Proposed Regulation, Exhibit JE-9, Explanatory Memorandum, p. 6.

1027. Hence, in its design, structure, and operation, the measure suffers from inherent contradictions: the European Union *prevents* sale of seal products derived from seals that are killed *humanely*, but *permits* seal products derived from seals that are killed *inhumanely*.

1028. It is not plausible to suggest that Norway could reasonably have anticipated that the European Union would adopt such a measure. In fact, even if a reasonable person had contemplated many years ago that the European Union would subsequently adopt a measure to regulate the animal welfare aspects of seal hunting, *that person would have anticipated exactly the opposite regulatory action*, namely, a *prohibition* on seal products derived from animals killed *inhumanely*, and *permission* to sell seal products derived from animals killed *humanely*.

v. Conclusion

1029. Given that the EU Seal Regime was adopted 18 and 30 years after the conclusion of the negotiations resulting in the tariff concessions at issue, it is presumed that Norway did not anticipate the adoption of this measure. The European Union bears the burden of rebutting that presumption.

1030. Norway knows of no facts suggesting that it should have been aware that there was even a remote possibility that the European Union's tariff concessions on seal products would be nullified by a measure like the EU Seal Regime. To the contrary, at the conclusion of the relevant negotiations, Norway held the very reasonable expectation that the tariff concessions for seal products embodied in the EU schedule would confer the market access benefits that usually flow from the concessions made pursuant to Article II of the GATT 1994.

1031. Furthermore, for the reasons set forth in paragraphs 1015 to 1028, the facts surrounding the adoption of the EU Seal Regime demonstrate that, even by today's standards, the EU Seal Regime is a ground-breaking legislative development for the European Union. It is fanciful to suggest that a measure of this type was, or should reasonably have been, foreseen by the European Union's trading partners in 1979, or 1993.

1032. The design, structure, and operation of the EU Seal Regime also shows that the measure was not within Norway's reasonable contemplation in 1979, or 1993, because, in pursuit of animal welfare objectives, the European Union prevents the sale of seal products

that a reasonable person would expect to be permitted and, conversely, permits the sale of seal products that a reasonable person would expect to be prevented.

3. The benefits accruing to Norway are being nullified or impaired as a result of the application of the EU Seal Regime

1033. To recall, under Article XXIII:1(b), a benefit accruing to the complainant must be nullified or impaired due to the application of a measure by another Member.[1303]

1034. Norway benefits from tariff concessions on seal products negotiated with the European Union, as set out in Exhibit JE-42. These concessions reflect reciprocal concessions conceded by Norway in successive rounds of negotiations. The EU Seal Regime effectively prevents such Norwegian products from being sold on the EU market. Therefore, the EU Seal Regime entirely empties the value of the tariff concessions on these products accorded by the European Union to Norway, denying products from Norway "any opportunity for competition", which clearly upsets the competitive situation of Norwegian goods.[1304] By so doing, the EU Seal Regime nullifies or impairs the benefits accruing to Norway under such concessions.

1035. Moreover, while denying access to Norwegian products, the EU Seal Regime maintains market access opportunities for products meeting: *(a)* the Indigenous Communities Requirements (effectively *all* product originating in Denmark (Greenland)[1305]); or *(b)* the Sustainable Resource Management Requirements (effectively *all* of the product originating in the European Union[1306]). By allowing market access to product originating in Denmark (Greenland) or the European Union, the European Union upsets the competitive position of Norwegian products as compared to products from the preferred sources.[1307] In this manner, too, the EU Seal Regime nullifies or impairs Norway's reasonably anticipated benefits under tariff concessions in relation to seal products from Norway.

1036. Absent this measure, Norwegian seal products would continue to enjoy access to, and the opportunity to compete on, the European Union's market. Therefore, the nullification or impairment suffered by Norway is caused by the application of the EU Seal Regime.

[1303] *See* paras. 1000 to 1003 above.
[1304] Panel Report, *EC – Asbestos*, para. 8.289.
[1305] *See* paras. 376 to 404 above.
[1306] *See* paras. 424 to 451 above.
[1307] Panel Report, *Japan – Film*, paras. 10.82.

E. Conclusion

1037. In summary, the EU Seal Regime nullifies or impairs benefits accruing to Norway under Article II:1 of the GATT 1994, and the market access concessions obtained in successive rounds of negotiations and bound pursuant to Article II:1. At the time the relevant concessions were agreed, Norway could not reasonably expect that they would be impaired by a measure such as the EU Seal Regime. Indeed, as Norway has shown, the European Union itself could not anticipate the adoption of such a measure. Hence, irrespective of whether the EU Seal Regime violates any provision of the covered agreements, this measure has upset the "careful balance of … interests"[1308] achieved through negotiations.

1038. Accordingly, pursuant to Article XXIII:1(b) of the GATT 1994 and Article 26.1 of the DSU, Norway is entitled to see this balance restored through a satisfactory, compensatory adjustment.[1309]

IX. CONCLUSION

1039. For the reasons set forth above, Norway respectfully requests the Panel to find that:

(i) The EU Seal Regime violates Article I:1 of the GATT 1994, on the grounds that:

a. the EU Seal Regime and each of the three sets of requirements (Indigenous Communities, Sustainable Resource Management, and Personal Use Requirements) laid down by it are covered by Article I:1 of the GATT 1994 as rules in connection with importation, and as matters referred to in paragraph 4 of Article III of the GATT 1994;

b. for any given class of product (*e.g.*, seal oil; omega-3 capsules containing seal oil; seal fur skin; seal skin boots and slippers; or seal meat), seal products that meet the qualification requirements of the Indigenous Communities Requirements are "like" seal products that do not;

c. through their design, structure and expected operation, the Indigenous Communities Requirements accord an advantage, favour, privilege or immunity to seal products originating in Denmark (Greenland); and this advantage, favour, privilege or immunity is not accorded immediately and unconditionally to the like product originating in other WTO Members, including Norway.

[1308] MTN.GNG/NG13/W/31, Exhibit JE-41, p. 6.
[1309] MTN.GNG/NG13/W/31, Exhibit JE-41, p. 6.

(ii) The EU Seal Regime violates Article III:4 of the GATT 1994, on the grounds that:

a. the EU Seal Regime and each of the three sets of requirements (Indigenous Communities, Sustainable Resource Management, and Personal Use Requirements) laid down by it are laws, regulations or requirements affecting internal sale, offering for sale, transportation, distribution or use;

b. for any given class of product (*e.g.*, seal oil; omega-3 capsules containing seal oil; seal fur skin; seal skin boots and slippers; or seal meat), seal products that do not meet the qualification requirements of the Sustainable Resource Management Requirements are "like" seal products of national origin that do meet those requirements; and

c. through their design, structure and expected operation, the "non-systematic" sale condition and the "non-profit" condition accord seal products of Norway treatment that is less favourable than that accorded to like products of national origin.

(iii) The EU Seal Regime violates Article XI:1 of the GATT 1994, on the grounds that:

a. each of the three sets of requirements (Indigenous Communities, Sustainable Resource Management, and Personal Use Requirements) establish limiting conditions, as a result of which the quantity of imports is restricted, thereby imposing a "restriction other than duties, taxes or other charges ... instituted ... on the importation" of seal products.

(iv) The EU Seal Regime violates Article 4.2 of the *Agreement on Agriculture*, on the grounds that:

a. the seal products affected by the EU Seal Regime include products falling within HS chapters 2, 5, 15, 16, 21, 23 and HS headings 4103 and 4301; pursuant to Annex 1, paragraph 1 of the *Agreement on Agriculture* that Agreement applies to seal products falling under HS chapters 2, 5, 15, 16, 21, 23 and HS headings 4103 and 4301;

b. for the same reasons that the EU Seal Regime constitutes a quantitative restriction for purposes of Article XI:1 of the GATT 1994, it also constitutes a "quantitative import restriction" on agricultural products;

c. accordingly, through the EU Seal Regime, the European Union maintains, resorts to or has reverted to a measure of the kind that the *Agreement on Agriculture* required to be converted into ordinary customs duties.

(v) The EU Seal Regime is a technical regulation in the sense of Annex 1.1 of the *TBT Agreement*, and therefore subject to the disciplines on technical regulations set forth in Article 2.2 and 5 of that Agreement, on the grounds that:

a. the EU Seal Regime applies to an identifiable group of products, namely, all products;

b. the EU Seal Regime lays down product characteristics, including applicable administrative provisions, by prescribing when products may or may not contain seal inputs; and

c. compliance with the EU Seal Regime is mandatory.

(vi) The EU Seal Regime violates Article 2.2 of the *TBT Agreement*, on the grounds that:

a. the objectives of the EU Seal Regime are:

- the protection of animal welfare, including to respond to consumer concerns regarding animal welfare;
- the prevention of consumer confusion;
- the protection of the "economic and social interests" of certain indigenous communities;
- the sustainable management of marine resources;
- allowing consumer choice; and
- harmonization of the internal market;

b. amongst these objectives, the objective of harmonization of the internal EU market and the objective of protecting the "economic and social interests" of certain indigenous communities are not "legitimate" in the sense of Article 2.2;

c. the EU Seal Regime is more trade restrictive than necessary to fulfil its legitimate objectives, taking account of the risks that non-fulfilment would create, because:

- the trade-restrictiveness inherent in the EU Seal Regime:
  - makes no contribution to the EU's animal welfare objective, and constitutes arbitrary or unjustifiable discrimination between countries where the same conditions prevail and a disguised restriction on international trade;

- makes no contribution to preventing consumer confusion, and constitutes arbitrary and unjustifiable discrimination between countries where the same conditions prevail;

- partly contributes to the objective of encouraging the sustainable management of marine resources, but also, through the "non-profit", "non-systematic", and "sole purpose" conditions, undermines this objective, and introduces arbitrary or unjustifiable discrimination between countries where the same conditions prevail and a disguised restriction on international trade;

- partly contributes to the objective of allowing personal choice, but also, through the conditions in each of the three sets of requirements (Indigenous Communities, Sustainable Resource Management, and Personal Use Requirements), undermines this objective; and

- less trade restrictive alternatives would fulfil the European Union's objectives to an equivalent or greater degree, taking account of the risks that non-fulfilment would create, namely:

  - removal of the restrictive conditions of the EU Seal Regime; or

  - requiring a system conditioning placing on the market on compliance with animal welfare requirements; and

  - with respect to sustainable resource management, adopting a measure without the "non-systematic" condition, including as to quantity, and without the "non-profit" and "sole purpose" conditions of the Sustainable Resource Management Requirements.

(vii) <u>The EU Seal Regime violates Article 5.1.2 of the *TBT Agreement*, on the grounds that:</u>

a. the EU Seal Regime requires a positive assurance of conformity with technical regulations;

b. the EU legislator conferred authority on the European Commission to prepare and adopt conformity assessment procedures, and to administer those procedures;

c. the European Commission is a central government body in the sense of Article 5.1.2; and

d. the Commission has prepared, adopted or applied conformity assessment procedures in a manner that lacks an essential element needed to enable trade to occur, because the Commission has failed to

designate a recognized body competent to assess conformity and issue conformity certificates for all seal products that may conform to the Indigenous Communities or Sustainable Resource Management Requirements.

(viii) The EU Seal Regime violates Article 5.2.1 of the *TBT Agreement*, on the grounds that:

a. by failing to designate a recognized body capable of assessing conformity with the Indigenous Communities and Sustainable Resource Management Requirements, the European Union prevents conformity assessment procedures from being undertaken and completed "as expeditiously as possible", or indeed, at all.

(ix) The EU Seal Regime nullifies or impairs benefits accruing to Norway in the sense of Article XXIII:1(b) of the GATT 1994, whether or not it conflicts with relevant provisions, on the grounds that:

a. the EU Seal Regime constitutes a "measure" attributable to the European Union in the sense of Article XXIII:1(b);

b. benefits, in the form of tariff concessions bound pursuant to Article II:1 of the GATT 1994, accrued to Norway through successive rounds of negotiations;

c. the EU Seal Regime could not reasonably have been anticipated by Norway at the time of the conclusion of the negotiations in which the relevant concessions were agreed; and

d. the EU seal Regime effectively prevents Norwegian seal products, in relation to which tariff concessions were made, from being sold on the EU market, and, at the same time as denying market access to Norwegian seal products, allows seal products from certain other sources to be placed on the EU market.

1040. Norway respectfully requests, pursuant to Article 19.1 of the DSU, the Panel to recommend that the Dispute Settlement Body request that the European Union bring the contested measures into conformity with its obligations under the GATT 1994 and the *TBT Agreement*.

1041. If, and to the extent, that the Panel finds that the EU Seal Regime does not conflict with relevant WTO provisions, but nonetheless finds that the measure nullifies or impairs benefits accruing to Norway in the sense of Article XXIII:1(b) of the GATT 1994, Norway respectfully requests the Panel to recommend that the Dispute Settlement Body request the European Union to make a mutually satisfactory adjustment as required by Article 26.1 of the DSU.