BEFORE THE WORLD TRADE ORGANIZATION

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

First Opening Statement of Norway

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TABLE OF CONTENTS

Page

I. INTRODUCTION

1. Mr. Chairman, members of the Panel, Norway thanks you for this opportunity to appear before you. In our statement today, we will focus on two recurring themes that lie at the heart of this dispute: *first*, the inherent *contradictions and inconsistencies* that riddle the EU's Seal Regime; and, *second*, as a consequence, the *discrimination* that the measure establishes between seal products of different origins.

2. *First*, the EU Seal Regime bans some seal products because, the EU says, seals cannot be hunted consistently with animal welfare requirements, yet it opens the EU market to other seal products without regard to animal welfare. As a result, the measure is highly selective about the necessity to protect seal welfare and it does not establish a high level of protection for seals. Moreover, by opening the EU market to seal products irrespective of animal welfare, the measure makes little or no contribution to that objective.

3. *Second*, the highly selective manner in which the EU promotes its ostensible objectives belies a more fundamental problem. The criteria that the EU has chosen to determine whether to admit seal products are not random in their effects on international trade: seal products from Canada, Iceland, Namibia, and Norway are banned on purported animal welfare grounds; however, seal products from Denmark (Greenland), Finland, and Sweden are admitted without consideration of animal welfare. This cherry-picking of objectives, and thereby supplying countries, offends the WTO's cornerstone principle of non-discrimination.

4. To explain the many contradictions, the EU turns to a conception of public morals that is, of necessity, also contradictory, and appears to owe more to political choice than genuine standards of right and wrong conduct. Moreover, the EU's purported justification of its patchwork of morals is ill-founded. It wrongly suggests that seals cannot be hunted consistently with animal welfare; it relies on ill-informed public opinion; and it draws a distinction between commercial and other seal hunting that is contradicted by the facts.

5. In today's statement we will address five points:

- *First*, the EU's incorrect characterization of its measure as a "General Ban" with exceptions that can be divorced from each other;

- *Second*, the EU's flawed legal and factual arguments under Articles I:1 and III:4 of the GATT 1994;

- *Third*, the EU's failure to offer any defence under Article XX of the GATT 1994 for its discrimination in favour of seal products from Denmark (Greenland), Finland, and Sweden;

- *Fourth*, the EU's incorrect assessment that the EU Seal Regime is not a technical regulation; and,

- *Fifth*, the EU's unsuccessful efforts to show that its contradictory measure is no more trade-restrictive than necessary under Article 2.2 of the *TBT Agreement*.

6. For the sake of time, we will not cover in our statement our claims under Article XI:1 and Article XXIII:1(b) of the GATT 1994, Article 4.2 of the *Agreement on Agriculture*, and Articles 5.1.2 and 5.2.1 of the *TBT Agreement*.

II. CHARACTERIZATION OF THE MEASURE

7. Norway begins with the characterization of the measure, an issue on which the parties are sharply divided. The EU perceives its measure as setting forth a "General Ban" "supplement[ed] by" three "permissive" "exceptions".[1] The complainants, on the other hand, characterize the measure as comprising three sets of trade-restrictive conditions: the Indigenous Communities (hereafter called the IC), Sustainable Resource Management (hereafter called the SRM), and Personal Use requirements.[2]

8. This distinction is more than merely semantic. The EU's characterization of the measure as a General Ban plus exceptions – analyzed separately rather than holistically – has a profound impact on its assessment of the trade-restrictiveness of the measure. In that analysis, the EU focuses exclusively on the General Ban, which it says is "very trade-restrictive". Correspondingly, it suggests that the "exceptions" "are not trade-restrictive [and, hence] they do not require justification under Article 2.2 TBT".[3] Thus, for the EU, the issue under Article 2.2 is whether the so-called General Ban is necessary, whereas the Complainants assess whether the three sets of restrictive conditions are necessary.

9. The proper characterization of a measure starts with the words used by a Member. In the case of the EU Seal Regime, the EU legislator chose not to provide wording that

[1] See, e.g. EU's first written submission ("FWS"), paras. 1 and 357-358.
[2] See, e.g. Norway's FWS, paras. 3, 474, 601, 602, 626, 672 and 691.
[3] EU's FWS, paras. 358, 362 and 416.

establishes a general ban. Indeed, the reader searches in vain for words providing that seal products "shall be prohibited". Article 3(1) of the Basic Seal Regulation – which the EU cites as establishing a prohibition[4] – contains no such wording. In fact, Article 3(1) provides that the marketing of seal products "…shall be ***allowed***…", which certainly does not express a "General ***Ban***". This measure may be contrasted with other EU measures that involve a formally and substantively distinct ban and exceptions.[5]

10. To assess the legal character of a measure with respect to WTO obligations on trade restrictions, Norway submits that the Panel must answer a straightforward question: if market access for a seal product is restricted, which domestic legal provision serves to restrict access?

11. Under the EU Seal Regime, the answer to that question is ***not*** a provision establishing a "General Ban", because there is no such provision. Instead, the answer is that market access is restricted by the provisions setting forth the cumulative conditions comprising each of the three requirements.[6] These conditions alone determine whether a seal product is admitted to, or excluded from, the EU market. If a seal product does not meet the conditions of, at least, one of the requirements, it is denied market access.

12. Thus, the *legal source* of the EU decision on market access is *always* the conditions comprising the three requirements. These conditions simultaneously and cumulatively define the scope of the measure's prohibitive and permissive elements. As the Appellate Body has recognized, these two elements are inseparable, like two sides of the same coin.[7] Indeed, in the measure at issue, these two elements are *not* separated into a ban and exceptions, but are formally and substantively combined in the three sets of conditions.

13. In discussing less restrictive alternatives, the EU itself accepts Norway's characterization. It argues that "removing the 'three sets of requirements'" would amount to "***repealing*** the EU Seal Regime and allowing the placing on the [EU] market of seal products

[4] EU's FWS, para. 11.
[5] See, e.g. European Parliament and Council of the European Union, *Regulation (EC) No 1523/2007 banning the placing on the market and the import to, or export from, the Community of cat and dog fur and products containing such fur*, Official Journal of the European Union L 343/1 (11 December 2007), Exhibit EU-6, Article 3.
[6] The relevant conditions are established by the Basic Seal Regulation and Implementing Regulation in combination.
[7] Appellate Body Report, *EC – Asbestos*, para. 64.

without any restriction."[8] Hence, the EU itself sees the conditions comprising the "three sets of requirements" as the source of the market access "restriction".

14. In any event, in assessing whether a measure imposes a trade "restriction", neither the generality of a rule nor its association with an exception is important. Rather, as the Appellate Body has held, what matters is whether a measure imposes *conditions* that, by nature or effect, place *limits* on trade.[9] Hence, in characterizing a measure for purposes of WTO obligations addressing trade restrictions, a panel must ascertain whether a measure imposes a "limiting condition" and, if so, assess whether that condition is WTO-consistent.

15. In the case of the EU Seal Regime, each of the three requirements includes a series of specific conditions that place limits on EU market access. *The subject-matter of this dispute is these specific limiting conditions*, which are the legal source of the market access restrictions on Norwegian seal products.

16. The complainants have shown that, through the contested conditions, the EU pursues a patchwork of disparate objectives. These conditions give rise to discrimination; undermine animal welfare; and do not achieve the other objectives stated in the measure.

III. ARTICLE I:1 AND III:4 OF THE GATT 1994

A. Introduction

17. We turn now to discrimination. The EU has failed to rebut Norway's claims that the EU Seal Regime discriminates in favour of products originating in Denmark (Greenland) and the EU itself, contrary to Articles I:1 and III:4 of the GATT 1994.

18. In the face of this discrimination, the EU has posited a legal standard that is, quite simply, wrong. In particular, the EU says that the legal standard that applies to the MFN and national treatment obligations under Article 2.1 of the *TBT Agreement* applies equally to Articles I:1 and III:4 of the GATT 1994.[10] This overlooks crucial differences in the text and context of these different provisions that dictate a different legal standard. The EU has also sought to read *de facto* discrimination out of Articles I:1 and III:4 of the GATT 1994.

[8] EU's FWS, heading 3.3.4.4.2 (preceding para. 415) and para. 415 (emphasis added).
[9] Appellate Body Report, *China – Raw Materials*, para. 319; Appellate Body Report, *US – Tuna II (Mexico)*, para. 319.
[10] In relation to Article I:1, see, e.g. EU's FWS, para. 528. In relation to Article III:4, see, e.g. EU's FWS, para. 502.

B. The EU does not dispute that several elements of Norway's GATT discrimination claims are made out

19. Before addressing the EU's erroneous standard, we note that the EU does not dispute key elements of Norway's discrimination claims. In particular, it accepts that seal products conforming to the requirements of the EU Seal Regime are "like" those that do not.[11] Further, the EU "does not dispute that the EU Seal Regime amounts to a 'law' 'affecting the internal sale' of seal products within the EU" and is, therefore, covered by Articles I:1 and III:4.[12] In addition, it "does not dispute that the EU Seal Regime, through the IC exception, provides an 'advantage' in the sense of Article I:1".[13] The evidence supports the shared views taken by all parties on these points.

C. Greenland and EU seal products are favoured by the conditions of the EU Seal Regime

20. In relation to Norway's discrimination claims, the sole difference between the parties is whether the relevant market access conditions favour seal products from some origins over others, in particular Norway.

21. In relation to Article I:1, the issue is whether the market access advantage granted to seal products from Denmark (Greenland) is accorded "unconditionally" to seal products from other WTO Members, including Norway. Under Article III:4, the issue is whether the SRM requirements accord Norway's seal products "treatment no less favourable" than EU seal products. These issues relate to how the EU Seal Regime affects conditions of competition between like seal products of different origins.

1. The EU wrongly extends the legal standard from Article 2.1 of the *TBT Agreement* to Articles I:1 and III:4 of the GATT 1994

22. The EU says that the Appellate Body's findings under Article 2.1 of the *TBT Agreement* regarding the term less favourable treatment apply equally to Articles I:1 and III:4 of the GATT 1994.[14]

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[11] In relation to Norway's Article III:4 claim, see EU's FWS, para. 514. In relation to Norway's Article I:1 claim, see EU's FWS, para. 544.
[12] EU's FWS, para. 511.
[13] EU's FWS, para. 542.
[14] In relation to Article I:1, see, e.g. EU's FWS, paras. 528 and 538. In relation to Article III:4, see, e.g. EU's FWS, paras. 503-509.

23. This argument has no merit. In particular, the EU is wrong to suggest that, under Articles I:1 and III:4, differential treatment on grounds of origin can be excused, *under those provisions*, where it is based on a "legitimate regulatory distinction". The issue of a "legitimate regulatory distinction" is simply not relevant under Articles I:1 and III:4.

24. The EU errs in assuming that the obligations under Article 2.1 and Articles I:1 and III:4 are substantially "the same".[15] The Appellate Body has explicitly stated the contrary: "the assumption that the obligations under Article 2.1 of the *TBT Agreement* and Articles I:1 and III:4 of the GATT 1994 are substantially the same … is … incorrect", and "the scope and content of these provisions is not the same".[16]

25. The key reason is that text and context of the provisions are significantly different.[17] In particular, whereas the GATT 1994 balances the MFN and national treatment obligations with *separate exceptions*, notably in Article XX, the *TBT Agreement* does not. Under the *TBT Agreement*, the sixth recital of the preamble[18] must be taken into account in interpreting the obligations set forth in Article 2.1 itself, which provided the basis for the Appellate Body to conclude technical regulations "must not be applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination".[19]

2. The EU errs in its analysis of *de facto* discrimination

a. The EU adopts the incorrect legal standard in assessing de facto discrimination

26. The EU compounds the flaws in its analysis by adopting an incorrect standard in assessing *de facto* discrimination. The EU says that: "there is no discrimination when the treatment granted to two different sub-categories of the group of like products … are treated

[15] In relation to Article I:1, see, e.g. EU's FWS, paras. 528. In relation to Article III:4, see, e.g. EU's FWS, para. 502.
[16] Appellate Body Report, *US – Tuna II (Mexico)*, para. 405.
[17] Appellate Body Report, *US – Tuna II (Mexico)*, para. 211. See also Appellate Body Report, *US – Clove Cigarettes*, para. 169.
[18] The sixth paragraph of the preamble recognizes: "…that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement".
[19] Appellate Body Report, *US – Tuna II (Mexico)*, paras. 212-213. See also Appellate Body Report, *US – Clove Cigarettes*, paras. 171-175.

differently".[20] More boldly, the EU argues that "if the [regulatory] conditions in order to obtain an advantage are drafted in an *origin-neutral manner* … such condition … *would not be discriminatory*".[21] This argument contradicts long-standing GATT and WTO case-law.

27. It is well established that Articles I:1 and III:4 cover *de facto* as well as *de jure* discrimination.[22] Where a measure differentiates between like products on the basis of regulatory conditions that are *ostensibly* origin-neutral, *de facto* discrimination arises if the conditions operate, in fact, to benefit predominantly products from some origins, and disadvantage products predominantly from other origins.[23] As the Appellate Body said recently, "a measure may be *de facto* inconsistent [with discrimination obligations] *even when it is origin-neutral on its face*".[24] Indeed, if the EU were correct that there can be no discrimination just because the regulatory conditions are *ostensibly* origin-neutral, *de facto* discrimination could *never* arise.

28. To assess whether origin-neutral regulatory criteria disproportionately advantage products from certain origins, a panel must compare, on a holistic basis, the treatment of like products from the complainant with the treatment of like products originating in or destined for any other country under Article I:1, or of domestic products under Article III:4; this assessment includes like products benefiting and not benefiting from an advantage.[25]

29. The EU fails to make such a comparison in addressing Norway's claims under Articles I:1 and III:4.[26] Instead, it takes a highly selective approach, considering only if the advantage of the IC and SRM requirements is, *as a matter of law*, theoretically available to products from all sources meeting those requirements.

[20] EU's FWS, paras. 547. See also, ibid. paras. 508, 538, 552 and 561.
[21] EU's FWS, para. 538 (emphasis added).
[22] Norway's FWS, paras. 359 ff, in relation to Article I:1, and 418 ff, in relation to Article III:4.
[23] See, e.g. Appellate Body Reports, *Chile – Alcoholic Beverages*, para. 52 (citing Appellate Body Report, *Japan – Alcoholic Beverages II*, DSR 1996:I, 97, footnote 20); *Thailand – Cigarettes (Philippines)*, para. 128; *Korea – Various Measures on Beef*, para. 137, discussed in Norway's FWS, para. 422; and *Canada – Autos*, para. 76, discussed in Norway's FWS, para. 362.
[24] Appellate Body Reports, *US – Tuna II (Mexico)*, para. 225 (emphasis and underlining added); and Appellate Body Report, *US – COOL*, para. 269 (emphasis and underlining added).
[25] See, e.g. Appellate Body Reports, *US – Clove Cigarettes*, para. 194; *Chile – Alcoholic Beverages*, para. 52; and *EC – Asbestos*, para. 100.
[26] EU's FWS, para. 516, referring, *inter alia*, to paras. 323-325, and para. 549.

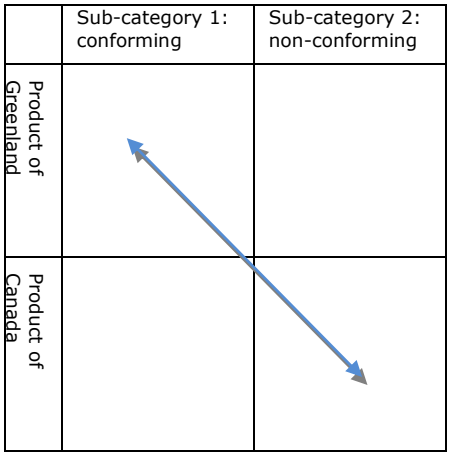
30. It conducts this analysis by assessing the treatment accorded to products from different origins *within* particular "sub-categories of the group of like products".[27] On this basis, the EU finds that like products from all sources, including Canada and Norway, are potentially capable of fulfilling the IC and SRM conditions. In its words, "any country in the world, including Norway, *could* meet all of the conditions".[28]

31. The EU's analysis is fatally truncated. In essence, in finding that products from all sources are *theoretically capable* of fulfilling the IC and SRM requirements, it has examined no more than whether the regulatory conditions are *ostensibly* origin-neutral. In other words, it has examined solely *de jure* discrimination. (As we shall see in a moment, it has not even examined *de jure* discrimination correctly, because the criteria under the IC requirements are *not* even ostensibly origin-neutral.[29])

32. Having examined whether the regulatory conditions are ostensibly origin-neutral, the EU failed to assess whether they discriminate *de facto* on grounds of origin. In particular, the EU has failed to compare the relative treatment of *all* like products from different origins.

33. In taking this approach, the EU falls into the fallacy of which it accuses Canada. It accuses Canada of "comparing the treatment given to a *sub-category* of like products … with [the treatment given to] another sub-category of like products from other origin".[30] Essentially, the EU says Canada undertakes the analysis described in Figure 1:

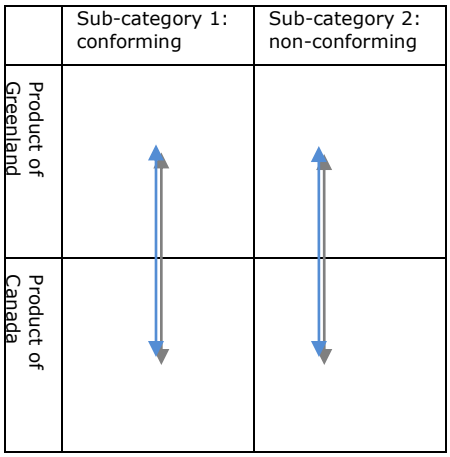
Figure 1



[27] EU's FWS, para. 547.
[28] EU's FWS, para. 523 (emphasis added). See also EU's FWS, paras. 5, 14, 318, 319, 497, 538, 590 and footnote 446 to para. 335.
[29] See below, paras. 42-48.
[30] EU's FWS, para. 292 (emphasis added).

34. The EU insists that, rather than make a comparison for particular sub-categories of like products, Canada must make a holistic comparison for the *entire* group of like products.[31] Yet, the EU fails to do the same, and instead compares – as described in Figure 2 – whether there are products of each origin that "could" theoretically qualify in either of the separate "sub-categories".

Figure 2



35. The correct approach to consider whether there is *de facto* discrimination is to analyse the measure by reference to the product group *as a whole*, and thus to consider the treatment of *all* seal products of one origin against the treatment of *all* like products of another origin, specifically Norway as complainant.[32] In undertaking such analysis, a panel must consider whether – in terms of design, structure, and expected operation – a measure predominantly favours products of certain origins over other origins.

36. Figures 3 and 4 illustrate the correct mode of analysis. Figure 3 shows a holistic comparison of the treatment given to all seal products from Denmark (Greenland) with the treatment given to all like seal products from Norway. Figure 4 shows the comparison of seal products from Norway with like products from the EU. The figures illustrate that the regulatory conditions chosen by the EU are expected to operate predominantly to the advantage of seal products from Denmark (Greenland) and the EU, respectively.

[31] EU's FWS, para. 292.
[32] See, e.g. Appellate Body Reports, *EC – Asbestos*, para. 100; *Chile – Alcoholic Beverages*, para. 52; and *US – Clove Cigarettes*, para. 194.

Figure 3

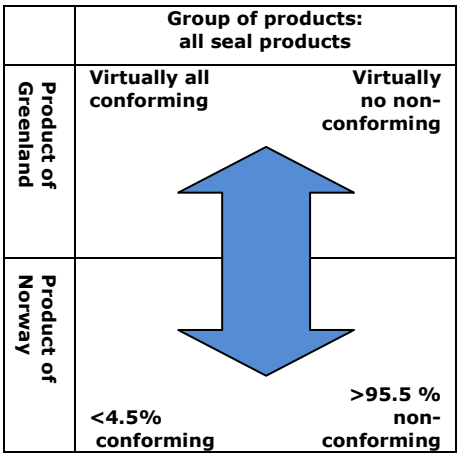
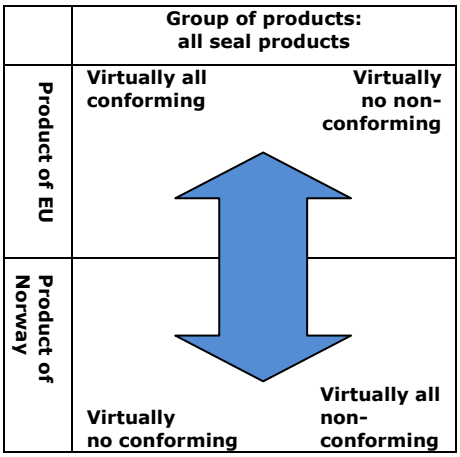


Figure 4



b. The EU fails to rebut the facts material to the correct application of Articles I:1 and III:4

37. Figures 3 and 4 also show the key facts for Norway's discrimination claims:

1) the vast majority of seal products from Denmark (Greenland) are expected to qualify under the IC requirements;

2) the vast majority of seal products from the EU are expected to qualify under the SRM requirements; and

3) no or very few seal products from Norway will qualify for access under any of the marketing requirements of the EU Seal Regime.

38. Norway has provided detailed evidence in support of each of these three points and the EU does not attempt to rebut these key facts.[33]

39. The EU suggests Norway is wrong to "assume" that *all* seal products from Denmark (Greenland) will qualify under the IC requirements.[34] Two points deserve mention. *First*, Norway's claim does not depend on *all* Greenlandic products meeting the IC requirements. It suffices that a significant majority does so, whereas a significant majority of Norway's products do not. *Second*, Norway's arguments regarding the expected operation of the IC requirements are based on fact, not assumption. The evidence shows that the vast majority of Greenlandic hunters belong to an indigenous community with a long-tradition of seal hunting

[33] In relation to products from Denmark (Greenland), see Norway's FWS, paras. 389-403. In relation to products from the EU, see Norway's FWS, paras. 430-431 and Norway's FWS, paras. 60-70, 103-104, 137, 140-142 and 440. In relation to products from Norway, see Norway's FWS, paras. 391 and 393 (in relation to the IC requirements) and 432-440 (in relation to the SRM requirements).
[34] EU's FWS, para. 365.

in Greenland; and seal products derived from the hunt are partly used within the community for subsistence purposes.[35]

40. The EU has not contested these facts. Moreover, the EU's own impact assessment, conducted by COWI, reached the same conclusion.[36] The EU suggests that "COWI had neither the authority, nor the qualifications nor the mandate" to engage in this type of assessment.[37] This is very surprising, because the Commission itself chose COWI to conduct this assessment and relied on COWI's assessment in the legislative process.[38] The criticism that COWI did not assess the final measure is also misleading, because COWI's assessment of the advantages for Denmark (Greenland) was based on criteria very close, indeed, to the final criteria.[39]

41. As to Article III:4, Norway has shown that the SRM requirements are expected to operate to the preponderant advantage of EU seal products and to the preponderant disadvantage of like products from Norway.[40] Again, the EU does not rebut this fact but argues that "any country in the world, including Norway, *could* meet all of the conditions".[41] However, this is merely an assertion that there is no *de jure* discrimination – a claim that Norway has not made under Article III:4 – because the SRM conditions are *ostensibly* origin neutral.[42]

3. The EU shows that the IC requirements are not origin neutral

42. With respect to Norway's claim under Article I:1 regarding the IC requirements, the EU insists wrongly that the IC requirements are "origin neutral" and that they "do not *de jure* ... discriminate".[43]

43. The EU bases its argument on the *express* terms of the measure: "[n]one of the[] conditions [under the IC requirements] <u>*explicitly*</u> relate to a country or limited group of

[35] 2012 Management and Utilization of Seals in Greenland, Exhibit JE-26, pp. 15-16.
[36] COWI, *Traceability systems for trade in seal products – Briefing note for workshop participants*, 20 October 2009, pp. 7-15, in 2010 COWI Report, Exhibit JE-21, annex 5.
[37] EU's FWS, footnote 480.
[38] See, e.g. Proposed Regulation, JE-9, Explanatory Memorandum, p. 10 and footnote 13.
[39] For COWI's outline of the criteria applied, see COWI, *Traceability systems for trade in seal products – Briefing note for workshop participants*, 20 October 2009, pp. 3-4 and 11, in 2010 COWI Report, Exhibit JE-21, annex 5.
[40] See Norway's FWS, paras. 430-431. See also Norway's FWS, paras. 60-70, 103-104, 137, 140-142 and 440.
[41] EU's FWS, para. 523 (emphasis added).
[42] See above, paras. 29-32.
[43] EU's FWS, paras. 547-548.

countries".[44] However, the Appellate Body has made clear that *de jure* discrimination must be assessed in light of *both* the words *explicitly* used *and* their *necessary implications*.[45] The EU has failed to consider the *necessary implications* of the IC requirements.

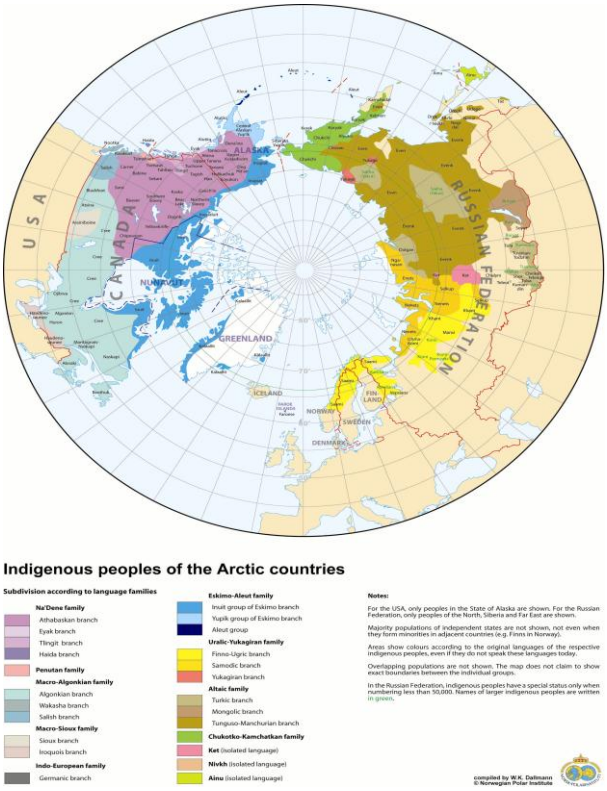
44. As Norway has shown, the necessary implications of the IC requirements are that the goods of a defined, closed and limited group of countries may benefit from the requirements. These countries are: Canada, Denmark (Greenland), Russia, the United States (Alaska), Norway and the EU (Finland and Sweden).[46]

45. The EU argues that whether a country "*happens*" to have an indigenous community is "*incidental*", and does not involve a "disparate impact" "by design".[47] However, qualification under the IC requirements is not a matter of chance. An indigenous community is one descended from people that have "inhabited" a particular territory "*at the time of conquest or colonisation or the establishment of the present State boundaries*";[48] they must have retained "political institutions";[49] and the community must have a "*tradition*" of seal hunting "*in the geographical region*".[50]

46. The EU also suggests that any country with an indigenous community can be added to the list of beneficiary territories, offering Ukraine as an example.[51] However, this is incorrect, because the qualifying indigenous community must have a "tradition" of seal hunting "in the geographic region", with the seals partly used there for subsistence.[52]

47. In essence, the question for the Panel when considering *de jure* discrimination is whether the territories from which qualifying goods may originate can be identified on a map, either explicitly or by necessary implication. The EU answers this question itself when addressing *de jure* discrimination, providing a map highlighting in colour territories from which qualifying goods may originate, provided they meet other conditions as well.[53]

[44] EU's FWS, para. 286 (emphasis and underlining added).
[45] See Norway's FWS, paras. 360-361.
[46] Norway's FWS, paras. 378 and 383.
[47] EU's FWS, para. 289 (emphasis added).
[48] Implementing Regulation, Exhibit JE-2, Article 2(1) (emphasis added).
[49] Implementing Regulation, Exhibit JE-2, Article 2(1).
[50] Implementing Regulation, Exhibit JE-2, Article 3(1)(a) (emphasis added).
[51] EU's FWS, para. 558.
[52] Implementing Regulation, Exhibit JE-2, Article 3(1).
[53] EU's FWS, para. 283.



48. The fact that the EU can refer to a map of the territories where qualifying products may originate belies the argument that the IC conditions do not, by necessary implication, identify a closed group of beneficiating countries. On this map, for example, Iceland is excluded from the coloured qualifying group. For qualifying countries, it is true the *extent* of the benefit differs *de facto* from country-to-country. For example, Denmark (Greenland) is a very significant beneficiary, and Norway is not. However, the basic point is that the IC requirements are not origin-neutral.

IV. THE EU FAILS TO DEFEND THE DISCRIMINATORY ASPECTS OF THE MEASURE UNDER ARTICLE XX OF THE GATT 1994

49. The EU Seal Regime violates, *first*, Article I:1 of the GATT 1994 through the IC requirements, and, *second*, Article III:4 of the GATT 1994 through the SRM requirements.[54] When a respondent's measure violates a provision of the GATT 1994, it may invoke the exception provided by Article XX, with the burden of proof resting on the respondent.[55] The EU argues that the EU Seal Regime is justified under subparagraphs (a) and (b) of Article XX, and that it complies with the chapeau. We firmly disagree.

[54] In this oral statement, we have chosen not to address Article XI:1 of the GATT 1994. Accordingly, we also do not address Article XX as a defense for the Article XI:1 violation.
[55] See, e.g. Appellate Body Reports, *US – Gasoline*, pp. 22-23 DSR 1996:I, 3 at 21; *US – Wool Shirts and Blouses*, pp. 15-16, DSR 1997:I, 323 at 337; and *US – FSC (Article 21.5 – EC)*, para. 133.

50. According to well-established case law, "what has to be justified" under Article XX "is each of the inconsistencies with another GATT Article found to exist".[56] As a result, what the EU must justify under Article XX is *discrimination on grounds of origin*. However, when raising its Article XX arguments, the EU completely overlooks the elements of its measure that give rise to this discrimination.

51. In its Article XX arguments,[57] the EU focuses exclusively on what it labels a "General Ban". The EU says that the ban is justified by Article XX(a) because it is necessary to protect public morals, and by Article XX(b) on grounds of animal welfare.[58] With respect to "the exceptions" – that is, the IC and SRM requirements – it states that they "are not trade-restrictive and, therefore, do not have to be justified".[59]

52. The EU is defending the wrong aspect of the measure: it is not a "General Ban" that violates Articles I:1 and III:4, it is the restrictive conditions of the IC and SRM requirements that favour certain origins. The EU does not even attempt to justify its decision to open market access to seal products from Denmark (Greenland), Finland and Sweden, while denying market access to like products from Canada, Iceland, Namibia, and Norway.

V. THE EU SEAL REGIME IS A TECHNICAL REGULATION WITHIN THE MEANING OF ANNEX 1.1 OF THE *TBT AGREEMENT*

53. A measure is a technical regulation under the *TBT Agreement* if it meets three requirements: it applies to identifiable products; it lays down product characteristic or their related processes and production methods, including the applicable administrative provisions; and compliance is mandatory.[60] The EU disputes only the second requirement.

[56] GATT Panel Report, *US – Section 337 Tariff Act*, para. 5.27. See also, e.g. Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 177 ("to justify an inconsistency with Article III:4, what must be shown to be 'necessary' is the treatment giving rise to the finding of less favourable treatment").
[57] The EU states that its arguments on the necessity of the measure for the protection of public morals are contained entirely in its arguments under Article 2.2: see EU's FWS, paras. 586-589.
[58] EU's FWS, paras. 580 and 359 (in relation to Article XX(a)); EU's FWS, paras. 591 and 359 (in relation to Article XX(b)).
[59] EU's FWS, para. 362. See also, ibid. para. 366. These arguments refer to Article 2.2 of the *TBT Agreement*, but are incorporated into the EU's arguments regarding Article XX: see EU's FWS, paras. 586-589.
[60] Appellate Body Report, *EC – Sardines*, para. 176. See also, e.g. Appellate Body Reports, *EC – Asbestos*, paras. 66-70.

A. The EU Seal Regime must be examined as an integrated whole, including the three sets of marketing requirements

54. The EU argues that "none of the three exceptions lays down product characteristics", and that for this "decisive" reason the measure is not a technical regulation.[61] Again, the EU artificially separates the prohibitive and permissive elements of the measure. This argument fails to appreciate that "the measure at issue is to be examined as an integrated whole" taking account of both the prohibitive and permissive elements of the measure.[62] Although the EU appears to admit this point,[63] it fails to conduct an integrated analysis.

B. The EU Seal Regime lays down product characteristics

55. The EU further misconceives its own measure, arguing that the EU Seal Regime "does not lay down product characteristics".[64] However, the EU concedes a key consideration: namely that whether a product is "derived or ... obtained from seals"[65] is a *defined product characteristic*. It states that "all seal products (either as inputs or as finished/processed products) have *identical product characteristics, i.e., they derived or were obtained from seals*".[66] The EU also recognizes that the so-called "exceptions" govern when a product may possess this characteristic: "[w]hether products may contain seal … depends on a *nuanced set of conditions*", which are found in the "exceptions".[67]

56. In respect of this defined product characteristic, the EU Seal Regime mandates requirements for identifiable products in both positive and negative terms. Specifically, the Regime provides when products may, and may not, be derived or obtained from seal.[68] If the conditions of one of the three marketing requirements are met, products may possess this product characteristic. If the conditions are not met, they may not.

57. The situation is analogous to *US – Tuna II (Mexico)*. In that dispute, the measure set forth certain conditions that determined when products could, and could not, possess a defined characteristic, namely carry a label.[69] The measure at issue is the same: it lays down

[61] EU's FWS, para. 219. See also, ibid. paras. 220-222.
[62] Appellate Body Report, *EC – Asbestos*, para. 64.
[63] EU's FWS, paras. 216-219.
[64] EU's FWS, para. 199.
[65] EU's FWS, para. 254.
[66] EU's FWS, para. 254 (emphasis added). See also paras. 514 and 544.
[67] EU's FWS, para. 223 (emphasis added).
[68] See Appellate Body Report, *US – Tuna II (Mexico)*, para. 193.
[69] See, e.g. Appellate Body Report, *US – Tuna II (Mexico)*, paras. 192 and 193.

conditions that determine when a product can, and cannot, possess a defined characteristic, namely contain seal. In *US – Tuna II (Mexico)*, both the panel and the Appellate Body held that the measure constituted a technical regulation.

C. There is no relevant distinction between product derived entirely from seal and those partly derived from seal

58. The EU argues that a distinction must be drawn between products that exclusively contain seal, and so-called "mixed" products that also contain other inputs.[70] For the EU, the EU Seal Regime cannot lay down characteristics for products containing exclusively seal, which, it says, are the equivalent of asbestos fibres in *EC – Asbestos*.[71]

59. Norway notes, first, that the majority of seal products at issue are mixed products, including: boots with seal fur skin; omega-3 oil capsules; refined seal oil; processed seal meat; slippers with seal fur skin; and tanned seal fur skins.[72]

60. There is also an important distinction with *EC – Asbestos*. The Appellate Body emphasized that asbestos fibres had "no known use in their raw mineral form".[73] Thus, in this respect, the asbestos measure simply banned a *naturally occurring mineral* in the state in which it was extracted from the ground.[74] However, the seal products at issue are not in a naturally occurring state, they are processed.

D. The EC Seal Regime lays down applicable administrative provisions

61. The EU accepts that the measure lays down "administrative provisions", in the form of certification requirements for seal products with access to the EU market.[75] However, it says that these are not "applicable" under the definition of a "technical regulation" because they do not "apply to product characteristics".[76]

62. This too is wrong. In *EC – Asbestos*, the administrative provisions were "applicable" to products "with certain objective 'characteristics'",[77] namely they contained asbestos.[78]

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[70] EU's FWS, paras. 214 ff.
[71] EU's FWS, paras. 212-213.
[72] A number of seal products, including the production process, are described at Norway's FWS, paras. 85-102.
[73] Appellate Body Report, *EC – Asbestos*, para. 72.
[74] Appellate Body Report, *EC – Asbestos*, para. 71.
[75] Norway's FWS, paras. 502-503.
[76] EU's FWS, paras. 224 and 229-235.
[77] Appellate Body Report, *EC – Asbestos*, para. 74.
[78] See, e.g. Appellate Body Report, *EC – Asbestos*, paras. 64 and 74.

The provisions were "applicable", through the "exceptions", in order to demonstrate that a product with those characteristics could be placed on the market. The situation is the same under the EU Seal Regime: the administrative provisions are "applicable", through what the EU calls "exceptions", to products "with certain objective 'characteristics'" (i.e., products that contain seal); and the provisions apply to demonstrate that a product with that characteristic can be placed on the market.

E. The EU Seal Regime also lays down related processes

63. The elements we have just discussed are amply sufficient for the Panel to find that the EU Seal Regime is a technical regulation. Although we take the view that it is unnecessary for the Panel to examine whether the measure *also* lays down "related processes and production methods", the EU argues that it does not.[79]

64. We disagree. The panel in *EC – GIs* said that a "process" is "a systematic series of actions or operations directed to some end, as in manufacturing …".[80] The IC and SRM requirements lay down "processes" that must be followed for a product with defined characteristics to be marketed. The IC requirements prescribe a "process" involving a particular course of action (a traditional seal hunt by specified persons) with a defined end (the production of seal products for community subsistence). For the SRM requirements, the course of action concerns the purpose of the hunt (sustainable management of marine resources); the way in which the hunt is conducted (it must be regulated at national level pursuant to an SRM plan); and the way in which the seal products are marketed (not-for-profit, non-commercial nature and quantity); and the action also has a defined end (the sale of SRM by-products).

VI. THE EU SEAL REGIME VIOLATES ARTICLE 2.2 OF THE *TBT AGREEMENT*

65. Norway turns now to Article 2.2 of the *TBT Agreement*. Under Article 2.2, the Panel must, *first*, ascertain the objectives of the EU Seal Regime; *second*, assess the legitimacy of these objectives; and, *third*, determine whether the EU seal regime is necessary to achieve these objectives.

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[79] See EU's FWS, paras. 225-228.
[80] Panel Report, *EC – GIs (Australia)*, para. 7.510. This reproduces the definition of "process" from *The New Shorter Oxford English Dictionary*, p. 2364, meaning 4. Meaning 1 in the same definition is: "The action or fact of going on or being carried on; progress, course …".

66. In this case, an analysis of the design, structure, and expected operation of the measure reveals that the EU's objectives differ from those it now advances. Instead of coherently addressing animal welfare, the measure pursues conflicting objectives in an incoherent manner, cherry-picking seal products from certain origins that enjoy market access irrespective of animal welfare and excluding other like seal products. As a result, the restrictions imposed on some – but not all – seal products are unnecessary, and the EU's objectives could be better achieved through alternative measures.

A. The objectives of the EU Seal Regime

67. We begin with the EU's objectives. The Appellate Body has said that panels must make "an *independent* and objective assessment" of a technical regulation's objectives, and cautioned against undue deference to the respondent's formulation of its objectives.[81] In unusually trenchant terms, it also said that "*the importance of a panel identifying with sufficient clarity and consistency the objective or objectives pursued by a Member through a technical regulation cannot be overemphasized*".[82]

68. In this case, Colombia rightly notes that "the EU's description of [its] policy objectives is *confusing and obscure*".[83] Indeed, the EU's description of its objectives has shifted over time, from the terms of the measure itself, through the EU's notification to the TBT Committee,[84] to its arguments in this dispute. A respondent cannot use confusion and obfuscation of its objectives as a means of avoiding effective scrutiny of a technical regulation. Hence, in responding to the EU's arguments below, Norway provides "clarity and consistency" in presenting a *prima facie* case regarding the EU's objectives.

1. The EU confirms Norway's position that the Seal Regime pursues a patchwork of six objectives

69. An objective assessment of a measure's objectives must focus on "the texts of statutes, legislative history, and other evidence regarding the structure and operation of the measure".[85] On that basis, Norway has explained that the EU pursues *six distinct*

[81] Appellate Body Report, *US – COOL*, paras. 394 and 395.
[82] Appellate Body Report, *US – COOL*, para. 387 (emphasis added).
[83] Colombia's TPS, para. 11 (emphasis added).
[84] See Norway's FWS, para. 624.
[85] Appellate Body Report, *US – Tuna II (Mexico)*, para. 314. See also Norway's FWS, paras. 545-548.

objectives.[86] The EU recognizes that the measure pursues a patchwork of objectives, and it partly confirms Norway's description; however, it usually formulates the underlying objectives in terms of alleged "moral" concerns.

70. The EU confirms that it pursues the first objective that Norway identified, namely animal welfare. Specifically, it argues that the measure addresses moral concerns arising "from the fact that *seal products may have been obtained from animals killed in a way that causes them excessive pain, fear or other forms of suffering*."[87]

71. The EU also confirms that it pursues the second objective Norway identified, namely protecting the "fundamental economic and social interests"[88] of indigenous communities.[89] For the EU, this objective is justified on "moral grounds"[90] because it would be "morally wrong"[91] if the "economic and social interests" of this community were prejudiced by the EU Seal Regime. For the EU, these "moral" concerns even "override" public concerns regarding the welfare of seals.[92]

72. Although the EU *formally* disputes the third objective Norway identified, the *substance* of its arguments confirms Norway's assessment. Norway contends that the SRM requirements promote the sustainable management of marine resources, by allowing the sale on the EU market of seals hunted for that purpose. The EU asserts that this "wrongly identifies" the objective, because the SRM requirements do not "relat[e] to sustainable marine resource management".[93] Yet, it repeatedly admits that the SRM requirements serve to allow the sale of seal products from seals hunted "*for the sole purpose of sustainable management of marine resources*".[94] It is simply not credible to argue that allowing the sale on the EU market of seals hunted for that "*sole purpose*" does not relate to sustainable marine resource management. Echoing Norway's position, the European Parliament Agriculture

[86] See Norway's FWS, para. 627. The six objectives identified are: (i) the protection of animal welfare, including to respond to consumer concerns regarding animal welfare; (ii) the protection of the economic and social interests of indigenous communities; (iii) the encouragement of the sustainable management of marine resources; (iv) allowing consumer choice; (v) preventing consumer confusion; and (vi) harmonizing the internal market.
[87] EU's FWS, para. 2 (emphasis added).
[88] Basic Seal Regulation, Exhibit JE-1, preamble, recital 14.
[89] EU's FWS, paras. 40, 49, 263-268. See also Proposed Regulation, Exhibit JE-9, Explanatory Memorandum, p. 5 (under "Grounds for and objectives of the proposal", ibid., p. 2).
[90] EU's FWS, para. 43.
[91] EU's FWS, para. 268.
[92] EU's FWS, para. 268.
[93] See, e.g. EU's FWS, paras. 308 and 521.
[94] EU's FWS, paras. 9, 22, 41, 221, 308, 312, 319, 331, 511 and 521 (emphasis added).

Committee stated that the SRM requirements were necessary to allow the "*rational use of natural resources*, which advises that *maximum possible use should be made of an animal after it has been killed*".[95]

73. As regards the fourth objective, the EU argues that the Personal Use requirements do not promote the personal choice of travelling consumers. Instead, it says that the purpose is to prevent "inequitable results" that could arise by imposing an import prohibition on travellers who have unwittingly purchased seal products abroad.[96] However, the EU does not deny that these requirements also serve to promote choice for travellers who knowingly seek out seal products, for example, as "hunting trophies".[97]

74. Concerning the fifth objective, the EU contends that the complainants wrongly argue that the measure pursues the objective of *promoting consumer information*.[98] The EU has misunderstood Norway's argument. Relying on the preamble to the Basic Seal Regulation, Norway maintains that the objectives include *preventing consumer confusion*, by ensuring that EU consumers do not unwittingly purchase unlabelled seal products – which the EU admits travellers might do.[99] The EU has not addressed this point. Finally, the parties agree on the sixth objective, namely that the measure pursues harmonization of the EU market.

75. In sum, with the exception of consumer choice and consumer confusion, Norway sees no meaningful differences between the six objectives it has identified – based on the terms of the measures and its legislative history – and the objectives effectively recognized by the EU.

2. The evidence shows that the EU Seal Regime does not pursue any defined "moral" norms as an objective

76. The EU calls for the Panel to afford deference to its conception of public morality.[100] Although Norway agrees that Members deserve considerable deference to their definition of public morality, it also agrees with Colombia, Japan, and Mexico that public morality is not an endlessly elastic concept.[101] Far from being an empty vessel to be filled as the respondent

[95] Opinion of AGRI in EU Parliament Final Report on Trade in Seal Products, Exhibit JE-4, p 57 (emphasis added).
[96] EU's FWS, para. 42.
[97] 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).
[98] EU's FWS, para. 43.
[99] See, e.g. Norway's FWS, para. 627.
[100] EU's FWS, para. 569 (citing Panel Report, *US – Gambling*, para. 6.461).
[101] Colombia's TPS, para. 31; Japan's TPS, para. 11; and Mexico's TPS, paras. 55-56 and 64.

wishes, the concept must be understood as part of WTO law and applied in light of the evidence.

77. Norway recognizes that the task facing a panel called upon to review public morals is not easy. Public morals are very difficult to define and, as one of the EU's own exhibits recognizes: "*Virtually anything* can be characterized as a moral issue".[102] It is, therefore, crucial for panels to verify that an asserted public moral genuinely exists within a community to ensure that this justification is not used to cloak mere policy choices.

a. The concept of public morality in WTO law

78. As the EU observes, the term "public morals" refers to "*standards* of right and wrong conduct".[103] However, not every issue of public *concern* rises to the level of a "standard of right and wrong conduct" under WTO law. Nor does every *political choice* or *social policy* adopted by the executive or legislature constitute a public moral.

79. Rather, a moral "*standard*" connotes the existence of a societal *rule or norm* with *precise and specific content* that *unambiguously* delineates right and wrong conduct.[104] To constitute a moral rule or norm, the standard must also be *generally applied* within the community. As Japan says, to constitute a "standard", the alleged norm must be applied consistently and coherently (in Japan's words "horizontally") to particular conduct.[105]

80. Before turning to the facts, Norway notes that the EU bears the burden of proving the existence of the facts that it alleges.[106] In this case, it repeatedly alleges the existence of several public morals relating to seal products. As a result, the EU bears the burden of proving the existence of each alleged moral norm within the EU.

81. To that end, the EU has offered the following evidence: (1) the measure at issue, through which the EU legislator, to quote the EU, "recognise[s] and interpret[s] the moral

[102] Exhibit EU-35, quoting Steve Charnowitz (emphasis added).
[103] See Panel Report, *US – Gambling*, para. 6.465 (emphasis added); see also Panel Report, *China – Publications and Audiovisual Products*, para. 7.759.
[104] For the existence of a legal norm, see, by analogy, the Appellate Body's reasoning on when a challenge against a "rule or norm" as such may be raised: Appellate Body Report, *US – Zeroing (EC)*, para 198.
[105] Japan's TPS, para. 13.
[106] See, e.g. Appellate Body Report, *US – Shirts and Blouses*, p. 14, DSR 1997:1, p. 323 at 335 ("the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof").

concerns of the European people";[107] (2) surveys of EU public opinion; and (3) scientific evidence. Norway will address this evidence in turn.

b. The EU has not proved the existence of any defined moral norm constituting a standard of conduct

i. The terms of the measure do not support the EU's alleged public morals

(1) The alleged umbrella public moral is devoid of normative content

82. Although the EU recognizes that its measure pursues a patchwork of objectives, it tries to disguise these objectives behind a single umbrella objective, which it labels vaguely as "moral concerns of the EU public with regard to the presence on the EU market of seal products".[108] However, the measure shows that the asserted umbrella moral is devoid of normative content. The use of a convenient label, like public morality, does not mask the fact that the EU pursues several objectives that are substantively very different, even incompatible and contradictory.

83. The first concern forming part of the alleged umbrella moral relates to the treatment of seals. The EU says that the prohibitive elements of the measure respond to moral concerns arising "from the fact that *seal products may have been obtained from animals killed in a way that causes them excessive pain, fear or other forms of suffering*."[109] These concerns apply, of course, to *all seals*, whatever the type and purpose of the seal hunt. Yet, the EU Seal Regime does not ban all seal products.

84. To the contrary, it *allows* trade in some seal products *irrespective* of animal welfare. For the EU, allowing this trade is also a matter of public morals, albeit different ones that are nonetheless alleged to form part of a single umbrella norm. The EU alleges that public morals require that trade in seal products from indigenous communities be allowed in view of their "fundamental social and economic interests".[110] Moral concerns also animate the EU's

[107] EU's FWS, para. 189.
[108] EU's FWS, para. 2. See also, e.g. EU's FWS, paras. 33 and 317.
[109] EU's FWS, para. 2 (emphasis added).
[110] EU's FWS, paras. 40, 43, 363 and 375.

decision to allow trade in seals hunted for SRM purposes.[111] Even the need to avoid "inequitable results" for travellers "seeks to uphold a rule of public morality".[112]

85. For the EU, all of these different moral concerns can be grouped together under a single umbrella moral regarding "the presence [or not] on the EU market of seal products".[113] Norway disputes the existence of any such moral norm which has no defined content. For Norway, the result of this patchwork of concerns is an umbrella riddled with holes much like Swiss cheese.

(2) The EU has no coherent and consistent "standard of right and wrong" regarding the humane treatment of seals

(a) The EU's pursuit of seal welfare is incoherent and inconsistent

86. Norway turns now to consider animal welfare as a distinct objective reflecting public morals. The EU notes that seals may be "killed in a way that causes them excessive pain, fear or other forms of suffering."[114] As a result, EU consumers are "repelled by their availability in the EU market", and they do "not wish to be accomplice to [their] killing".[115]

87. Norway recognizes that such concerns *could* give rise to a "standard of right and wrong conduct" regarding the treatment of seals. However, such a standard is not reflected coherently and consistently in the measure. If seals are hunted by indigenous people or for SRM purposes, or if seal products are imported by travellers for personal use, the EU public *ceases completely* to have moral convictions about the humane killing of seals. In such cases, seals may be hunted in the most inhumane manner.

88. Indeed, the "deep and longstanding"[116] animal welfare concerns at the core of the alleged "public morals" vanish to the point that the EU sees no need even to inform

[111] EU's FWS, paras. 43, 363 and 375.
[112] EU's FWS, para. 42.
[113] EU's FWS, para. 2. See also, e.g. EU's FWS, paras. 33 and 317.
[114] EU's FWS, para. 2.
[115] EU's FWS, para. 36.
[116] EU's FWS, para. 2.

consumers that the product they are purchasing contains seal – let alone inform them whether the seal was caught humanely.[117]

89. In this patchwork of political and policy choices, Norway cannot discern any consistent and coherent "*standard* of right and wrong conduct" regarding the treatment of seals. Sometimes it is acceptable to kill seals inhumanely, sometimes it is not; sometimes the humane treatment of seals does not matter at all. There is, therefore, no "standard" evidenced by the measure.

(b) The EU's alleged distinction between commercial and non-commercial sealing is inconsistent with a "standard of right and wrong conduct" regarding animal welfare

90. In an attempt to reconcile the normative conflicts within its measure, the EU argues that the EU public's concerns turn decisively on whether a seal is hunted for "commercial" reasons. [118] For commercial hunts, a "high level of protection" is desired, whereas for non-commercial hunts it is appropriate "to tolerate a higher level of risk to the welfare of seals".[119] This argument is flawed for three reasons.

91. *First*, if a standard of right and wrong exists with respect to the treatment of an animal, that standard must apply generally, consistently, and coherently, whether the animal is killed for commercial reasons or not. The inhumane suffering of an animal is not lessened because it is killed for non-commercial reasons. Either seal welfare is an important value pursued coherently and consistently, or it is not.

92. *Second*, the EU is unable to trace any meaningful distinction between so-called commercial and non-commercial seal hunting. Under the IC requirements, seal hunting must contribute "partly" to the subsistence of the community. However, this does not mean that

[117] EU's FWS, para. 43. Norway shares the view expressed by Namibia that the absence of a labelling requirement in the EU Seal Regime further undermines animal welfare. See Namibia's TPS, p. 8, last paragraph.
[118] See, e.g. EU's FWS, paras 295 ff and 325 ff.
[119] EU's FWS, para. 39.

seal hunting is not also commercial. Indeed, the Greenland Government itself recognizes that "the seal hunt in Greenland is both subsistence oriented and a *commercial activity*".[120]

93. With respect to the SRM requirements, the EU also wrongly argues that the seal hunt has no commercial dimensions. The EU notes that these requirements allow fishermen to kill seals as "pests that endanger fish stocks"[121] and that "cause problems to fisheries by damaging gears and catches".[122] In so doing, the fisherman has commercial motives – he is killing seals for purposes of his commercial fishing activities, to protect "gear and catches". As the Commission itself said, in its impact assessment, this "pest control" is "not a hunt per se but *man-induced killing* of seals" – "induced" for commercial reasons.[123] Furthermore, the legislative history suggests that the fisherman is entitled to earn "income" compensating for the cost of his time.[124] Finally, other commercial parties in the supply chain, such as processors, distributors, and retailers, can earn profits from the sale of the seal products.[125] Hence, it is fanciful to suggest that there is no commercial dimension to sealing under the SRM requirements.

94. *Third*, the EU allows a variety of commercial activities relating to seal products to take place *in the EU* without consideration of animal welfare aspects of the seal hunt, e.g., domestic production for export, inward processing for export, and export sale at EU auction houses. Hence, the measure is, again, highly selective in its treatment of seal products produced for "commercial" reasons.[126] As a consequence, by design, the EU Seal Regime attenuates the economic impact of the measure on EU-based economic activities, as it also does through the SRM requirements.

[120] 2012 Management and Utilization of Seals in Greenland, Exhibit JE-26, p. 27 (emphasis added). In Greenland, there are 2,100 full time hunters, representing 7% of the work force. On average, 53% of Greenland seal skins are traded "commercially", amounting to more than 98,000 animals. Ibid. pp. 2 and 27.
[121] EU's FWS, para. 309, quoting the European Parliament's Committee on Agriculture and Rural Development.
[122] EU's FWS, para. 310, quoting a statement from Finland during the legislative process.
[123] Commission Impact Assessment, Exhibit JE-16, section 3.1.2, p. 15 (emphasis added).
[124] See General Views of Finland in Member States' Comments on the Proposed Regulation (19 January 2009), Exhibit JE-10, p. 16 (explaining, that in Finland, "[b]ased on the management plan about 500 seals are hunted yearly. The seals are not hunted only as pests but they are used as a natural resource for livelyhood and also as a means to generate income. Prohibiting this possibility for income at a local level would lead to a waste of resources as the hunting would continue without the possibility to make proper use of the seals").
[125] For discussion, see Norway's FWS, paras. 694, 695 and 740.
[126] Norway's FWS, paras. 694 and 695.

ii. The EU's evidence on science and public opinion does not support the EU's alleged public morals

95. The evidence invoked by the EU includes public opinion and science as a basis for its claim that it is pursuing the objective of public morals. Norway finds it telling that both sets of evidence relate to *animal welfare*, and not to the various other objectives that the EU claims involve "public morals".

96. Norway contests the scientific evidence further below, showing that the EU provides a misleading impression of seal hunting generally, and the Norwegian hunt in particular. However, Norway notes that the scientific considerations – whatever their merits – apply consistently to *all* seal hunting, irrespective of the size and purpose of the hunt. In particular, if the EU were correct that scientific evidence shows that seal hunting *cannot* be conducted humanely (a point that Norway contests), that evidence would apply equally to seals hunted under the IC and SRM requirements. If the EU's scientific evidence were truly the basis for the alleged public moral, the measure would not be riddled with incoherence and inconsistency.

97. The EU's evidence of public opinion demonstrates the level of knowledge of, and attitudes to, seal hunting in some EU member States. The most striking feature of this evidence is that the respondents professed an *extremely low level of knowledge* about seal hunting.[127] This was confirmed by COWI's own assessment, which found a "knowledge gap" in the EU regarding hunting methods.[128] Norway recognizes that individual members of the public are sometimes willing to form views on the acceptability of conduct despite knowing nothing about it. However, Norway does not accept that a Member can legislate trade-restrictive measures relying on ill-informed opinion as a "public moral" under WTO law.

98. The EU's surveys also provide no basis for the distinctions that the EU draws between different types and purposes of seal hunting. The surveys did not elicit information on whether the indigenous ethnicity of the hunter eliminates animal welfare concerns; and they

[127] For example, in a survey of 11 EU Member States, an aggregate 78% of respondents said that they either: (i) knew "not very much" about commercial seal hunting; (ii) knew "nothing" about commercial seal hunting; or (iii) had "never heard" of commercial seal hunting. This percentage was as high as 95% in countries such as Lithiania, Poland, and Romania. See Public opinion survey by IPSOS-Mori for IFAW and HSI, June 2011 (Belgium, France, Germany, United Kingdom, Italy, Lithuania, Netherlands, Poland, Romania, Spain and Sweden), Exhibit EU-59.
[128] 2008 COWI Report, Exhibit JE-20, Executive Summary, p. 5, section 6.1.1, p. 126 and section 6.3, p. 132.

did not ascertain attitudes towards fishermen eliminating seals as pests as part of an SRM plan or seal products purchased by travellers. Moreover, trade restrictions are not acceptable simply because "beggar-thy-neighbour" policies enjoy majority public support.

iii. Conclusion

99. In sum, the EU has failed to show that its measure pursues any "*standard* of right and wrong conduct" regarding the treatment of seals that rises to the level of a public moral. In the absence of a moral norm, the EU Seal Regime *cannot* be necessary to pursue such a moral objective.

B. It is not legitimate under Article 2.2 for the EU either to distinguish between commercial and non-commercial seal hunting or to confer discriminatory trade preferences on indigenous communities

100. The second step in the analysis under Article 2.2 requires the Panel to assess whether the objectives pursued by the challenged measure are "legitimate" within the meaning of Article 2.2, i.e., whether they are apt to justify measures that are "trade-restrictive".

101. As noted, Norway has shown that the EU Seal Regime pursues six objectives. As regards the legitimacy of these objectives, Norway has explained that the protection of animal welfare, the sustainable management of marine resources, the prevention of consumer confusion, and allowing consumer choice, are, in principle, legitimate objectives.[129] However, with respect to animal welfare, Norway has shown that the measure does not pursue a "moral" concern that constitutes a "standard of right and wrong conduct".

102. In this section Norway shows that, as regards animal welfare concerns, it is *not* legitimate to distinguish between commercial and non-commercial seal hunting. In addition, Norway does not agree that it is legitimate for purposes of Article 2.2 to protect the "economic and social interests" of specific producers located in certain Members, at the expense of the interests of producers located in other Members.[130]

[129] Norway's FWS, paras. 631-640 and 661.
[130] It is unnecessary for Norway to address the EU's harmonization objective since the EU has acknowledged that "this objective could have been achieved in different ways" (EU's FWS, para. 47), or, put another way, that the pursuit of harmonization itself cannot itself justify trade restrictions under the EU Seal Regime, since there is a wide range of less trade restrictive alternatives would equally fulfil the objective of harmonization.

1. It is not legitimate to pursue animal welfare objectives by distinguishing between commercial and non-commercial seal hunting

103. With respect to animal welfare, the EU notes that seals may be "killed in a way that causes them excessive pain, fear or other forms of suffering."[131] However, as noted, these concerns apply equally to all seal hunts, irrespective of the type and purpose of the hunt. Nonetheless, the EU opens its market to seal products from both indigenous and SRM hunts, irrespective of animal welfare. In an effort to reconcile these inconsistencies, the EU attempts to distinguish between so-called "commercial" and "non-commercial" seal hunts, with a "high level of protection" for the former and "higher level of risk" for the latter".[132] In other words, whereas the EU public is concerned by animal welfare with respect to commercial hunting, those concerns disappear with respect to non-commercial hunting.

104. Norway has explained that the purported distinction between commercial and non-commercial seal hunting is illusory, because so-called non-commercial seal hunts have commercial dimensions.[133] Instead, this illusory distinction serves as a pretext for the EU to cherry-pick favoured suppliers of seal products to the exclusion of others. The cherry-picking of beneficiaries on the basis of an illusory distinction cannot be an element of a "legitimate" objective under Article 2.2.

105. Norway also considers that a prohibition applied *solely* to the "commercial" exploitation of natural resources is not *legitimate* under Article 2.2, when so-called "non-commercial" exploitation is permitted. The preamble to the GATT 1994 and the *WTO Agreement* recognize that trade relations – commerce – should be conducted with a view "to raising standards of living", including through the use of "the resources of the world".[134] It is incompatible with the objectives of the *WTO Agreement* and, hence, not "legitimate" under Article 2.2 for a Member to restrict trade when "commercial" operators wish to improve their standards of living, but to allow trade when "non-commercial" operators apparently do not.

[131] EU's FWS, para. 2.
[132] EU's FWS, para. 39.
[133] See paras. 92-93 above.
[134] GATT 1994, preamble, second recital; see also *WTO Agreement*, preamble, first recital; and *TBT Agreement*, preamble, second recital ("*Desiring* to further the objectives of GATT 1994").

2. It is not legitimate to protect the economic and social interests of producers located in specific countries through discriminatory trade preferences

106. The EU suggests that the IC requirements are legitimate in light of public international law. However, the mere fact that instruments of international law call for the favourable consideration of certain interests does not mean Article 2.2 automatically authorizes trade restrictions to promote those interests.

107. Article 2.2 authorizes trade restrictions that are "necessary", *as a consequence of regulating "product characteristics"*, in order to achieve a legitimate objective.[135] For example, a Member may impose trade-restrictive requirements on the tensile strength of metal, if that is necessary for consumer safety. The provision does not, however, authorize trade restrictions resulting from a political choice to favour producers in certain Members through special and differential treatment. Such a choice is neither necessary for, nor consequent upon, the regulation of product characteristics.

108. Non-discrimination is one of the cornerstone principles of the covered agreements.[136] In that regard, the immediate context of Article 2.1 confirms that the drafters did not contemplate discriminatory trade preferences being justified under Article 2.2.[137]

109. Rather, if a Member wishes to grant special and differential treatment in the form of discriminatory trade preferences, it must obtain express authorization from WTO Members, whether through a waiver or a GATT/WTO instrument such as the Enabling Clause. For instance, with respect to the Lomé Convention between the EU and ACP countries, the panel in *EC – Bananas III* observed that it was only by "incorporat[ing] a reference to the Lomé Convention into the Lomé waiver" that "the meaning of the Lomé Convention became a GATT/WTO issue, at least to that extent".[138] Similarly, the Enabling Clause was the outcome of negotiations *within* the GATT, and is now part of the GATT 1994.

110. Unless mediated through the terms of WTO law itself, relying on instruments from other areas of international law to permit discriminatory trade preferences could seriously erode the WTO's cornerstone principles. Instruments of international law rightly call for

[135] See Norway's FWS, paras. 646-656
[136] See, e.g., Appellate Body Report, *EC – Tariff Preferences*, para. 101.
[137] Norway's FWS, para. 648.
[138] Panel Report, *EC – Bananas III*, para. 7.98. See also Appellate Body Report, *EC – Bananas III*, para. 167.

special consideration of many different economic and social interests, including: least-developed countries; developing countries generally; landlocked developing countries; small island developing countries; structurally weak, vulnerable and small economies; national minorities; and indigenous peoples.[139] A UN declaration is currently being negotiated on peasants and other rural workers.[140] International law also recognizes that countries enjoy the right to exploit their own natural resources for their own development.[141] Although important, these interests do not *automatically* justify discriminatory trade restrictions under WTO law, without express supporting language in the covered agreements.

111. If the EU's arguments were correct, there would be no need for waivers for preferences to least developed and developing countries, no need for negotiations on special and differential treatment, no need for an Enabling Clause, and no need for Part IV of the GATT 1994. Members could simply rely on "public morals" to justify all discriminatory trade preferences.

C. The EU Seal Regime is more trade-restrictive than necessary to achieve a legitimate objective

112. We turn now to the third step under Article 2.2 of the *TBT Agreement*, which is the analysis of whether the measure is more trade restrictive than necessary to pursue its legitimate objectives. This step requires a "relational" analysis of the measure's trade-restrictiveness; its contribution to the legitimate objectives; and the risks non-fulfilment would create. Typically, this relational analysis is aided by the "conceptual tool"[142] of comparing the challenged measure with less trade-restrictive alternatives.

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[139] See, e.g. UN General Assembly, *Declaration on the Establishment of a New International Economic Order* and *Programme of Action on the Establishment of a New International Economic Order*, A/RES/S-6/3201 and A/RES/S-6/3202, New York (1 May 1974); UN General Assembly, *Charter of Economic Rights and Duties of States*, A/RES/29/328, New York (12 September 1974); UN General Assembly, *Rio Declaration on Environment and Development*, Annex 5 to *Report of the UN Conference on Environment and Development*, Rio de Janeiro, 3-14 June 1992, A/CONF.151/26 (Vol. I) (12 August 1992); Council of Europe, *Framework Convention for the Protection of National Minorities*, H(1995)010), Strasbourg (1 February 1995); UNCTAD, *Resolution 21 (II) on Preferential or free entry of exports of manufactures and semi-manufactures of developing countries to the developed countries*, TD/97, New Delhi (26 March 1968).

[140] Advisory Committee on Human Rights, *Draft Declaration on the Rights of Peasants and Other People Working in Rural Areas*, A/HCR/AC/8/L.1, Geneva (24 February 2012).

[141] See, e.g. UN General Assembly Resolution 1803 (XVII), *Permanent Sovereignty Over Natural Resources*, New York, (14 December 1962).

[142] Appellate Body Report, *US – Tuna II (Mexico)*, para. 320.

1. The trade-restrictiveness of the three marketing requirements

113. The EU says that its measure must be viewed as a "General Ban" and "exceptions". According to the EU, the "General Ban" is very restrictive, whereas the "exceptions" are not and, therefore, require no justification. As we have said, this characterization is incorrect.[143]

114. The measure does not consist of a formally and substantively distinct ban and exceptions. Rather, the conditions under the three marketing requirements serve as a restrictive gateway to the EU market, simultaneously combining permissive elements for conforming seal products and prohibitive elements for non-conforming seal products. The legal source of trade restriction is, therefore, the restrictive conditions under the three requirements. The EU itself recognizes this point, noting that "*removing the 'three sets of requirements*'" would "*allow*[] *the placing on the market of seal products without any restriction*".[144]

2. The EU Seal Regime does not contribute to its animal welfare and SRM objectives

115. Having addressed the legitimate objectives and trade restrictiveness, we turn to consider whether, and, if so, to what extent, the restrictive conditions contribute to fulfilling the measure's legitimate objectives. We focus on two legitimate objectives: (1) whether the restrictive conditions applied under the IC, SRM, and Personal Use requirements contribute to animal welfare; and (2) whether the SRM requirements that seal 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, contribute to sustainable resource management.[145]

a. Contribution to animal welfare

i. The EU Seal Regime does not address animal welfare

116. As regards, animal welfare, we have shown that none of the three requirements imposes conditions relating to animal welfare.[146] There is, therefore, *nothing* to ensure that products from seals killed inhumanely are not placed on the EU market.[147] Moreover, the

[143] See above, paras. 7-16.
[144] EU's FWS, heading 3.3.4.4.2 and para. 415 (emphasis added).
[145] Basic Seal Regulation, Exhibit JE-1, Article 3(2)(b); and Implementing Regulation, Exhibit JE-2, Article 5.
[146] Norway's FWS, paras. 679-690.
[147] Norway's FWS, paras. 670-690.

evidence shows that inhumane killing methods are used in the hunts whose products enjoy EU market access.[148] As a result, the measure is rationally disconnected from its purported animal welfare objective and is inapt to address public concerns regarding the inhumane treatment of seals.

ii. The EU Seal Regime allows the marketing of seal products produced without regard to animal welfare

117. The rational disconnect between the measure and its purported animal welfare objective is not merely theoretical, because the seal products with access to the EU market derive from hunts that pose considerable animal welfare concerns. According to EFSA, indigenous hunts, generally, "have few, if any, regulations and are poorly monitored",[149] and the killing of nuisance seals (whose products can be marketed under the SRM requirements) "may or may not be regulated".[150]

118. As regards the indigenous hunt, the Greenland Government has said that, "[f]rom October to the end of March, *netting* is the prevailing [hunting] method since it is impossible to use any other technique during the dark winter months."[151] From October to March, sizeable catches are made,[152] meaning netting accounts for a sizeable proportion of the annual catch. For example, 30% of all ringed seals are caught in nets, amounting to around 24,000,[153] which far exceeds the total Norwegian average annual catch of 11,300.[154] EFSA has explained why netting is inhumane, involving protracted suffering and stress.[155] Norway prohibits netting.[156]

119. In Denmark (Greenland), harp seals are, generally, shot from open water, with the hunter trying to retrieve the seal "before it sinks".[157] In consequence, there are significant

[148] See, in particular, Norway's FWS, paras. 680 and 681.
[149] 2007 EFSA Scientific Opinion, Exhibit JE-22, p. 13.
[150] 2007 EFSA Scientific Opinion, Exhibit JE-22, p. 13.
[151] 2012 Management and Utilization of Seals in Greenland, Exhibit JE-26, p. 19 (emphasis added).
[152] See graphs showing catch data by month for both harp and ringed seals in 2012 Management and Utilization of Seals in Greenland, Exhibit JE-26, pp. 23 and 24, respectively.
[153] The percentage of ringed seals is derived from Table 1 in 2012 Management and Utilization of Seals in Greenland, Exhibit JE-26, p. 20 (providing data on netting of ringed seals). The percentage is calculated from the percentage of catches by netting, by region, and the distribution of catches by region. The percentage is applied to the average number of ringed seals caught shown in Table 2, ibid. p. 22 (providing annual catches of seals in Greenland from 1993-2009) (data relative to years 2000 to 2009).
[154] See Norway's FWS, footnote 616, accompanying Table 1 at para. 391.
[155] 2007 EFSA Scientific Opinion, Exhibit JE-22, pp. 46-48.
[156] Conduct Regulation, Exhibit NOR-15, Section 11(a).
[157] 2012 Management and Utilization of Seals in Greenland, Exhibit JE-26, p. 18.

struck and lost problems – considerably greater than in the Norwegian hunt, which prohibits shooting seals in water for this reason.[158] EFSA has noted that part-time Greenlandic hunters reported a struck and lost rate of 26%, and full-time hunters reported a rate of 21%, with rates as high as 40 to 50% in May to July.[159] This suggests that somewhere between 35,000 and 44,000 harp seals are struck and lost.[160]

120. The EU wrongly suggests that these animal welfare violations do not matter, because the overall number of seals placed on the EU market will be reduced. As discussed earlier, the EU does not contest that the vast majority of seal products from Greenland will qualify for market access under the IC requirements.[161] Greenland's average annual catch is around 165,000 seals[162] – not counting struck and lost seals – in itself exceeding the EU market of 110,000 seal skins in 2006.[163] Moreover, Greenland has stockpiled 290,000 seal skins awaiting approval of a recognized body,[164] which is more than double the total EU market in 2006 and dwarfs Norway's annual production of 17,847 seals in that same year.[165]

121. In a nutshell, the EU Seal Regime picks "winners and losers" for access to the EU market. A trade preference is now granted to seal products from a source that uses inhumane killing methods and that can be expected to fully satisfy EU demand. Competing supply from other sources, with strict animal welfare regulations, is blocked. In these circumstances, animal welfare outcomes are worse under the EU Seal Regime than they were previously.

iii. The EU Seal Regime involves arbitrary or unjustifiable discrimination and a disguised restriction on international trade

122. Referring to the sixth paragraph of the preamble to the *TBT Agreement*, Norway contends that the EU Seal Regime violates Article 2.2 because it involves arbitrary or unjustifiable discrimination between countries where the same conditions prevail and a

[158] Conduct Regulation, Exhibit NOR-15, Section 6.1(c).
[159] 2007 EFSA Scientific Opinion, Exhibit JE-22, p. 66.
[160] Table 2 in 2012 Management and Utilization of Seals in Greenland, Exhibit JE-26, p. 22, provides data on Greelandic harp seal catches from which the figures are calculated, using EFSA's struck and lost rates (data relative to years 2000 to 2009).
[161] See paras. 39 above. See also Norway's FWS, paras. 389-403
[162] 2012 Management and Utilization of Seals in Greenland, Exhibit JE-26, p. 27, Table 3.
[163] 2008 COWI Report, Exhibit JE-20, p. 106, Table 5.2.3, total of the figures under "Import to EU-27".
[164] EU's FWS, footnote 671.
[165] See Norway's FWS, Table 1 at para. 391.

disguised restriction on international trade.[166] Seal products derived from seals hunted in Denmark (Greenland) and certain EU member States enjoy market access *irrespective of* animal welfare, whereas seal products from other sources are prohibited *because of* animal welfare. Yet, seals from *all* countries are vulnerable to exactly the *same* animal welfare risks. Ignoring these risks for seal products from some sources, but making them decisive for seal products from other sources, involves arbitrary and unjustifiable discrimination between countries where the same conditions prevail and is a disguised restriction on trade. Although the EU did not address this argument, it recognizes the importance of the sixth recital for the interpretation of Article 2.2.[167]

iv. Conclusion: the EU Seal Regime does not contribute to animal welfare

123. In sum, there is a rational disconnect in terms of the design, structure, and expected operation of the EU Seal Regime between the restrictive conditions imposed under the three requirements – which have nothing to do with animal welfare – and the stated animal welfare objective. As a result of this rational disconnect, the EU Seal Regime fails to contribute to protecting animal welfare, or to public concerns regarding animal welfare.

b. Contribution to sustainable resource management

124. Under the SRM requirements, seal products must meet several conditions, including the following three conditions which Norway regards as unnecessary to the achievement of the SRM objective: (i) resource management must be the "sole purpose" of the hunt; (ii) the products must be placed on the market "non-systematically"; and (iii) the hunters cannot make a profit.[168] Norway has explained in detail why these three conditions are more trade-restrictive than necessary to achieve the EU's SRM objective.[169] However, the EU has declined to rebut Norway's *prima facie* case on this point, because it wrongly asserts that the conditions are not trade-restrictive.[170] This is an absurd argument, because each of these three conditions could block market access.

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[166] Norway's FWS, paras. 568-577, 696-703, 713-716, 730-733, 739-742, 752; see also, e.g. Appellate Body Report, *US – Clove Cigarettes*, paras. 95-96.
[167] EU's FWS, para. 347. The Appellate Body has explained that the preamble to the *TBT Agreement* provides relevant context for the interpretation of the provisions of the *Agreement*, and also sheds light on the object and purpose of the Agreement. Appellate Body Report, *US – Clove Cigarettes*, para. 89.
[168] Norway's FWS, paras. 717-753.
[169] Norway's FWS, paras. 721-752.
[170] EU's FWS, paras. 358, 362 and 416.

3. The risks non-fulfilment would create

125. In assessing necessity, the Panel must also take "account of the risks non-fulfilment would create".[171] The EU only comments on the risks of non-fulfilment of the animal welfare objective. Even then, its comments are based on a *hypothetical measure* that ignores the inconsistencies and contradictions inherent in the measure it *actually adopted*. Its arguments illustrate the fallacy of its position.

126. The EU begins by noting that animal welfare is extremely important to the EU.[172] Then, however, the EU simply proceeds to repeat its unsupported assertion that the EU Seal Regime "does make a substantial contribution to the welfare of seals".[173] However, this argument artificially separates the so-called "General Ban" and "exceptions", entirely ignoring the impact of the "exceptions". As Norway has just explained,[174] the measure as a whole does not contribute to the animal welfare objective. Indeed, the measure admits seal products from a source that uses inhumane killing methods and that is expected fully to satisfy EU demand.

127. As a result, in adopting the EU Seal Regime, the EU has chosen to *accept* the *certainty* of very significant non-fulfilment of its animal welfare objective – or, as the EU prefers to say, the concerns motivating its "public morals".

4. Less trade-restrictive alternatives would make at least an equivalent contribution to the asserted objectives

128. To show that a measure is more trade-restrictive than necessary a complainant may put forward alternative measures, provided that: (i) their contribution to the legitimate objectives is equivalent to that of the challenged measure, having regard to the risks non-fulfilment would create; and (ii) they are reasonably available.

a. Norway's proposed less trade-restrictive alternatives would make an equivalent contribution

129. The benchmark against which alternative measures must be judged is the degree of contribution "actually" achieved by the challenged measure as revealed through its design,

[171] *TBT Agreement*, Article 2.2.
[172] EU's FWS, para. 367.
[173] EU's FWS, para. 368.
[174] See paras. 116-123 above.

structure, and expected operation.[175] The question is: does an alternative measure make a contribution, at least, equivalent to that made by the challenged measure?

130. To recall, the measure's legitimate objectives are: the protection of animal welfare (whether or not labelled as "public morals"); the sustainable management of marine resources; personal choice of travelling consumers; and dispelling consumer confusion. Norway has put forward three alternative measures that would achieve these objectives:

- The first alternative consists of the removal of the three sets of marketing requirements;
- A second alternative consists of restricting access to the EU market to those seal products that are demonstrated to comply with animal welfare requirements, with labelling;[176]
- With respect to the SRM requirements, a third alternative would allow market access for seal products derived from sustainable resource management hunts, without requiring that the hunt be for the "sole purpose" of sustainable resource management; and that sales by the hunter be "non-systematic" and "not for profit".

i. Conditioning market access on compliance with animal welfare requirements

131. The EU focuses almost exclusively on the second alternative, with which we begin. As Norway has explained, by conditioning market access on compliance with animal welfare requirements, such an alternative would address directly the concerns that, according to the EU, motivate the measure.[177] The contribution to the EU's animal welfare objective would, therefore, be *greater* than under the EU Seal Regime as currently drafted.

132. The EU's dismissal of the alternative rests on the assertion that EU legislators sought a higher level of fulfilment than that provided by such a measure.[178] Specifically, the EU legislators chose not to tolerate "the inherent risks that seals could experience excessive suffering".[179] The EU fails to recognize that, whatever abstract "level of fulfilment" its legislators had in mind, the measure it adopted does not pursue that high level of protection. As the Appellate Body has said, the question is not, "in the abstract, the level at which a

[175] Appellate Body Report, *US – COOL*, para. 373.
[176] Norway's FWS, para. 793. For the full analysis provided by Norway, see ibid., paras. 793-911.
[177] See, e.g. EU's FWS, para. 2.
[178] EU's FWS, para. 373.
[179] EU's FWS, para. 373.

responding Member wishes or aims to achieve that objective".[180] Instead, the question is "to what degree, or if at all, the challenged technical regulation, as written and applied, actually contributes to the legitimate objective".[181]

133. The measure at issue permits a large number of seal products to be placed on the EU market, which could entirely satisfy EU demand, without addressing the risk "that seals could experience excessive suffering".[182] Thus, the very same risks that the EU says "could not be tolerated" in the proposed alternative are not even addressed in the challenged measure.[183]

134. The EU also claims that "the proposed alternative would allow the placing on the market of seal products obtained from seals hunted for commercial purposes *which may have been killed in a manner that causes them excessive suffering*".[184] Again, this is wrong. Under Norway's alternative, which has animal welfare requirements, seals "killed in a manner that causes them excessive suffering" would *not* have access to the EU market. It is the EU Seal Regime, as adopted by the EU, that allows market access to seals killed in such a manner.[185]

135. This alternative would also contribute to a greater extent than the EU Seal Regime to consumer choice and preventing consumer confusion. Norway's alternative includes *labelling* of animal welfare-compliant seal products admitted to the EU market,[186] which would make a much greater contribution than the EU Seal Regime to dispelling consumer confusion and allowing greater consumer choice. It would alert EU consumers to the sale of seal products (which the EU Seal Regime does not), informing them that animal welfare requirements were met (which the EU Seal Regime cannot), and allowing consumers to leave the products on the shelf.

136. Finally, provided that the sustainable resource management hunts comply with animal welfare requirements, this alternative would also allow the pursuit of the sustainable resource management objective.

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[180] Appellate Body Report, *US – COOL*, para. 390.
[181] Appellate Body Reports, *US – COOL*, para. 373; and *US – Tuna II (Mexico)*, para. 317 (footnotes omitted).
[182] EU's FWS, para. 373.
[183] EU's FWS, para. 373.
[184] EU's FWS, para. 375 (emphasis added).
[185] See Norway's FWS, paras. 679-690.
[186] Labelling is a feature of the alternative described by Norway: see Norway's FWS, para. 779.

ii. The two other alternatives proposed by Norway

137. We turn briefly to the two other alternatives identified by Norway, respectively: retaining market access for seal products caught pursuant to sustainable resource management, but removing the contested SRM conditions; and, removing the three requirements in their entirety.

138. In relation to the alternative of removing the three contested SRM conditions, the EU's only argument is that the changes proposed by Norway "would enlarge"[187] the scope of application of the SRM requirements, and "thereby undermin[e]" the objective of the EU Seal Regime.[188] This argument reflects the EU's confusion regarding its objectives. The issue is whether the alternative ensures an equivalent contribution to the SRM objective pursued by this aspect of the measure. Norway has already shown that it would.[189] The contested SRM conditions have no rational connection to animal welfare.

139. The EU dismisses the alternative of removing entirely the three sets of market access requirements on the basis that it "amounts to repealing the EU Seal Regime".[190] The EU's argument, however, presumes the EU Seal Regime makes a contribution to its animal welfare objectives that is greater than would be the case were the measure not in place. That presumption is not consistent with the facts.

b. Reasonable availability of a measure conditioning market access on compliance with animal welfare requirements

140. With regard to the alternative of conditioning market access on compliance with animal welfare requirements, the EU contests that a system of market access based on compliance with animal welfare requirements is reasonably available. In making this argument, the EU argues that "in practice" it is "*impossible* to apply and enforce" humane killing methods in the seal hunt.[191] The EU's evidence presents a distorted picture of the science regarding seal hunting generally and Norwegian seal hunt in particular. The EU also ignores the evidence of animal welfare concerns in the indigenous and SRM seal hunts, in particular the inhumane practices applied in the Greenland hunt, such as netting.

[187] EU's FWS, para. 417.
[188] EU's FWS, para. 417.
[189] Norway's FWS, paras. 915-916.
[190] EU's FWS, para. 415.
[191] EU's FWS, para. 373 (emphasis added).

141. Indeed, the whole perspective of the EU's critique of seal hunting is profoundly misleading. The EU suggests that it pursues a "high level of protection"[192] and that shortcomings in the seal hunt "could not be tolerated".[193] The EU would have the Panel believe that it seeks perfection from the seal hunt. In truth, the EU's level of protection achieved is far from perfection, because the measure opens the EU market to seal products from sources that use inhumane killing methods.

142. Also, the EU's position that it is "***impossible***" to hunt seals humanely is contradicted by the legislative history. In the Impact Assessment, the Commission concluded that there is "*clear evidence of th[e] fact that seals within the varying commercial hunts may be killed in an appropriate manner*"[194] and that "*it is possible for animal welfare concerns to be minimised*".[195] Without questioning EFSA's "mandate", as it does now,[196] the Commission said that EFSA's "independent scientific opinion" was "rigourous enough to inform the policy-making process", and it cited EFSA's conclusion that "*it is possible to kill seals rapidly and effectively without causing them avoidable pain or distress*".[197]

143. Consistent with the Commission's earlier views, the Norwegian hunt achieves high animal welfare standards that far exceed the levels that the EU willingly tolerates under the IC and SRM requirements. However, it bears saying that the issue is not whether Norway's sealing regulations or practices achieve an appropriate level of protection. The issue is whether it is ***possible*** for the EU, as part of an alternative measure, to legislate market access requirements that would ensure humane killing of seals.

i. Disagreement amongst experts is common and need not impede regulation

144. The EU acknowledges that "most veterinary experts agree that it could be possible, in theory, to define a humane method for killing seals".[198] Norway agrees. However, the EU sees this as irrelevant, because veterinary experts "disagree on the requirements that should

[192] EU's FWS, para. 39.
[193] EU's FWS, para. 373.
[194] Commission Impact Assessment, Exhibit JE-16, section 3.1.4, p. 17 (emphasis added).
[195] Commission Impact Assessment, Exhibit JE-16, section 3.1.4, p. 16 (emphasis and underlining added).
[196] EU's FWS, para. 80.
[197] Commission Impact Assessment, Exhibit JE-16, section 2.3, p. 9 and section 3.1.4, p.16 (emphasis original, underlining added).
[198] EU's FWS, para. 378.

be part of such method".[199] Norway is certain that the EU knows, like all regulators, that differences of opinion exist in every field, and that such differences are not a reason to selectively ban trade on the basis that regulation is impossible.

ii. Similar situations show it is possible to lay down and enforce an acceptable level of animal welfare protection

145. The EU challenges Norway's argument that measures taken in related product areas may provide guidance on what is reasonably available.[200] The EU responds by arguing that only measures relating to "sufficiently similar situations"[201] are relevant, and that there is no requirement of consistency in the regulation of "different products"[202]. We have three comments. *First*, guidance may be drawn from "similar" products, even if the products are not the same.[203] *Second*, Norway derives guidance from "sufficiently similar" situations regarding slaughter-house and wild-hunt animals.[204] The similarity of the situations arises because they all involve ensuring animal welfare when killing animals to produce consumer products. In the other situations, the EU has permitted trade subject to animal welfare requirements and there is no reason it cannot do so for seals.

146. Third, and most strikingly, Norway derives guidance from standards that the EU applies with respect to the *same products* in the *same situations*. Specifically, seal products killed by indigenous communities or hunters under an SRM plan can be sold without consideration of animal welfare. At the same time, seal products killed by Norwegian seal hunters cannot be placed on the market.

iii. Environmental and related factors need not impede the achievement of an acceptable level of animal welfare protection

147. The EU argues that certain "inherent obstacles"[205] render impossible the achievement of acceptable animal welfare outcomes in the context of seal hunting. Norway disagrees that the factors cited by the EU inevitably lead to unacceptable animal welfare outcomes or imply that seals cannot be hunted humanely.

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[199] EU's FWS, para. 378.
[200] Norway's FWS, paras. 878-883.
[201] EU's FWS, para. 405.
[202] EU's FWS, para. 404.
[203] Appellate Body Report, *Korea – Various Measures on Beef*, paras. 169-172.
[204] See Norway's FWS, paras. 878-883.
[205] EU's FWS, para. 384.

(1) The EU gives a misleading impression of the Norwegian hunt

148. In making its critique, the EU addresses the Norwegian seal hunt. Even though the dispute does not concern Norway's sealing regulations or practices, we wish to correct the misleading impressions created by the EU. In doing so, Norway will show that humane killing of seals is possible in the circumstances of the Norwegian seal hunt.

149. In seeking to discredit the Norwegian hunt, the EU provides a report by NOAH, a Norwegian animal rights NGO, which paints a selective and inaccurate picture of the Norwegian hunt. The report consists of selective quotations collected together to suggest endemic animal welfare problems in an uncontrolled hunt. When the selective quotations are placed in context, a different picture emerges. *First*, it should be noted that the inspectors' reports are used by Norway as part of an effective monitoring system. They are thus used to improve practices. I will give one example: since Inspector Moustgaard reported difficulty with contacting the Directorate while at sea in 2005,[206] provision has been made for inspectors to be able to contact the Directorate 24 hours a day during the entire hunt. In addition, the government routinely follows up on reports of unacceptable conduct: as the EU notes, an extreme example of unacceptable conduct was the subject of a criminal prosecution in 2009.[207]

150. *Second*, importantly, the NOAH report fails to acknowledge that the problems identified pertain to a tiny fraction of animals hunted. For example, the report references Anne Moustgaard's report of the 2009 hunt on Havsel, which records non-compliance with regulations regarding around 25 seals.[208] In that hunt, 3,197 seals were hunted,[209] which means that over 99% of animals were hunted consistently with the standards required by Norwegian regulation and with an acceptable animal welfare outcome. By any standard, this is a high level of protection, that compares very favourably with Denmark (Greenland), where as noted 30% of ringed seals are netted, and struck and lost rates exceed 20%.[210]

[206] Quoted in NOAH Report, Exhibit EU-43, p. 19.
[207] EU's FWS, para 188.
[208] Anne Moustgaard's 2009 comments, mistakenly attached to the 2010 Inspector Report in Appendix Q to the NOAH report, Exhibit EU-43.
[209] Source: Norwegian Directorate of Fisheries.
[210] See paras. 118 and 119 above.

151. To give the Panel an impression of the hunt, Norway wishes to play a short video to show the Norwegian seal hunt in practice.[211] This video contains scenes involving the killing of seals, with the killing process involving the shooting of seals, the administration of the hakapik, and bleeding out. The aesthetics of the hunting process from the perspective of human viewers have nothing to do with the question whether the seals are killed humanely.[212] The video was filmed during the 2011 and 2012 hunting seasons and is narrated by Mr. Jan Danielsson, an inspector of the Norwegian seal hunt who has already provided a statement for the Panel.

[*Play video*]

(2) Introduction of comments by Dr. Knudsen

152. In light of the video, we now address the issues raised by the EU in suggesting that seal hunting in general, and the Norwegian hunt in particular, cannot achieve high standards of animal welfare protection. Several of the factors referred to by the EU involve veterinary science. We have asked Dr. Siri Knudsen, a veterinary science expert with expertise in seals, to address these factors. Dr. Knudsen has also already provided a statement for the Panel.

(3) Comments by Dr. Knudsen

153. [*Dr. Knudsen*]: I have been asked to comment today on the animal welfare implications of three issues raised by the EU in its first written submission.

(a) Delay

154. The first relates to delays between the stunning and killing of seals. The EU describes implication of that delay as part of an argument that it is impossible, in practice, to apply effectively a genuinely humane killing method.[213] I note that in relation to the Norwegian hunt, the EU expresses concerns only with delays when seals are shot, not when they are stunned initially through use of the blunt end of the hakapik. Nonetheless, the EU labels

[211] A copy of the video is submitted as Exhibit NOR-116.
[212] See, e.g. AVMA Guidelines, Exhibit NOR-91, p. 5 ("human attitudes and responses … should not outweigh the primary responsibility of using the most rapid and painless euthanasia method possible under the circumstances"; and, e.g. "[m]ethods that preclude movement of animals are more aesthetically acceptable to most technical staff even though lack of movement is not an adequate criterion for evaluating euthanasia techniques").
[213] In connection with the Canadian hunt, see EU's FWS, paras. 126 and 139-144, referring to Exhibits EU-30, EU-33 and EU-37.

Norway's regulation as "deficient" because it only requires that the hakapik be applied to shot animals "as soon as possible".[214]

155. When seals are shot, the most important factor with regard to animal welfare is to ensure that the animal is rendered irreversibly unconscious or dead by the rifle shot. An animal that is effectively stunned and killed in this way is incapable of suffering.

156. In my view, it is quite feasible for shooters to assess whether a seal has been shot properly. Indicators of a successful shot, visible to a shooter through a telescopic sight, will be that the impact of the shot is in the seal's head and that the head immediately falls to the ice and stays relaxed. Since the rifle shot in many cases will be grossly destructive, the shooter can also look for damages to the head/skull including a grossly destructed head, as well as severe bleeding from the skull. If there is any doubt whether the animal was effectively stunned/killed by the first shot, e.g. if the head is not relaxed, if there is movement, and/or if skull damage or severe bleeding are not clearly visible, the shooter should immediately reshoot the animal.

157. An additional step (such as bleeding-out) following stunning of an animal is usually only required for so-called "simple stunning" methods (e.g. methods that only induce temporary unconsciousness). For combined "stun/kill" methods, there is no requirement for such additional steps, as shown, for example, by the EU Regulation on the protection of animals at the time of killing, and the 2007 AVMA Guidelines.[215]

158. The use of firearm with free projectile (i.e. bullet) is, according to both AVMA and EU law, a combined stun/kill method that can be used on all species. When this method is used, there is therefore no requirement for additional steps (like bleeding-out) as, to quote the EU Regulation, the method: "[causes] Severe and irreversible damage of the brain provoked by the shock and the penetration of one or more projectiles".[216]

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[214] In relation to the Norwegian seal hunt, the EU says "when a seal is shot first, as is generally the case nowadays, Norway's regulations do not require to strike it with the spike of the hakapik immediately after shooting, but only "as soon as possible", and asserts that this is a way in which Norwegian regulations are "deficient": EU's FWS, para. 172.

[215] Council of the European Union, *Regulation (EC) No 1099/2009 on the protection of animals at the time of killing*, Official Journal of the European Union L 303/1 (September 2009) ("Regulation 1099/2099"), Exhibit NOR-117, Article 4; and AVMA Guidelines, Exhibit NOR-91.

[216] Regulation 1099/2099, Exhibit NOR-117, Annex 1, Chapter 1.

159. Based on the degree of skull/brain damage produced as described by Daoust and colleagues (Daoust et al. 2002, Daoust and Caraguel 2012), the appropriate use of a rifle shot with adequate ammunition to the head of seals must be regarded as a combined "stun/kill" method (that is to say, irreversible unconsciousness/death is caused by the shot). I note that, in its opinion on animal welfare aspects of seal hunting, EFSA also concluded that rifle shots to the head/upper-neck with appropriate ammunition "cause immediate death because of its impact power and the large ensuing wound".

160. Accordingly, the extra steps used on rifle shot seals in the Norwegian hunt, namely the application of the spike of the hakapik, followed by bleeding, have to be regarded as precautionary measures after a stun/kill method has been applied.

161. For these reasons, I do not regard the Norwegian regulations as "deficient" simply because there may be a delay between shooting a seal and the administration of the precautionary steps with the hakapik, and bleeding out.

162. That is not to say that additional measures could not be taken to further reduce any risk of a shot seal regaining consciousness before being hit with the hakapik and bled. For example, in order to guard against this risk, a shooter should, in my opinion, keep monitoring the shot animal for any signs that the animal has not been properly stunned, and if necessary apply a further shot.

(b) Effectiveness of the hakapik

163. The second issue raised by the EU on which I have been asked to comment is that the EU has questioned the effectiveness of the hakapik as a stunning weapon under the Norwegian regulations.

164. As a physical stun/kill method, there is little doubt that the hakapik is effective if applied properly. The proper use of the hakapik consists in striking the skull bones covering the brain (the calvarium) so that multiple fractures and collapse of the skull and destruction of the brain occur. Destruction of the brain will lead to immediate loss of consciousness and death.

165. According to AVMA a blow to the head is a humane method of euthanasia for young animals with thin skulls as 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 (AVMA 2007).[217]

166. At the time EFSA was considering its report on the animal welfare aspects of killing and skinning seals in 2007, there was limited scientific data with continuity of evidence on the effective use of the hakapik. I note that, in recently published data from Canada, Daoust and colleagues have extensively studied the effect of the hakapik and these investigations have been published in a scientific journal with peer-review (Daoust and Caraguel 2012).[218] This work provides data on the effective use of the hakapik, which also applies to the use of the hakapik in Norway.

167. I strongly disagree with the statement cited by the EU that "inflicting multiple blows with a … hakapik [is] a practice … unacceptable from an animal welfare point of view". To the contrary, to avoid any risk of suffering, it is very important that the hunters are trained not to hesitate to re-apply stunning steps if they are in any doubt whether the animal has been properly stunned.

168. I also disagree that "stunning via delivery of a manual percussive blow with a … hakapik may not be a suitable method of killing seals which have reached the 'beater' stage of development". Daoust and colleagues (Daoust et al. 2002, Daoust and Caraguel 2012)[219] have extensively studied the effect of the hakapik on beaters (> 500 animals). In my opinion, these studies convincingly show that the hakapik is a highly effective weapon for beaters, a conclusion also supported by the EFSA.[220]

169. The two Daoust investigations (Daoust et al. 2002 and Daoust & Caraguel 2012) [221] are the only veterinary studies of the methods employed in seal hunt that are published in peer-reviewed scientific journals. Both the Burdon et al. 2001 and Butterworth et al 2007[222] papers are unpublished, non-peer reviewed reports, that base all their conclusions on analysis of extracted sequences of video clips and/or on examination of abandoned carcasses. I agree with EFSA in that analyses of videotapes and/or examination of abandoned carcasses (where the killing of the animals has not been observed and recorded) are of limited value for

[217] Exhibit NOR-91.
[218] Exhibit CDA-34.
[219] Exhibits EU-32 and CDA-34.
[220] Exhibit JE-22.
[221] Exhibits EU-32 and CDA-34.
[222] Exhibits EU-31 and EU-34.

assessing whether or not an animal was rendered immediately unconscious or not during the hunt (EFSA 2007).[223]

170. Insofar as the EU argues that the use of the spike of the hakapik on shot animals equates to pithing, there are no scientific data to support such a conclusion. I do not believe that you can compare an accurate and forceful strike with the spike of the hakapik on the skulls of seals, which likely will cause skull fractures and also damages in the underlying brain tissue, to pithing, which is done with a thin plastic rod slowly inserted through the hole created by a captive bolt gun.

(c) Absence of a check for consciousness

171. The third issue on which I have been asked to comment relates to the statement by the EU that the absence of check of unconsciousness before bleeding out is a deficiency of the Norwegian regulation.

172. When the hakapik is used as the primary weapon, the Norwegian regulation demands that the sealers ensure that the skull is crushed by the blunt end (Norwegian regulation § 7).[224] As I stated in my statement of 6 November 2012, I disagree that use of a blink test or other tests for unconsciousness would result in a higher level of animal welfare than is currently achieved by the requirement under the Norwegian regulation that, following initial stunning/killing with the blunt of the hakapik (crushing the skull), a seal must be struck with the sharp end of the hakapik before being bled out. The merit of the current approach required by Norway's regulations is, firstly, that it is much faster to apply another strike with the hakapik than to thoroughly examine the animal. Secondly, this step does not leave any room for interpretation or doubt. In sum, this is both a safer and more practical method, in my opinion.

(4) Introduction of comments by Mr. Danielsson

173. Thank you Dr. Knudsen.

[223] See EFSA 2007, p. 54 (third full paragraph). EFSA stated: "Because of the difficulty in evaluating whether or not a seal has been rendered unconscious by a blow to the head or by a bullet at a distance or on videotape (Burdon et al. 2001) or after the animal has been skinned..." See alsoEFSA's comments on the Butterworth et al. 2007 paper that: "Therefore, the proportion of seals that were not killed by the first shot in the study of Butterworth et al. 2007 remains unclear (p. 56, top of page); and "Based on this evidence, however, it was not possible to determine what may have been the state of consciousness of these animals following the blow(s)." (p. 57, second full paragraph).
[224] Exhibit NOR-15.

174. In addition to raising issues best addressed as matters of veterinary science, the EU also raises a series of issues about the conditions under which the Norwegian hunt takes place and other circumstances of the hunt. The EU says that these conditions pose "inherent obstacles" to implementation of humane killing methods.[225]

175. To respond to such points, I will now turn to Mr. Danielsson, who is an experienced inspector of the Norwegian seal hunt and a veterinarian.

(5) Comments by Mr. Danielsson

176. [*Mr. Danielsson*] Thank you. I have been asked to address three different factors:

- Weather conditions, including factors affecting visibility,[226] wind,[227] the movement of the ocean,[228] as well as cold;[229]
- The fact seals are unrestrained when stunned, unlike cattle in a slaughterhouse;[230] and
- Aspects of shooting, including shooting distance,[231] shooting near open water,[232] and the targeted location of the shot.[233]

(a) Weather conditions

177. I first address weather conditions.

178. I believe that the EU overstates the significance of weather conditions as a barrier to the achievement of very high animal welfare standards on the Norwegian hunt.

179. The animal welfare risk associated with all of the environmental factors cited by the EU is, essentially, that these factors may make shooting inaccurate, and therefore give rise to animal welfare issues.

[225] EU's FWS, section 2.4.4.2.
[226] EU's FWS, paras. 128 and 133 (referring to Richardson (2007), Exhibit EU-36, pp. 40-43; Butterworth (2012), Exhibit EU-37, pp. 7-8).
[227] EU's FWS, para. 133 (referring to Butterworth (2012), Exhibit EU-37, p. 7).
[228] EU's FWS, para. 133 (referring to Butterworth (2012), Exhibit EU-37, p. 7).
[229] EU's FWS, para. 133 (referring to Butterworth (2012), Exhibit EU-37, p. 7).
[230] EU's FWS, para. 127 (referring to Butterworth (2012), Exhibit EU-37, p. 33; Richardson (2007), Exhibit EU-36, pp. 21-22).
[231] EU's FWS, para. 132 (referring to Butterworth (2007), Exhibit EU-34, p. 3 and pp. 40-41; Richardson (2007), Exhibit EU-36, p. 39; Butterworth (2012), Exhibit EU-37, pp. 5-6).
[232] EU's FWS, para. 172 (referring to section 7 of Norway's seal hunt Conduct Regulation).
[233] EU's FWS, para. 172.

180. Although the Norwegian regulations do not address the factors specifically listed by the EU, they do require that all of these factors, together with any others that impinge upon favorable animal welfare outcomes, be taken into account by the captain, shooter, and inspector, in deciding whether the conditions allow hunting.

181. In my experience, with the framework laid down by these regulations, shooting performance is very high. Shooters are responsible professionals whose shooting skills are tested, and whose rifle is checked, prior to the hunt. A hunter typically knows the limits of the equipment and his/her ability. They always aim to kill with the first shot. They refrain from shooting if weather conditions mean they are not confident of the accuracy of the shot. Moreover, they are adequately dressed for the cold and, on the relatively large Norwegian sealing vessels, can always warm up inside.

182. An important consideration in addressing the environmental conditions of the hunt is to make sure that the marksman is competent to deal with those conditions. That is one of the objectives of the training and testing regime required for the participants in the Norwegian seal hunt. It would be feasible for a regulator to insist upon additional training that takes account of environmental factors, such as visibility, wind, cold, and movement of the shooting platform and target.

(b) Seals as "moving targets"

183. Moving on to the second point I have been asked to address, in my view the EU overstates the degree to which the fact that seals are unrestrained gives rise to animal welfare concerns. Seals are slow moving on the ice. As illustrated on the video we just have played, although seals may sometimes move, the relatively slow and predictable movements are seldom an impediment to a good shot by a skilled hunter. Indeed, seals are frequently a stationary target that is easy for the marksman to shoot.

184. The marksmen are invariably experienced in hunting on land. During hunts on land, there is often limited visibility, obstacles, a narrow shooting area and a greater shooting distance. The shots are often directed towards animals on the move and animals that are timid and that may thus make quick and unexpected movements. By comparison, hunting seals is considerably more simple.

185. I find it strange that the EU draws a negative comparison to a slaughterhouse with the argument about seals being shot from a distance of 40 or so metres. For me, the comparison is more connected to the fact that animals in a slaughterhouse are more stressed in an unusual and extremely noisy environment, while seals are shot where they are found, normally undisturbed and thus not stressed. In this regard, the Norwegian seal hunt compares very positively to a slaughterhouse, from an animal welfare aspect.

(c) Aspects of shooting

186. I will now address the third set of issues on which I have been asked to comment, namely the conditions for shooting.

187. I have already addressed, in my statement of 7 November 2012, the relative closeness of seals hunted from a distance of 30-40 metres using telescopic sights, particularly for the skilled and well-practiced marksmen on the seal hunt.

188. Marksmen also have time to focus on doing their job properly. There is no "race between sealers"[234] to hunt as many seals as possible before quotas are filled. In recent years, actual catches have been well below quota levels.

189. The main rule of the hunt states that utmost considerations must be taken regarding animal welfare. Shooting a seal close to the water's edge of an ice floe would carry a risk of "struck and lost" in the seal hunt. Hunters wish to avoid this both for animal welfare reasons, to which they are legally bound to give highest priority, and also because losing an animal requires hunting to stop while a search is conducted. In my observations, struck & lost rates are extremely low.

190. In my view, therefore, the absence of specific rules stating that seals may not be shot close to the water's edge is not a significant gap in the Norwegian regulations.

191. The same is true of the absence of a specific rule prohibiting shooting any place other than the head.

[234] EU's FWS, para. 147.

192. In practice, the shooters always target the head because this shot is the best for rendering the animal irreversibly unconscious. Shooting in the body would also reduce the value of the pelt.

(d) The system of inspectors

193. Finally, I wish to comment on the EU's claim that "in practice, it is very difficult for the inspector to keep an adequate overview of all the activities of the hunt at all times".[235]

194. As I detailed in my expert statement, in my experience, the overview of the hunt is very good and an inspector can effectively monitor the hunt. The Norwegian hunt is a relatively small hunt, where each animal is killed manually by a team of hunters. The level of oversight from an inspector on the seal hunt compares favourably to the level of oversight during industrial slaughter.

195. If the hunting takes place from the main boat, the inspector can effectively monitor the hunt, maintaining a good overview of the kills. The inspector can also observe the hunt from the crow's nest, giving a bird's eye perspective. In addition, the inspector has binoculars, aiding his observations even further.

196. If the hunt takes place from the small boats, the inspector can join the small boat and observe the hunt from close by, or he/she can observe the hunt with binoculars from the main boat.

197. In order to monitor the hunt effectively, it is not necessary to see every kill in close detail. An inspector can have a very good sense of what is going on by keeping a more general overview. Indeed, the presence of an inspector, who is responsible to the Directorate of Fisheries, ensures that hunters know their compliance with the regulation is being monitored, and encourages compliant behaviour.

198. Overall, inspectors are very effective in ensuring that the sealing regulations are understood and that the rules are followed.

199. In closing, I wish to emphasize that, as a veterinarian, I have ethical obligations to ensure that animals do not suffer unnecessarily.

[235] EU's FWS, para. 181 (referring to the evidence cited in the NOAH Report, Exhibit EU-43, pp. 3-4).

(6) Conclusion: The EU is incorrect in asserting that environmental factors prevent Norwegian seal hunters from respecting animal welfare

200. Thank you Mr. Danielsson. Dr. Knudsen and Mr. Danielsson will follow up these remarks with statements to accompany Norway's second written submission. Dr. Knudsen and Mr. Danielsson will also be available to answer questions.

201. In sum, Dr. Knudsen and Mr. Danielsson show that the EU incorrectly asserts that environmental factors prevent Norwegian seal hunters from respecting animal welfare. Norway's regulations require an assessment of all the factors raised, and any others affecting animal welfare, and hunting does not occur if conditions do not allow. However, if a regulator wished to go further, it could require that particular factors be considered in assessing whether hunting is possible. A regulator could even establish minimum standards, supported by evidence, for example addressing wind and visibility. Norway's evidence confirms the conclusions of EFSA and the EU Commission that "*it is possible to kill seals rapidly and effectively without causing them avoidable pain or distress*".[236]

202. In closing our discussion on the availability of an alternative measure that bases market access on animal welfare requirements, we recall that the Panel's task is not to consider whether an alternative meets some *theoretical* level of protection. Rather, the task is to consider whether an alternative would make a contribution to seal welfare *equivalent* to the actual contribution of the EU Seal Regime. Given that the measure opens the EU market to large quantities of seal products without consideration of animal welfare, it makes a markedly *lesser* contribution than an alternative basing market access on animal welfare requirements.

VII. CONCLUDING REMARKS

203. Finally, with this statement, Norway submits two new exhibits, Exhibits NOR-116 and NOR-117, which are referenced in footnote 211 to para. 151, and footnote 215 to para. 157, respectively.

204. In closing, we again would like to thank the Panel for this opportunity to make a statement, and we look forward to questions from the Panel and the parties.

[236] See para. 142 above.