CONFIDENTIAL

BEFORE THE WORLD TRADE ORGANIZATION

European Communities – Measures Prohibiting the Importation and Marketing of Seal Products

(WT/DS401)

Second Written Submission of Norway

27 MARCH 2013

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LIST OF ABBREVIATIONS

Abbreviation	Description
AIDCP	Agreement on the International Dolphin Conservation Programme
APNN	Greenland Department for Fisheries, Hunting and Agriculture
AVMA	American Veterinary Medical Association
Basic Seal Regulation	European Parliament and Council of the European Union, *Regulation (EC) No. 1007/2009 on Trade in Seal Products*
Commission Impact Assessment (or Impact Assessment)	European Commission, *Impact Assessment on the potential impact of a ban of products derived from seal species*, COM(2008) 469 (23 July 2008)
Conduct Regulation	*Regulation Relating to the Conduct of the Seal Hunt in the West Ice and East Ice*, adopted by the Norwegian Ministry of Fisheries and Coastal Affairs as Regulation of 11 February 2003 No. 151, amended by the Regulation of 11 March 2011 No. 272
Danielsson Statement	Expert Statement of Mr Jan Vikars Danielsson (7 November 2012)
Danielsson Second Statement	Expert Statement of Mr Jan Vikars Danielsson (13 March 2013)
Danielsson Third Statement	Expert Statement of Mr Jan Vikars Danielsson (26 March 2013)
DFO	Canadian Department of Fisheries and Oceans
EC Treaty	Treaty establishing the European Community
EFSA	European Food Safety Authority
EU	European Union
First OS	Opening Statement at the First Substantive Meeting of the Panel
FWS	First Written Submission
GATS	*General Agreement on Trade in Services*
GATT	*General Agreement on Tariffs and Trade*
HS	Harmonized Commodity Description and Coding System
IC	Indigenous Communities

ICCC	Inuit Circumpolar Council Canada
ICES	International Council for the Exploration of the Sea
IDCP	International Dolphin Conservation Programme
ILO Convention	*ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries*
Implementing Regulation	European Commission, *Regulation (EU) No. 737/2010 Laying Down Detailed Rules for the Implementation of Regulation (EC) No. 1007/2009 of the European Parliament and of the Council on Trade in Seal Products*
ITK	Inuit Tapiriit Kanatami
Knudsen Statement	Expert Statement of Professor Siri Kristine Knudsen (6 November 2012)
Knudsen Second Statement	Expert Statement of Professor Siri Kristine Knudsen (25 March 2013)
Knudsen, "The Dying Animal"	S. Knudsen, "The Dying Animal: A Perspective from Veterinary Medicine", in A. Kellehear (ed.), *The Study of Dying: From Autonomy to Transformation*, Cambridge University Press (2009), pp. 27-50
Landmark Statement	Expert Statement of Mr Vidar Jarle Landmark (7 November 2012)
Leghold Trap Regulation	Council of the European Union, *Regulation (EEC) no. 3254/91 prohibiting the use of leghold traps in the Community and the introduction into the Community of pelts and manufactured goods of certain wild animal species originating in countries which catch them by means of leghold traps or trapping methods which do not meet international humane trapping standards*, Official Journal of the European Communities (1991) L 308/34 (4 November 1991)
MFN	Most favoured nation
MMPA	US Marine Mammal Protection Act
MSC	Marine Stewardship Council
Moustgaard Statement	Expert Statement of Ms Anne Moustgaard (25 May 2012)
NAFO	Northwest Atlantic Fisheries Organization
NAMMCO	North Atlantic Marine Mammal Commission

NEAFC	The North East Atlantic Fisheries Commission
NGO	Non-Governmental Organization
Proposed Regulation	European Commission, *Proposal for a Regulation of the European Parliament and of the Council Concerning Trade in Seal Products*, COM/2008/0469, 2008/0160 COD (23 July 2008)
PU	Personal Use
RC	Canada's Royal Commission on Sealing
RTKL	Finnish Game and Fisheries Research Institute
SCOS	University of St. Andrews' Sea Mammal Research Unit, Special Committee on Seals
SCM Agreement	*Agreement on Subsidies and Countervailing Measures*
SRM	Sustainable Resource Management
Technical Guidance Note	European Commission, *Technical Guidance Note Setting out an Indicative List of the Codes of the Combined Nomenclature that May Cover Prohibited Seal Products*
TAC	Total allowable catch
TBT Agreement	*Agreement on Technical Barriers to Trade*
TPS	Third Party Submission
TRIMs Agreement	*Agreement on Trade-Related Investment Measures*
UNDRIP	*United Nations Declaration on the Rights of Indigenous Peoples*
VCLT	*Vienna Convention on the Law of Treaties*
VKM	Norwegian Scientific Committee for Food Safety
WGHARP	ICES/NAFO/Joint Working Group on Harp and Hooded Seals
VKM Report	Norwegian Scientific Committee for Food Safety ("VKM"), Panel on Animal Health and Welfare, *Scientific Opinion on Animal Welfare Aspects of the Killing and Skinning in the Norwegian Seal Hunt* (8 October 2007)
WTO	World Trade Organization

2007 EFSA Scientific Opinion	[EFSA Panel on Animal Health and Welfare], *Scientific Opinion on Animal Welfare Aspects of the Killing and Skinning of Seals*, The EFSA Journal (2007) 610, pp. 1-122 (6 December 2007)
2008 COWI Report	COWI, *Assessment of the Potential Impact of a Ban of Products Derived from Seal Species* (April 2008)
2009 Management and Utilization of Seals in Greenland	Greenland Home Rule Department of Fisheries, Hunting and Agriculture, *Management and Utilization of Seals in Greenland* (revised in January 2009)
2010 COWI Report	COWI, *Study on Implementing Measures for Trade in Seal Products*, Final Report (January 2010)
2012 Animal Welfare Assessment	European Commission, *Impact Assessment accompanying the Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the European Union Strategy for the Protection and Welfare of Animals 2012-2015*, COM (2012) 6 final, SEC(2012) 56 final (19 January 2012)
2012 Management and Participation Regulation	*Regulation Relating to Regulatory Measures and the Right to Participate in Hunting of Seals in the West Ice and East Ice in 2012*, adopted by the Norwegian Ministry of Fisheries and Coastal Affairs as Regulation of 30 January 2012 No. 108
2012 Management and Utilization of Seals in Greenland	Greenland Home Rule Department of Fisheries, Hunting and Agriculture, *Management and Utilization of Seals in Greenland* (revised in April 2012)

I. INTRODUCTION

1. The EU Seal Regime[1] establishes three sets of restrictive conditions for seal products to be placed on the EU market. These three sets of requirements embody a political compromise reached by the EU Parliament when it adopted the Regime. The requirements contain both prohibitive and permissive elements, and define whether or not a product may possess the characteristic of containing seal.

2. The *prohibitive* elements serve to restrict the placing on the market of seal products from some sources, and effectively ban Norwegian seal products from the EU market. The *permissive* elements, by contrast, open the EU market to products that conform with the relevant conditions. In particular, the Sustainable Resource Management ("SRM") requirements open the market to seal products resulting from hunts in the European Union (Sweden and Finland), by tailoring conditions to match the way seals are hunted in the European Union, but not elsewhere. In addition, the Indigenous Communities ("IC") requirements open the market to seal products from Denmark (Greenland) by relying on qualifications that are met by hunts there, but that cannot be met by the overwhelming proportion of seal products from countries like Norway.

3. Although the parties differ on exactly how the objectives of the EU Seal Regime should be described, it is clear that one of the EU legislator's objectives in preparing the EU Seal Regime was to protect the animal welfare of seals. This is an objective that Norway shares.

4. However, an analysis of the design, structure and expected operation of the EU Seal Regime shows that the EU legislator lost sight of this objective when enacting its measure. Instead of promoting the welfare of seals, the three sets of requirements allow seal products to be marketed in the European Union without regard to animal welfare.

5. The EU legislator also lost sight of the European Union's WTO obligations because, in addition to failing to address animal welfare, the EU Seal Regime gives rise to discrimination on grounds of origin, contrary to the cornerstone non-discrimination principles

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

of WTO law. Further, it imposes restrictions on international trade that are neither necessary to achieve legitimate objectives, nor consistent with other basic WTO requirements.

6. In all these ways, the EU Seal Regime is, indeed, a "poor compromise" between different sets of interests,[2] and, moreover, is one that violates the GATT 1994, the *TBT Agreement*, the *Agreement on Agriculture*, and one that also nullifies benefits accruing to Norway after successive rounds of tariff negotiations.

7. In addressing Norway's claims, the European Union's strategy has been to shock the conscience of the Panel with video footage and commentary highlighting instances of poor animal welfare outcomes on seal hunts. The European Union appears to believe that such footage would lead the Panel to overlook the discriminatory, arbitrary and unnecessary consequences for international trade of the "poor compromise" adopted by the EU Parliament, and conclude that seal hunting should not be tolerated, even though seal hunting and seal products are tolerated by the European Union itself.

8. The European Union's strategy cannot prevail. Its approach is flawed because the duty of the Panel is to make an objective assessment of the matter before it. In making that objective assessment, the Panel cannot ignore the features and effects of the measure adopted by the European Union. The Panel cannot disregard that the measure's contribution to its overarching animal welfare objective is severely compromised by its pursuit of other objectives and there are less trade restrictive alternatives that would make, at least, an equivalent contribution to all of the measure's legitimate objectives. Nor can the Panel set aside the origin-based discrimination between seal products reflected in the SRM and IC requirements, or the arbitrary and unjustifiable discrimination between countries where the same animal welfare and resource management conditions prevail. These factors are central to the Panel's objective assessment because they are revealed in the considerable evidence regarding the design, structure, and expected operation of the measure at issue.

9. This evidence shows that the European Union's legislative approach rests on a flawed premise. That premise is that seal hunting is "inherently inhumane", because it is *impossible* to hunt seals in a manner that avoids pain, stress or other forms of suffering. Norway has already shown, and further substantiates with this submission, that this is not the case. Under

[2] European Parliament, *Debates – Item A6-0118/2009,* P6_CRE(2009)05-04 (4 May 2009), ("European Parliament Debates"), Exhibit JE-12, p. 64, reporting MEP comments at the time of the adoption of the Basic Seal Regulation. For discussion, see Norway's FWS, paras. 20 and 517-519.

sound regulatory conditions, it is perfectly *possible* to hunt seals in a manner that avoids them experiencing unnecessary pain, stress and other forms of suffering. Indeed, this occurs in the Norwegian seal hunt.

10. The European Union's litigation strategy is also grounded in a flawed premise, namely that the EU Seal Regime responds to the "inherent" inhumanity of seal hunting by adopting a "General Ban" on the marketing of seal products. This is incorrect, because the so-called "General Ban" is a highly selective ban. Although seal products from Norway are prohibited, the same is not true for seal products from Denmark (Greenland) or from the European Union, which are capable of satisfying the entire demand for seal products in the European Union. The selective nature of the European Union's ban results not only in discrimination, it also belies the EU argument that its measure pursues a high level of animal welfare protection, since animal welfare outcomes in both Denmark (Greenland) and the European Union are *worse* than they are on Norway's carefully regulated and inspected seal hunt.

11. Finally, in considering the European Union's assertions that there are insurmountable obstacles to implementing satisfactory regulatory requirements for sealing, Norway observes that the European Union has succeeded in developing systems to control and enforce conformity with regulatory requirements for the roughly 360,000,000 pigs, sheep, goats and cattle, and more than 4,000,000,000 poultry, killed in EU slaughterhouses each year.[3] In this light, the assertion that insurmountable obstacles prevent the same for an industry that, in Norway, catches less than 20,000 animals a year, under the permanent supervision of a government-employed veterinarian, is simply not credible.

12. The Panel has had the benefit of considerable argumentation and evidence from the parties. With that in mind, Norway seeks, in this submission to restate, briefly, the essence of each of its claims. Norway then addresses, by way of rebuttal, points that have been raised by the European Union, particularly those that have not been fully discussed until now.

13. Against that background, this submission is structured as follows.

[3] European Commission, *Summary of Impact Assessment Report for Council Regulation on the Protection of Animals at the Time of Killing*, SEC(2008) 2425 (18 September 2008), Exhibit NOR-39, p. 2.

14. In Section II, Norway shows that the EU Seal Regime results in discrimination on grounds of origin, contrary to the requirements of Articles I:1 and III:4 of the GATT 1994.

15. In Section III, Norway demonstrates that the EU Seal Regime is inconsistent with Article XI:1 of the GATT 1994 because of its limiting effect on the importation of seal products. In addition, because the *Agreement on Agriculture* applies to those seal products falling within the scope of Annex 1 to that *Agreement*, the EU Seal Regime also violates Article 4.2 of the *Agreement on Agriculture*.

16. In Section IV, Norway shows that, contrary to the European Union's position, the discriminatory effect of the EU Seal Regime has not been justified by the European Union under Article XX of the GATT 1994.

17. In Section V, Norway shows that the EU Seal Regime is a technical regulation within the meaning of Annex 1.1 of the *TBT Agreement*.

18. In Section VI, Norway shows that the EU Seal Regime violates Article 2.2 of the *TBT Agreement* because it is more trade restrictive than necessary to fulfil those of its objectives that are legitimate. In particular, there are less trade restrictive alternatives that would make, at least, an equivalent contribution compared with the existing measure to the legitimate objectives of the EU Seal Regime.

19. In Section VII, Norway shows that the conformity assessment procedures prepared, adopted and applied by the European Union unnecessarily obstruct international trade, contrary to Article 5.1.2 of the *TBT Agreement*, and create unnecessary delays in conformity assessment, inconsistently with Article 5.2.1.

20. In Section VIII, Norway shows that, irrespective of whether the EU Seal Regime violates relevant WTO provisions, the EU Seal Regime nullifies or impairs benefits accruing to Norway, in the sense of Article XXIII:1(b) of the GATT 1994, with respect to seal products not permitted onto the EU market.

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

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

22. Norway submits that the EU Seal Regime violates Articles I:1 and III:4 of the GATT 1994. The structure, design and expected operation of the EU Seal Regime bars all seal products of Norwegian origin from the EU market.[4] At the same time, because all or virtually all seal products from Denmark (Greenland) are expected to qualify under the IC requirements,[5] the EU Seal Regime discriminates in favour of seal products originating in Denmark (Greenland) and against like products from Norway, contrary to Article I:1.[6]

23. Further, all or virtually all seal products originating in Sweden and Finland are expected to qualify under the SRM requirements.[7] In this way, the EU Seal Regime provides treatment that is less favourable for seal products from Norway than for "like" products originating in the European Union, contrary to Article III:4.[8]

24. Norway describes its respective claims under Articles I:1 and III:4 more fully below.

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[4] With respect to Norwegian seal products' compliance with the IC requirements, see, e.g. COWI, *Study on Implementing Measures for Trade in Seal Products*, Final Report (January 2010) ("2010 COWI Report"), Exhibit JE-21, section 3.1, pp. 30-31; Norwegian Ministry of Fisheries and Coastal Affairs, *Facts about Fisheries and Aquaculture 2010*, L-0542 E (2010) ("Facts about Fisheries and Aquaculture 2010"), Exhibit NOR-63, p. 21. With respect to Norwegian seal products' compliance with the SRM requirements, see, e.g. *Regulation Relating to Regulatory Measures and the Right to Participate in Hunting of Seals in the West Ice and East Ice in 2012*, adopted by the Norwegian Ministry of Fisheries and Coastal Affairs as Regulation of 30 January 2012 No. 108 ("2012 Management and Participation Regulation"), Exhibit NOR-13, section 4; Joint Norwegian/Russian Fisheries Commission, *Report of the Working Group on Seals to the 42nd Session – Appendix 8*, available at http://www.regjeringen.no/upload/FKD/Vedlegg/Kvoteavtaler/2013/Russland/Vedlegg_8.pdf (last checked 6 November 2012) ("2012 Report of the Norwegian/Russian Working Group on Seals"), Exhibit NOR-16, p. 2; COWI, *Traceability systems for trade in seal products – Briefing note for workshop participants*, 20 October 2009, in 2010 COWI Report, Exhibit JE-21, annex 5, pp. 13 and 15; Norwegian Ministry of Fisheries and Coastal Affairs, *Proposition No. 1 to the Storting for Budget Year 2012*, available at http://www.regjeringen.no/pages/35168309/PDFS/PRP201120120001FKDDDDPDFS.pdf (last checked 7 November 2012) ("2011-2012 Budget Proposal"), Exhibit NOR-71, pp. 108 and 109.

[5] See 2010 COWI Report, Exhibit JE-21, section 3.1, pp. 28-30, 42; Greenland Home Rule Department of Fisheries, Hunting and Agriculture, *Management and Utilization of Seals in Greenland* (revised in April 2012) ("2012 Management and Utilization of Seals in Greenland"), Exhibit JE-26, pp. 11, 27.

[6] See Norway's FWS, paras. 389-403; Norway's opening statement at the first substantive meeting of the Panel ("first OS"), paras. 37-39.

[7] See Finland's and Sweden's comments in Council of the European Union, *Member States' Comments on the Proposal for a Regulation Concerning Trade in Seal Products*, 5404/09 (19 January 2009) ("Member States' Comments on the Proposed Regulation (19 January 2009)"), Exhibit JE-10, pp. 16-18; European Parliament Debates, Exhibit JE-12, p. 72; Finnish Game and Fisheries Research Institute ("RKTL"), *Symposium on Biology and Management of Seals in the Baltic Area held in Helsinki, Finland* (15-18 February 2005), Exhibit NOR-64, pp. 11, 15, 25-29, 40-42, 45-47 and 69; University of St. Andrews' Sea Mammal Research Unit, Special Committee on Seals ("SCOS"), *Scientific Advice on Matters Related to the Management of Seal Populations* (2007), available at http://www.smru.st-andrews.ac.uk/documents/SCOS_2007_FINAL_ADVICE_1.pdf (last checked 12 October 2012), Exhibit NOR-65, p. 13; COWI, *Traceability systems for trade in seal products – Briefing note for workshop participants*, 20 October 2009, in 2010 COWI Report, Exhibit JE-21, annex 5, p. 15.

[8] See Norway's FWS, paras. 424-451; Norway's first OS, paras. 37, 38, and 41.

25. For purposes of both these claims, the parties agree that seal products conforming to the requirements of the EU Seal Regime are "like" those that do not, including because all such products share "identical product characteristics".[9] Accordingly, Norway does not focus here on the issue of "likeness", but recalls for the Panel that a detailed examination of the likeness of seal products is set out in paragraphs 286 to 336 of its first written submission.

A. The structure, design and expected operation of the IC requirements result in discrimination inconsistent with Article I:1 of the GATT 1994

1. The legal standard under Article I:1

26. Article I:1 of the GATT 1994 lays down the "cornerstone" principle of non-discrimination.[10] Article I:1 applies broadly: "*any* advantage" granted to "*any* product" originating in any third country must be accorded immediately and unconditionally to "like" products originating in or destined for "*all* other" WTO Members.[11]

27. Article I:1 articulates a legal standard with several elements,[12] in particular: (1) there must be an "advantage, favour, privilege or immunity" of the type covered by Article I:1 granted to "any product" originating in any country; and (2) if so, the advantage must be granted immediately and unconditionally to like products originating in all other WTO Members.

28. The European Union does not dispute that the EU Seal Regime, through the IC requirements, provides an "advantage" to seal products that conform with such requirements in the sense of Article I:1.[13] Under Article I:1, if an advantage is conferred on products from some countries, the next issue is whether that advantage is extended "immediately and unconditionally" to like products from all WTO Members.

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[9] EU's FWS, paras. 514 and 544 ("The European Union considers that *all* seal products have identical product characteristics, i.e., they derived or were obtained from seals") (emphasis added). See also Norway's FWS, paras. 286-336; Norway's first OS, para. 19; EU's response to Panel question No. 25, para. 84; Canada's FWS, paras. 307-321, 329-331.

[10] Appellate Body Report, *EC – Tariff Preferences*, para. 101.

[11] Appellate Body Report, *Canada – Autos*, para. 79.

[12] See, e.g. Panel Reports, *Indonesia – Autos*, para. 14.138; *EU – Footwear (China)*, para. 7.99.

[13] EU's FWS, para. 542; see also Norway's first OS, para. 19. Indeed, the evidence on the record supports the shared views taken by all parties that IC-conforming seal products enjoy an "advantage", consisting of the opportunity to be placed on the EU market (in the case of finished products) or the opportunity to be incorporated into a further processed seal product that may, in turn, be placed on the EU market (in the case of intermediate seal products). Accordingly, Norway does not address this element of the legal standard under Article I:1, and refers the Panel to paragraphs 349-355 and 366-375 of its first written submission.

29. Article I:1 applies both to *de jure* and *de facto* discrimination,[14] meaning "a measure may be *de facto* [discriminatory] *even when it is origin-neutral on its face*".[15] A facially origin-neutral measure may result in *de facto* discrimination where its expected operation predominantly favours the products of one origin over that of another.[16]

30. For Norway, in assessing whether origin-neutral regulatory criteria disproportionately advantage products from certain origins, a panel must, under Article I:1, 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. This assessment includes the entire group of like products from the respective sources, including those benefiting and those not benefiting from an advantage.[17] If such a comparison shows, as a matter of fact, that products from one source predominantly receive an "advantage", while like products from another WTO Member are predominantly denied the advantage, then the importing Member fails to accord the advantage "unconditionally" and violates Article I:1.

31. Norway recalls[18] that the term "unconditionally" has also been interpreted to provide that "the extension of [an] advantage may not be made subject to conditions with respect to the *situation* or *conduct*" of the exporting countries,[19] where such conditions result in disproportionate detrimental impact on imports from certain sources. Thus, an otherwise origin-neutral measure may be *de facto* discriminatory if it conditions access to an "advantage" on: the existence of a tradition of producing certain goods in the country or of belonging to a certain people that has long resided in a particular country (a "situation"); or the partial use of a product in the country of production ("conduct").

[14] Appellate Body Report, *Canada – Autos*, para. 78, referring in particular to the adopted GATT Panel Reports in *Spain – Unroasted Coffee* and *Japan –SPF Dimension Lumber*. *See also* Appellate Body Report, *EC – Bananas III*, para. 223 (in the context of the MFN obligation in Article II of the GATS).
[15] Appellate Body Reports, *US – Tuna II (Mexico)*, para. 225 (emphasis and underlining added); and Appellate Body Report, *US – COOL*, para. 269 (emphasis added). In both reports, *de facto* discrimination is addressed with respect to Article 2.1 of the *TBT Agreement*.
[16] Appellate Body Report, *Canada – Autos*, para. 76 ("some, but not all, motor vehicles imported from certain Members are accorded the import duty exemption, while some, but not all, like motor vehicles imported from certain other Members are not"). See also ibid., paras. 81 and 85-86; Panel Report, *US – FSC (Article 21.5 – EC)*, para. 8.159 (in the context of Article I:1 of the GATT 1994); Appellate Body Report, *US – COOL*, paras. 103-104 and fn 95 (in the context of Article 2.1 of the *TBT Agreement*).
[17] See, e.g. Appellate Body Reports, *US – Clove Cigarettes*, para. 194; *Chile – Alcoholic Beverages*, para. 52; and *EC – Asbestos*, para. 100.
[18] Norway's FWS, para. 358.
[19] Panel Report, *Canada – Autos*, para. 10.23. This aspect of the report was not appealed: *see* Appellate Body Report, *Canada – Autos*, para. 76.

2. The European Union posits the wrong legal standard for Article I:1

32. In interpreting the term "unconditionally" in Article I:1, the European Union rejects the approach described by Norway. The European Union says that the reasoning of the Appellate Body relating to the phrase "less favourable treatment" in Article 2.1 of the *TBT Agreement* should apply *mutatis mutandis* to Article I:1 of the GATT 1994.[20] In particular, "the same regulatory distinctions should be capable of showing that there is not discrimination regardless of whether the measures are examined under Article 2.1 of the *TBT Agreement* or under Article[] I:1 … of the GATT 1994".[21]

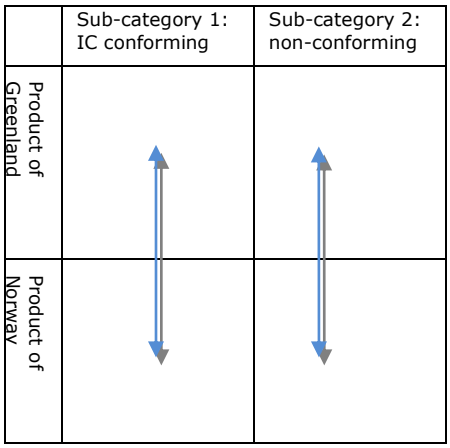
33. The European Union also rejects the established understanding of how a panel should analyse *de facto* discrimination. Instead of comparing whether, in fact, conditions operate to the predominant benefit of like products from one supplying country over another, the European Union says that, where regulatory conditions that govern access to an advantage "are drafted in an *origin-neutral manner*, … the requirement of such condition in order to obtain the advantage *would not be discriminatory*".[22]

34. In applying such a standard, the European Union only compares the treatment accorded to products from different origins *within* "sub-categories of the group of like products".[23] This means the European Union compares IC-conforming goods from any origin, and, separately, non-conforming goods from any origin, but fails to compare the treatment of the group of like products *as a whole*.

35. Figure 2 at paragraph 34 of Norway's first opening statement (reported below) illustrates the product comparison conducted by the European Union.

[20] EU's FWS, paras. 528, 538-540; see also, e.g. EU's responses to Panel questions Nos. 7, para. 17; 24, para. 83; and 28, paras. 90 and 96.
[21] EU's response to Panel question No. 7, para. 17 (emphasis added).
[22] EU's FWS, para. 538 (emphasis added).
[23] EU's FWS, paras. 293-295, 547. See also EU's responses to Panel questions Nos. 7, paras. 17-18; 23, paras. 80, 82; and 26, paras. 86-88.

Figure 2



36. On this basis, the European Union finds that "like" products from all sources, including Canada and Norway, are potentially capable of fulfilling the IC requirements. In its words, "[a]ny country in the world, including Norway, *could* meet all the conditions".[24]

37. The standard posited by the European Union is wrong in several respects.

a. The legal standards under Article I:1 of the GATT 1994 and Article 2.1 of the TBT Agreement *are not the same*

38. *First*, the European Union errs in stating that the Appellate Body's findings under Article 2.1 of the *TBT Agreement* regarding the term "less favourable treatment" apply equally to Article I:1 of the GATT 1994. In particular, the European Union is wrong to suggest that differential treatment on grounds of origin can be excused under Article I:1 *itself* where it is based on a "legitimate regulatory distinction".

39. Norway agrees that both the *TBT Agreement* and the GATT 1994 "are intended to strike a balance between trade liberalization and regulatory autonomy",[25] and therefore "should be interpreted harmoniously".[26] This is consistent with the Appellate Body's statement that the balance set out in the preamble of the *TBT Agreement* between, on the one hand, the desire to avoid creating unnecessary obstacles to international trade and, on the

[24] EU's FWS, para. 523 (emphasis added). See also EU's FWS, paras. 5, 14, 318, 319, 497, 538, 590 and fn 446 to para. 335.
[25] EU's response to Panel question No. 7, para. 17.
[26] EU's response to Panel question No. 7, para. 17.

other hand, the recognition of Members' right to regulate, "is not, in principle, different from the balance set out in the GATT 1994".[27]

40. Nonetheless, a "harmonious" interpretation necessarily includes an analysis of the textual and contextual *differences* between the two agreements. In fact, while the European Union may take the view that the obligations under the two provisions are substantially "the same",[28] this view has already been *expressly* rejected by the Appellate Body. The Appellate Body has stated that "the assumption that the obligations under Article 2.1 of the *TBT Agreement* and Article[] I:1 ... of the GATT 1994 *are substantially the same … is … incorrect*", and that "the scope and content of these provisions is *not the same*".[29]

41. Indeed, the Appellate Body has explained that the text and context of the respective provisions are significantly different.[30] In particular, whereas the GATT 1994 balances the MFN obligation with *separate exceptions*, notably in Article XX, the *TBT Agreement* does not. Under the *TBT Agreement*, the sixth recital of the preamble[31] must be taken into account in interpreting the obligations set forth in Article 2.1.

42. In other words, under the GATT 1994, the balance between trade liberalization and regulatory autonomy rests on the fundamental premise that trade liberalization obligations "are qualified by the general exceptions provision of Article XX".[32] In its analysis, the European Union erroneously disregards this fundamental premise by ignoring the role of Article XX in counterbalancing the non-discrimination obligation contained in Article I:1.

43. Conversely, under the *TBT Agreement*, the balance between trade liberalization and regulatory autonomy has been struck by the Appellate Body by taking into account the sixth recital of the preamble in the interpretation of the obligations set forth *in Article 2.1 itself*. In particular, in order to analyse a claim of *de facto* MFN discrimination under Article 2.1 of the

[27] Appellate Body Report, *US – Clove Cigarettes*, para. 96 (emphasis added). See Norway's responses to Panel questions Nos. 7, para. 41; and 35, para. 195.
[28] See, e.g. EU's FWS, paras. 528 and 538. See also EU's response to Panel question No. 24, para. 83.
[29] Appellate Body Report, *US – Tuna II (Mexico)*, para. 405 (emphasis added).
[30] Appellate Body Report, *US – Tuna II (Mexico)*, para. 211. See also Appellate Body Report, *US – Clove Cigarettes*, para. 169.
[31] 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".
[32] Appellate Body Report, *US – Clove Cigarettes*, para. 96.

TBT Agreement, a panel has to assess whether the technical regulation has a detrimental impact on imported products, that is, whether it "modifies the conditions of competition in the market of the regulating Member to the detriment of the group of imported products" from the complainant vis-à-vis the group of "like" domestic products or products originating in any other country.[33] The burden of proof concerning the existence of a detrimental impact rests on the complainant.

44. Where the complainant has met the burden of making its *prima facie* case of violation of Article 2.1 of the *TBT Agreement*, the respondent may rebut that claim by seeking to show that the disproportionate detrimental impact on imported products is justified under Article 2.1 because it "stems exclusively from a legitimate regulatory distinction".[34] In determining whether a detrimental impact on certain imports results from such a distinction, a panel must, *first*, identify the objective pursued by the technical regulation, assess its legitimacy,[35] and consider the particular regulatory distinctions drawn by the measure that are in pursuit of that objective.[36] *Second*, the panel must assess whether the regulatory distinctions drawn are rationally related or "calibrated"[37] in an "even-handed" manner[38] to the pursuit of that objective or, rather, whether they are "disproportionate",[39] reflect a "rational disconnect",[40] or otherwise operate in a manner that is *not* "even-handed", such that they reflect arbitrary or unjustifiable discrimination.[41] If the detrimental impact can be explained as stemming

[33] Appellate Body Report, *US – Clove Cigarettes*, para. 181.
[34] Appellate Body Report, *US – COOL*, para. 272. See also Appellate Body Report, *US – Tuna II (Mexico)*, para. 216. After laying down a legal standard whereby the burden of proving that the detrimental impact of the technical regulations stems exclusively from a legitimately regulatory distinctions rests on the respondent, the Appellate Body in *Tuna* went on to conclude that "the United States ha[d] not demonstrated that the detrimental impact of the US measure on Mexican tuna products stem[med] exclusively from a legitimate regulatory distinction". Appellate Body Report, *US – Tuna II (Mexico)*, para. 298.
[35] Appellate Body Reports, *US – Clove Cigarettes*, para. 225 (the Panel's finding that the objective of "reducing youth smoking" was a "legitimate objective" was not appealed); *US – Tuna II (Mexico)*, para. 242 (the Panel found that the objectives were "ensuring consumers are not misled or deceived" and "contributing to the protection of dolphins" were legitimate (para. 7.401) and the Appellate Body rejected Mexico's appeal that the second of these objectives was not legitimate: ibid., para. 342); and *US – COOL*, para. 343 (the objective pursued was to "provide consumers with origin information", which was a legitimate objective: ibid., para 453).
[36] Appellate Body Reports, *US – COOL*, para. 341; *US – Tuna II (Mexico)*, para. 251; and *US – Clove Cigarettes*, para. 222.
[37] Appellate Body Report, *US – Tuna II (Mexico)*, paras. 283, 286, 287.
[38] Appellate Body Reports, *US – Clove Cigarettes*, paras. 95, 182, and 215; *US – Tuna II (Mexico)*, paras. 225, 232, 281, 297; *US – COOL*, paras. 271, 272, 293, 333, 340, 341, 349.
[39] Appellate Body Report, *US – COOL*, paras. 347, 349.
[40] Appellate Body Reports, *US – Clove Cigarettes*, paras. 224 and 225; *US – Tuna II (Mexico)*, paras. 282-297; *US – COOL*, paras. 342-350.
[41] Appellate Body Report, *US – COOL*, paras. 271, 272, 293, 340, 341, 347, 349.

exclusively on a legitimate regulatory distinction, the measure is not inconsistent with Article 2.1.[42]

45. The textual and contextual elements upon which the Appellate Body based its interpretation of Article 2.1 of the *TBT Agreement* are simply not present in Article I:1 of the GATT 1994. This does not mean that a Member can never justify a detrimental impact on imports from some sources over other sources, contrary to Article I:1. However, within the scheme of the GATT 1994, in order to justify such an impact, a responding Member must have recourse to an exception, for instance one of the general exceptions provided by Article XX of the GATT 1994.[43]

46. Contrary to the European Union's argument, the standard outlined above does not undermine Article 2.1 of the *TBT Agreement*.[44] As a matter of principle, the provisions of the covered agreements contain cumulative obligations that may overlap in their application to a particular measure.

b. The EU adopts the wrong standard for finding de facto *discrimination*

47. *Second*, the European Union adopts an incorrect standard in assessing *de facto* discrimination when it says that "[i]f the conditions in order to obtain an advantage are drafted in an *origin-neutral manner*, ... the requirement of such condition in order to obtain the advantage *would not be discriminatory*.[45]

48. If the European Union were correct that there can be no discrimination when regulatory conditions are ostensibly origin-neutral, *de facto* discrimination could *never* arise. In other words, the European Union is proposing a standard that simply reads out *de facto* discrimination from Article I:1. This argument contradicts long-standing GATT and WTO case-law, which makes clear that Article I:1 covers *de facto* as well as *de jure* discrimination.[46]

[42] Appellate Body Reports, *US – Clove Cigarettes*, paras. 174, 175, 181, and 182; *US – Tuna II (Mexico)*, para. 215; *US – COOL*, paras. 271-272.
[43] The legitimate objectives under which a measure may have a detrimental impact under Article XX of the GATT 1994 and Article 2.1 of the *TBT Agreement* are different in scope. See Norway's response to Panel question No. 7, paras. 40-66.
[44] EU's response to Panel question No. 7, para. 17.
[45] EU's FWS, para. 538 (emphasis added).
[46] See also Norway's FWS, paras. 359 ff.

49. The interpretive error of the European Union in this regard results in the European Union's failure to compare, on a holistic basis, the treatment of "like" seal products from Norway with the treatment of "like" seal products originating in or destined for any other country. Instead, the European Union only assesses the treatment accorded to products from different origins *within* particular "sub-categories of the group of like products"[47] – i.e., on the one hand, IC-conforming goods from any origin and, on the other hand, non-conforming goods from any origin.[48] Further, the European Union states:

> if the treatment of imported seal products derived from commercial hunts is the same as the treatment of … other origin like seal products from commercial hunts (banned), and the treatment of imported seal products obtained from hunts for subsistence … purposes is the same as the treatment of … other origin like seal products under the same circumstances, then, inevitably the treatment of the group of imported seal products in aggregate is no less favourable than the group of like … other origin seal products in aggregate.[49]

50. On this basis, the European Union finds that like products from all sources, including Canada and Norway, are potentially capable of fulfilling the IC requirements. In its words, "[a]ny country in the world, including Norway, *could* meet all the conditions".[50]

51. But this approach is flawed, as it fails to analyse the IC requirements by reference to the product group *as a whole*, and not by reference to different sub-categories within the like product group. As noted in paragraph 30 above, a proper product comparison must be conducted with respect to the treatment of *all* seal products of one origin against *all* "like" products of another origin.[51]

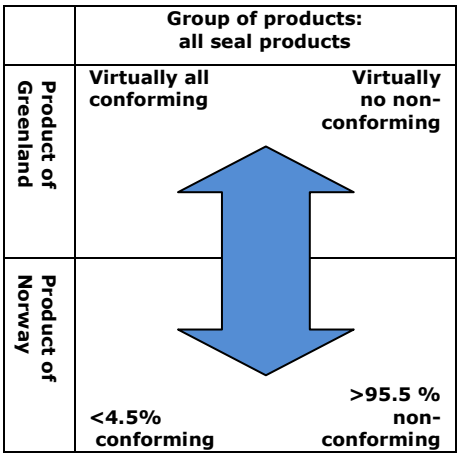
52. As observed by the Appellate Body, "the concept of 'like products' serves to *define the scope of products that should be compared* to establish whether less favourable treatment is being accorded".[52] In other words, once the universe of "like" products has been "defined",

[47] EU's FWS, paras. 293-295, 547. See also EU's responses to Panel questions Nos. 7, paras. 17 and 18; 23, paras. 80 and 82; and 26, paras. 86-88.
[48] EU's FWS, paras. 293-295, 547. See also EU's responses to Panel questions Nos. 7, paras. 17 and 18; 23, paras. 80 and 82; and 26, paras. 86-88.
[49] EU's response to Panel question No. 26, para. 88. See also EU's response to Panel question No. 23, para. 82.
[50] EU's FWS, para. 523 (emphasis added). See also EU's FWS, paras. 5, 14, 318, 319, 497, 538, 590 and fn 446 to para. 335.
[51] Appellate Body Report, *US – Clove Cigarettes*, para. 193.
[52] Appellate Body Report, *US – Clove Cigarettes*, para. 116 (emphasis added).

it is not appropriate to limit a "less favourable treatment" analysis to a comparison between the *sub-categories* of the like products within that universe.

53. Figure 3 at paragraph 36 of Norway's first opening statement (reported below) illustrates the correct mode of analysis for "less favourable treatment" under Article I:1 of the GATT 1994.

Figure 3



3. The IC requirements are *de jure* discriminatory

54. In addition to its attempt to read *de facto* discrimination out of Article I:1 by saying that ostensibly origin-neutral measures cannot be discriminatory, the European Union also fails properly to analyse whether its measure is origin-neutral.

55. A *de jure* violation may be discerned not only on the face of a measure,[53] but also from the "*necessary implication*" of the "words actually used in the measure".[54]

56. With this in mind, Norway notes that, contrary to the European Union's argument, the EU Seal Regime is not origin-neutral. The Basic Seal Regulation *expressly names*[55] certain Members (or territories within Members) as qualifying under those requirements, namely:

[53] For example, in *Colombia – Ports of Entry*, certain simplified customs procedures were available to all Members, except for Panama, thereby *de jure* violating Article I:1 of the GATT 1994. Panel Report, *Colombia – Ports of Entry*, paras. 7.362-7.367. Similarly, in *EC – Bananas III*, certain administrative requirements for importing bananas into the European Communities, and for the allocation of export certificates, provided an advantage to *defined sets of countries*, without that advantage being extended to imports from all Members, also *de jure* violating Article I:1. Appellate Body Report, *EC – Bananas III*, paras. 206-207.
[54] Appellate Body Report, *Canada – Autos*, para. 100 (albeit in the different context of Article 3 of the *SCM Agreement*).
[55] Basic Seal Regulation, Exhibit JE-1, Article 2(4).

"Canada", Denmark ("Greenland"), "Russia", and the United States ("Alaska").[56] Thus, *according to the words used in the measure*, goods originating in these Members expressly qualify for market access opportunities under the requirements.[57]

57. Moreover, for "other indigenous communities", the words used in the Implementing Regulation define, by *necessary implication*, a limited, additional group of WTO Members whose goods also qualify for market access opportunities under the IC requirements.[58] This group is defined and closed because a qualifying indigenous community is one descended from people that have "inhabited" a particular territory "*at the time of conquest or colonisation or the establishment of present State boundaries*";[59] they must have retained "political institutions";[60] and the community must have a "*tradition*" of seal hunting "*in the geographical region*".[61] Based on these criteria, and confirmed by an assessment conducted by COWI on behalf of the European Union, the additional qualifying Members under this aspect of the IC requirements constitute a closed group: the European Union (Sweden, and possibly Finland)[62] and Norway.[63]

58. For the qualifying countries listed above, the *extent* of the benefit differs *de facto* from country-to-country, as shown in paragraphs 59 to 68 below. However, the conditions set out in the IC requirements tie access to the EU market to the *origin* of the beneficiary goods, and identify a closed and limited group of countries that may benefit from the

[56] Basic Seal Regulation, Exhibit JE-1, Article 2(4). The 2010 COWI Report lists three indigenous communities in Alaska: Inupiat, Yupik and Aleut. 2010 COWI Report, Exhibit JE-21, section 3.1, p. 23. The non-exhaustive list of indigenous people in the Basic Seal Regulation, Article 2(4), includes the Inupiat and Yupik, but not the Aleut. If the EU does not regard the Aleut as "Inuit", their hunt would then be eligible under the second category: "other indigenous communities". *See* also 2010 COWI Report, Exhibit JE-21, section 3.1, p. 24 ("The hunt and trading of seal products by indigenous communities in Alaska is likely to comply with article 3.1").
[57] See Norway's FWS, para. 378.
[58] See Norway's FWS, para. 379; Norway's first OS, para. 45.
[59] Implementing Regulation, Exhibit JE-2, Article 2(1) (emphasis added).
[60] Implementing Regulation, Exhibit JE-2, Article 2(1).
[61] Implementing Regulation, Exhibit JE-2, Article 3(1)(a) (emphasis added).
[62] On Sweden, *see* 2010 COWI Report, Exhibit JE-21, section 3.1, p. 33. COWI also indicates that the Kihnu community in Estonia hunts seals, but does not provide further details. 2010 COWI Report, Exhibit JE-21, section 3.1, p. 22. COWI also indicates that indigenous communities that hunt seals "include" the Sami in Finland, but states that this community is not analysed in its report and concludes ultimately that "Finnish seal hunting is unlikely to comply with Article 3.1 as Finnish seal hunt is not undertaken by indigenous communities". 2010 COWI Report, Exhibit JE-21, *compare* section 3.1, p. 22 and p. 28.
[63] 2010 COWI Report, Exhibit JE-21, section 3.1, pp. 30-32. According to COWI, some Sami coastal hunt may qualify, but it is not clear that it would, and "there is no separate indigenous hunt". Ibid., p. 30. The European Union suggests that any country with an indigenous community can be added to the list of beneficiary territories, offering Ukraine as an example. EU's FWS, para. 558. 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. See Norway's first OS, para. 46.

requirements. These countries are: Canada, Denmark (Greenland), Russia, the United States (Alaska), Norway and the EU (Finland and Sweden).[64] Products from other countries where seal products are produced, such as Iceland or Namibia, can *never* qualify under the IC requirements.

4. The IC requirements result in *de facto* discrimination in favour of products originating in Denmark (Greenland)

59. As seen in paragraphs 54 to 58 above, through their design and structure, the IC requirements provide more favourable treatment to goods from six WTO Members.[65] In terms of their "expected operation"[66] the IC requirements benefit predominantly a single country out of this list of six, namely Denmark (Greenland). Conversely, these requirements are expected to operate, in practice, in a manner that confers virtually no benefit on seal products originating in Norway. Hence, the expected operation of the IC requirements reveals *de facto* discriminatory effects.[67]

60. To recall, the EU Seal Regime permits seal products to be placed on the market if they "result from hunts traditionally conducted by the Inuit and other indigenous communities and contribute to their subsistence".[68] The Implementing Regulation further details the requirements as follows:

- [t]o qualify for the exception, the Inuit or other indigenous community must have "a tradition of seal hunting in the community and in the geographical region";[69]
- [t]he products of the hunt must be partly "used, consumed or processed" within the communities according to their traditions";[70] and
- The seal hunt must "contribute to the subsistence of the community".[71]

61. Accordingly, based on the EU Seal Regime, the factors that determine the *extent* to which a Member may benefit from the Indigenous Communities Requirements are:

- the size of the indigenous community with a seal hunting tradition;

[64] Norway's FWS, paras. 378 and 383; Norway's first OS, para. 44.
[65] Canada, the European Union, Denmark (Greenland), Norway, Russia, and the United States (Alaska).
[66] Appellate Body Report, *US – COOL*, paras. 103-104 and fn 95.
[67] See Norway's FWS, para. 389.
[68] Basic Seal Regulation, Exhibit JE-1, Article 3(1).
[69] Implementing Regulation, Exhibit JE-2, Article 3(1)(a).
[70] Implementing Regulation, Exhibit JE-2, Article 3(1)(b).
[71] Implementing Regulation, Exhibit JE-2, Article 3(1)(c).

- the volume of seals harvested by that community; and
- whether the products of the seal hunt contribute to the subsistence of the community and are partly used, consumed, or processed within the community in question according to tradition.

62. As illustrated in Table 1 at paragraph 391 of Norway's first written submission, Denmark (Greenland) is, overwhelmingly, the primary beneficiary of the IC requirements.[72] Indeed an application of the factors outlined above to the Greenlandic seal hunt shows that:

- the evidence on the record shows that almost the entirety of Greenland's population is Inuit with a strong seal hunting tradition:[73]
  - (i) "Inuit is about 90 % of the total population";[74]
  - (ii) "[a]rchaeological investigations and discoveries have shown that the Greenlandic culture always has been based on the harvest of … seals";[75] and
  - (iii) "[t]he hunting of seals is a vital component of everyday life and culture in Greenland".[76]
- the Greenlandic hunt represents a very important proportion (between 20 and 25 per cent)[77] of the world's seal hunt, with 189,000 seals hunted in 2006[78] and an average annual catch of circa 162,000 seals between 2006 and 2009.[79] Even during a year in which the catch in Greenland was relatively low, such as 2009 (142,351 seals),[80] that catch still amounted to 17 times the entire Norwegian hunt for the same year (8,437 seals).[81]

[72] See Norway's FWS, para. 392.
[73] 2010 COWI Report, Exhibit JE-21, section 3.1, p. 28 ; 2012 Management and Utilization of Seals in Greenland, Exhibit JE-26, p. 11.
[74] 2012 Management and Utilization of Seals in Greenland, Exhibit JE-26, p. 11.
[75] 2012 Management and Utilization of Seals in Greenland, Exhibit JE-26, p. 11.
[76] 2012 Management and Utilization of Seals in Greenland, Exhibit JE-26, p. 11.
[77] This ratio is calculated by comparing the data relative to years 2006-2009 in the table at p. 22 of 2012 Management and Utilization of Seals in Greenland, Exhibit JE-26, with COWI's statement that "[b]efore the financial crisis and the [introduction of the EU Seal Regime], the total number of seals caught was in the order of 750 thousands" (2010 COWI Report, Exhibit JE-21, p. 41).
[78] 2010 COWI Report, Exhibit JE-21, section 3.1, pp. 28-30. See also 2012 Management and Utilization of Seals in Greenland, Exhibit JE-26, pp. 13 and 22.
[79] 2012 Management and Utilization of Seals in Greenland, Exhibit JE-26, p. 22. The European Union agrees that, prior to the adoption of the EU Seal Regime, the yearly seal catch in Denmark (Greenland) was around 180,000. EU's FWS, para. 299. See, generally Norway's FWS, paras. 395-396.
[80] 2012 Management and Utilization of Seals in Greenland, Exhibit JE-26, p. 22.
[81] Facts about Fisheries and Aquaculture 2010, Exhibit NOR-63, p. 21.

- the products derived from the seal hunt are partly consumed within the community and contribute to its subsistence,[82] and the seal hunt is widespread, representing "a vital component of everyday life".[83]

63. In light of those data, COWI observed that "all of the Greenland harvest is likely to qualify" under the IC requirements.[84] The European Union has not contested this issue.

64. The benefits afforded to seal products from other WTO Members that, by the structure and design of the EU Seal Regime, may benefit from the IC requirements, is different from that of Denmark (Greenland).[85] In particular, virtually no Norwegian seal products will benefit under those requirements, either in absolute terms or as a proportion of total Norwegian production. The Sami take part, at times, in the coastal hunt in Norway.[86] However, that hunt accounted for just 810 seals in total in 2006,[87] which is about 4.5% of the total Norwegian hunt during the same year. The Sami portion of the seals taken in the coastal hunt is a further fraction of the total.

65. Similarly, according to COWI, the vast majority – around 97 per cent – of seal products originating in Canada would *not* qualify under the IC requirements.[88]

66. As a result, through its design, structure, and expected operation, the IC requirements confer a significant advantage on seal products that originate in Denmark (Greenland). The competitive opportunity conferred on seal products from this origin is, as a matter of fact, not extended immediately and unconditionally to seal products (finished or intermediate) originating in other countries, including Norway.

67. Such a conclusion finds further support in the statements made during the EU legislative process by the official Rapporteur of the Responsible Committee of the European

[82] 2010 COWI Report, Exhibit JE-21, section 3.1, pp. 29-30; 2012 Management and Utilization of Seals in Greenland, Exhibit JE-26, pp. 11, 27.
[83] 2012 Management and Utilization of Seals in Greenland, Exhibit JE-26, p. 11.
[84] 2010 COWI Report, Exhibit JE-21, section 4.2, p. 42 (underlining added). See also ibid., pp. 28, 30.
[85] See Norway's FWS, paras. 393-394.
[86] 2010 COWI Report, Exhibit JE-21, section 3.1, pp. 30-31.
[87] Facts about Fisheries and Aquaculture 2010, Exhibit NOR-63, p. 21.
[88] According to COWI, "only approximately 3 per cent of total catch in Canada derives from Inuit hunt". 2010 COWI Report, Exhibit JE-21, section 4.2, p. 42. The European Union does not contest "that around 5% of Canadian seal products derived from Inuit hunts potentially fall within the IC exception". EU's FWS, para. 292 (referring to 2010 COWI Report, Exhibit JE-21, p. 42).

Parliament, Diana Wallis, and in the publicly reported conclusions of an opinion the Legal Service of the EU Council.[89] To recall, Rapporteur Wallis found that:

> given the relatively high contribution of products from Inuit hunting to Greenland's trade in seal products compared to other countries, there is a strong argument that ... the Inuit exception is discriminatory towards other countries, in practice providing an advantage to a good portion of the hunt of seals in Greenland.[90]

68. Similarly, publicly available evidence shows that the Legal Service of the EU Council, tasked with examining the "Compatibility with WTO" of the proposed IC requirements, concluded that "a regulation establishing a prohibition with the possibility to obtain derogation, or a regulation imposing almost a total ban on trade in seal products: ... would infringe Article I of the GATT if it contained an exemption for seal products from Inuit hunting".[91] Read together, this evidence indicates that, during the legislative process, the EU legislative institutions themselves expected that the IC requirements would operate, in fact, in a manner that discriminates in favour of some WTO Members over others, and would, specifically, favour Denmark (Greenland).

69. Finally, Norway notes that the European Union, having misinterpreted the applicable legal standard under Article I:1,[92] does not even attempt to rebut the key facts raised by Norway under this provision. For instance, the European Union admits that the IC requirements have a "detrimental impact" on products originating in the territory of Canada and Norway.[93]

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[89] See Norway's FWS, paras. 398-403. See also ibid., paras. 123-126, 138-139.
[90] Rapporteur Wallis' Explanatory Statement, in European Parliament, *Report on the Proposal for a Regulation of the European Parliament and of the Council concerning Trade in Seals Products* (COM(2008)0469 – C6-0295/2008 – 2008/0160(COD)), A6-0118/2009 (5 March 2009) ("EU Parliament Final Report on Trade in Seal Products"), Exhibit JE-4, p. 29.
[91] Inuit Tapiriit Kanatami and Inuit Circumpolar Council Canada, *European Union Knows Proposed Seal Ban Would Be Unlawful* (27 March 2009), available at http://inuitcircumpolar.com/files/uploads/icc-files/PR-2009-03-27-20090327ICCITKEUSealban.pdf (last checked 13 December 2012) ("ITK/ICCC Press Release"), Exhibit NOR-113, annex. A paper prepared for the Humane Society International in which the authors were "asked to comment on the Council Legal Service (CLS) opinion dated 17 March 2009 on the WTO compatibility of a ban on the European Community trade in seal products" corroborates that the Council Legal Service argued, in its 17 March 2009 opinion that "exemptions for products from Inuit subsistence hunts … would violate Article[] I … of the GATT 1994". Humane Society International and Respect for Animals, *Comments on the Council's Legal Service's Paper on the WTO Compatibility of Measures Relating to Seal Products Trade* (23 March 2009), available at http://www.hsi.org/assets/pdfs/seals_council-wto-reply-dt-ss-mar09-shortnd.pdf (last checked 13 December 2012) ("HSI Opinion"), Exhibit NOR-114, pp. 1 and 4.
[92] See paras. 37 to 51 above.
[93] EU's FWS, para. 259.

B. The SRM requirements result in *de facto* discrimination inconsistent with Article III:4 of the GATT 1994

1. The legal standard under Article III:4

70. In order to establish a violation of Article III:4, a panel must establish that: (i) the measure at issue is a law, regulation or requirement affecting the internal sale, offering for sale, purchase, or use of goods; (ii) the products at issue are "like"; and (iii) imported products are afforded less favourable treatment than that given to the "like" domestic products.

71. The European Union "does not dispute that the EU Seal Regime amounts to a 'law' 'affecting the internal sale' of seal products within the EU".[94] Moreover, the European Union agrees that seal products conforming to the requirements of the EU Seal Regime are "like" those that do not, for purposes of Article III:4.[95] Accordingly, Norway focuses here solely on the third prong of the legal standard under Article III:4, that is, "less favourable treatment" of imported seal products.

72. "Less favourable treatment" in the sense of Article III:4 is treatment that "modifies the *conditions of competition* in the relevant market to the detriment of imported products".[96] The Appellate Body has explained that a formal difference in treatment is neither necessary nor sufficient to establish discrimination.[97] Rather, the question is how "the design, structure and expected operation of the [challenged] measure"[98] affect the respective competitive position of domestic and imported products. The examination of these elements cannot rest on simple assertion, but must be founded on a careful analysis of the contested measure and of its implications in the marketplace.[99] In turn, a panel's analysis of "the design, structure and expected operation of the measure" does not require that the measure's implications in

[94] EU's FWS, para. 511.
[95] EU's FWS, paras. 514 and 544 ("The European Union considers that *all* seal products have identical product characteristics, i.e., they derived or were obtained from seals") (emphasis added). See also Norway's FWS, paras. 286-336; Norway's first OS, para. 19; EU's response to Panel question No. 25, para. 84; Canada's FWS, paras. 307-321, 329-331.
[96] Appellate Body Report, *Korea – Various Measures on Beef*, para. 137 (emphasis original). See also, e.g. ibid., para. 144; Appellate Body Report, *EC – Bananas III*, para. 213; Appellate Body Report, *US – Tuna II (Mexico)*, para. 231 (with respect to Article 2.1 of the *TBT Agreement*).
[97] Appellate Body Report, *Korea – Various Measures on Beef*, para. 137.
[98] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 130.
[99] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 215.

the marketplace be examined "based on the *actual effects* of the contested measure in the marketplace".[100]

73. Like Article I:1,[101] Article III:4 applies to both *de jure* and *de facto* discrimination.[102] In considering claims of *de facto* discrimination, a panel "must take into consideration 'the totality of facts and circumstances before it', and assess any 'implications' for competitive conditions 'discernible from the design, structure, and expected operation of the measure'".[103]

2. The European Union misinterprets the legal standard under Article III:4

74. With respect to Article III:4, the European Union articulates an incorrect legal standard, which suffers from the same flaws as those affecting its interpretation of the standard under Article I:1.

75. *First*, the European Union erroneously suggests that, pursuant to Article III:4, differential treatment on grounds of origin can be excused where it is based on a "legitimate regulatory distinction", as the obligations under Article III:4 and Article 2.1 of the *TBT Agreement* are substantially "the same".[104] The European Union's argument here is essentially the same as its argument in relation to Article I:1 of the GATT 1994.

76. However, in the same way as is discussed above in relation to that provision,[105] there are significant differences between the text and context of Article 2.1 of the *TBT Agreement* and Article III:4 of the GATT 1994.[106] Such differences, including the absence, in the *TBT Agreement*, of separate exceptions such as those set out in Article XX of the GATT 1994,[107] led the Appellate Body to state that "the assumption that the obligations under Article 2.1 of

[100] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 215 (emphasis original).
[101] See paras. 29-30 above.
[102] See, e.g. Panel Report, *US – FSC (Article 21.5 – EC)*, para. 8.159.
[103] Appellate Body Report, *US – COOL*, para. 269 (footnotes omitted) (referring, *inter alia*, to Appellate Body Reports, *Canada – Autos*, paras. 81 and 85-86; *Thailand – Cigarettes (Philippines)*, para. 130; *Korea – Various Measures on Beef*, para. 145; and Panel Report, *Mexico – Taxes on Soft Drinks*, para. 8.119. See Norway's FWS, paras. 359-363.
[104] See, e.g. EU's FWS, para. 502. See also EU's response to Panel question No. 24, para. 83.
[105] See above, paras. 38 to 45.
[106] Appellate Body Report, *US – Tuna II (Mexico)*, para. 211. See also Appellate Body Report, *US – Clove Cigarettes*, para. 169.
[107] Appellate Body Report, *US – Clove Cigarettes*, paras. 88, 101.

the *TBT Agreement* and Article[] III:4 ... of the GATT 1994 are substantially *the same* … is … *incorrect*", and that "the scope and content of these provisions is *not the same*".[108]

77. *Second*, the European Union erroneously conducts its "less favourable treatment analysis" on the premise that it is sufficient that "[*a*]*ny country* in the world, including Norway, *could* meet all the conditions" set out in the SRM requirements.[109] As stated above,[110] the European Union's analysis is fatally truncated, as it is limited to addressing *de jure* discrimination arising on the face of a measure and fails further to examine whether the EU seal regime *de facto* predominantly favours domestic seal products to the detriment of "like" imported products.

78. The European Union's disregard of *de facto* discrimination leads it erroneously to assess the treatment accorded to imported vs. domestic seal products *within* particular "sub-categories of the group of like products" – i.e., on the one hand, domestic and imported SRM-conforming goods and, on the other hand, domestic and imported non-conforming goods.[111] By doing so, the European Union fails to conduct the proper product comparison, which – in contrast to the EU approach – must be conducted with respect to the treatment of *all* imported seal products against *all* "like" domestic products.[112]

3. The SRM requirements result in *de facto* discrimination to the detriment of imported products

79. To recall, the SRM requirements were introduced in the EU Seal Regime as a "compromise" to "satisfy those [EU] Member States who are concerned that the Regulation would impact upon their policies for controlling seal populations".[113]

80. To resolve this concern, the SRM requirements allow the marketing of certain seal products, subject to conditions that must be met cumulatively. These conditions are as follows:

- seal products must derive from hunts conducted under a "natural resources management plan which uses scientific population models of marine resources

[108] Appellate Body Report, *US – Tuna II (Mexico)*, para. 405 (emphasis added).
[109] EU's FWS, para. 523 (emphasis added).
[110] See paras. 47 to 53 above.
[111] See Norway's first OS, paras. 32-34 and Figure 2.
[112] See Norway's first OS, paras. 35-36 and Figures 3 and 4. See also Norway's response to Panel question No. 22.
[113] Message from Mr Harbour, IMCO Coordinator, in email conversation on "Compromise on Article 3" (2-8 April 2009), Exhibit NOR-27. See also Norway's FWS, paras. 140-142, 425.

and applies the ecosystem-based approach";[114] the seal catch must "not exceed the total allowable catch quota" established under the plan;[115]

- the "nature and quantity" of the seal products must not be "such as to indicate that they are being placed on the market for commercial reasons";[116] this requires, in particular, that the seal products are "placed on the market in a non-systematic way";[117]

- the seal products must be sold "on a non-profit basis",[118] i.e., at a price that does not exceed cost recovery;[119] if "any subsidies [were] received in relation to the hunt",[120] these must be added to the sales price in order to determine whether a "profit" was made; and

- those seal products must be by-products of hunting that is "conducted for the sole purpose of the sustainable management of marine resources".[121]

81. Norway does not contend that the first condition, relating to a natural resources management plan, is discriminatory. Indeed, as explained in detail in Norway's first written submission,[122] Norway expects the products of its seal hunt to meet this condition, because:

- Norway's regulations establish total allowable catch quotas ("TACs") aimed at "stabilizing" the future population of adult seals[123] – or, if the seal population increases well above a level already considered sustainable within the ecosystem, at reducing the population;[124]

- the TACs are determined on the basis of "scientific advice from the International Council for the Exploration of the Seas (ICES), the Northwest Atlantic Fisheries Organization (NAFO) and the Institute of Marine Research in Norway"; these recommendations are drawn up using ecosystem-based population models,[125] taking into account, *inter alia*, the role of seals as apex predators in the ecosystem, as well as their reproductive rates and mortality;[126]

[114] Implementing Regulation, Exhibit JE-2, Article 5(a) (underlining added).
[115] Implementing Regulation, Exhibit JE-2, Article 5(b).
[116] Basic Seal Regulation, Exhibit JE-1, Article 3(2)(b).
[117] Implementing Regulation, Exhibit JE-2, Article 5(1)(c) (underlining added).
[118] Basic Seal Regulation, Exhibit JE-1, Article 3(2)(b) (underlining added).
[119] Implementing Regulation, Exhibit JE-2, Article 2(2).
[120] Implementing Regulation, Exhibit JE-2, Article 2(2).
[121] Basic Seal Regulation, Exhibit JE-1, Article 3(2)(b) (underlining added).
[122] Norway FWS, paras. 52, 258-266, 435-436.
[123] International Council for the Exploration of the Seas ("ICES")/Northwest Atlantic Fisheries Organization ("NAFO"), Joint Working Group on Harp and Hooded Seals, *Report on the Meeting Held in St. Andrews, Scotland, UK* (15-19 August 2011) ("2011 WGHARP Report"), Exhibit NOR-12, p. 4.
[124] See, e.g. with reference to the harp seal stock in the West Ice, ICES, *Report of the ICES Advisory Committee 2011*, Book 3 – "The Barents Sea and the Norwegian Sea" (2011), Exhibit NOR-69, p. 6.
[125] The scientific approach taken by ICES in making recommendations on the sustainable management of marine resources is discussed by ICES in Exhibit NOR-68 (*Report of the ICES Advisory Committee 2012*, Book 1, section 1.2 – "Advice Basis" (June 2012) ("ICES Advice 2012")). Further, the population models used for making recommendations regarding seals are described by the ICES/NAFO Working Group on Harp and Hooded Seals in Exhibit NOR-19 (NAFO Scientific Council Meeting, *Report on the Joint ICES/NAFO Working*

- the actual catch has not exceeded the TAC set by Norway in recent years; for instance, in 2012, the TAC for the West Ice was 25,000,[127] and 5,593 seals were caught;[128] for the East Ice, the TAC was 7,000 but Norwegian vessels did not participate in the hunt in the East Ice in 2012.[129]

82. On the basis of these data, COWI observed that the Norwegian hunt is conducted "based on ecosystem management principles".[130] COWI reaches the same conclusion for the seal hunt in Finland and Sweden.[131]

83. However, the three *additional* conditions attached to the SRM requirements – namely, the "non-systematic", "non-profit" and "sole purpose" conditions – are expected to operate to the preponderant advantage of EU seal products and to the preponderant disadvantage of "like" products from Norway.[132] The "fundamental thrust and effect" of each of these three conditions, discussed immediately below, is to prevent imported seal products from Norway being able to access the EU market under the SRM requirements, while allowing the placing on the market of seal products from the European Union.

a. The "non-systematic" condition

84. As shown by the evidence on the record, the "non-systematic" condition reflects the characteristics of seal hunting as it is carried out in the European Union and, therefore, does *not restrict* any seal products originating in the European Union from being placed on the EU market. In fact:

- both Finland and Sweden, in requesting to be allowed to continue placing on the market their seal products, indicated that the size of their respective hunts was small and sporadic;[133]

Group on Harp and Hooded Seals Meeting Held in St. Andrews, Scotland, 2011, NAFO SCS Doc. 12/17 (June 2012) ("2012 NAFO Scientific Council Meeting")).
[126] 2011 WGHARP Report, Exhibit NOR-12, p. 4.
[127] The 2012 Management and Participation Regulation, Exhibit NOR-13, section 4.
[128] 2012 Report of the Norwegian/Russian Working Group on Seals, Exhibit NOR-16, p. 2. In addition, 21 seals were caught for scientific purposes. Ibid.
[129] Norway's FWS, para. 52.
[130] COWI, *Traceability systems for trade in seal products – Briefing note for workshop participants*, 20 October 2009, in 2010 COWI Report, Exhibit JE-21, annex 5, p. 13. See also ibid., annex 4, p. 3.
[131] Finland: 2010 COWI Report, Exhibit JE-21, annex 4, p. 2; Sweden: 2010 COWI Report, Exhibit JE-21, annex 4, p. 5.
[132] See Norway's FWS, paras. 430-431. See also Norway's FWS, paras. 60-70, 103-104, 137, 140-142 and 440.
[133] Member States' Comments on the Proposed Regulation (19 January 2009), Exhibit JE-10, pp. 16 and 18: Finland indicated that it took on average 500 seals yearly, and Sweden requested a derogation for "small scale" hunt. See also the comments of MEP Lasse Lehtinen in European Parliament Debates, Exhibit JE-12, p. 72.

- scientific literature on interaction between seals and fisheries in EU countries further confirms the non-systematic nature of the hunt conducted by EU Member States;[134]

85. Accordingly, COWI concluded that seal products from Sweden and Finland would "probably" meet this first condition.[135]

86. At the same time, the condition effectively *excludes* the products of the sustainable management hunt conducted in non-EU countries, including Norway, from access to the EU market. As a result of the size of the seal populations involved in the Norwegian seal hunt, which are also reflected in the TAC recommended on the basis of scientific population models, the Norwegian seal hunt involves larger numbers than the occasional, incidental hunting carried out in the European Union.[136] The size of the harp seals stocks subject to Norwegian hunting is approximately 2.01 million.[137] Harp seals are at the top of the food web in the marine ecosystems and feed on fish stocks such as cod, herring and capelin that are utilized in wild capture fisheries.[138] One estimate showed that the total consumption by harp seals in the East Ice was about 4 million tons of biomass,[139] which is almost twice the size of the catch by the Norwegian fishing fleet of 2.3 million tons in 2011.[140]

87. On the basis of those data, COWI took the view that the nature and quantity of the hunt indicated that Norwegian seal products would *not* fulfil the SRM requirements,[141] because they are placed on the market "systematically".[142]

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[134] See, e.g. Finnish Game and Fisheries Research Institute ("RKTL"), *Symposium on Biology and Management of Seals in the Baltic Area held in Helsinki, Finland* (15-18 February 2005), Exhibit NOR-64, pp. 11, 15, 25-29, 40-42, 45-47 and 69; University of St. Andrews' Sea Mammal Research Unit, Special Committee on Seals ("SCOS"), *Scientific Advice on Matters Related to the Management of Seal Populations* (2007), available at http://www.smru.st-andrews.ac.uk/documents/SCOS_2007_FINAL_ADVICE_1.pdf (last checked 12 October 2012), Exhibit NOR-65, p. 13. For an overview of this evidence, see Norway's FWS, para. 431.

[135] COWI, *Traceability systems for trade in seal products – Briefing note for workshop participants*, 20 October 2009, in 2010 COWI Report, Exhibit JE-21, annex 5, p. 15.

[136] In 2012, for example, the TAC for harp seals in the West Ice was 25,000, and 5,593 seals were caught. 2012 Management and Participation Regulation, Exhibit NOR-13, section 4, and 2012 Report of the Norwegian/Russian Working Group on Seals, Exhibit NOR-16, p. 2. In addition, 21 seals were caught for scientific purposes. Ibid.

[137] See 2012 Report of the Norwegian/Russian Working Group on Seals, Exhibit NOR-16, sections 3.1 and 3.2. See also Expert Statement of Mr Vidar Jarle Landmark (7 November 2012) ("Landmark Statement"), Exhibit NOR-8, para. 8.

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

[139] See K.T. Nilssen et al., "Food consumption estimates of Barents Sea harp seals", *NAMMCO Scientific Publications*, Vol. 2 (2000), Exhibit NOR-17, p. 16.

[140] See Landmark Statement, Exhibit NOR-8, para. 8.

[141] COWI, *Traceability systems for trade in seal products – Briefing note for workshop participants*, 20 October 2009, in 2010 COWI Report, Exhibit JE-21, annex 5, p. 15.

88. In these ways, the "non-systematicity" condition was tailored so as to allow placing on the market of products of seal hunting in EU Member States, while excluding products of seal hunting outside the European Union, in particular by Norway. In other words, the design, structure, and expected operation of this aspect of the SRM requirements allow marketing of seal products originating in the European Union, while denying non-EU products an opportunity to compete, thereby according imported products treatment less favourable than that accorded to "like" domestic products inconsistent with Article III:4 of the GATT 1994.

b. The "non-profit" and "sole purpose" conditions

89. The "non-profit" and "sole purpose" requirements, too, are tailored to the reality of the EU seal hunt and, therefore, *do not restrict* seal products originating in the European Union from being placed on the EU market. At the same time, those conditions effectively *exclude* from the EU market seal products originating in Norway.

90. In the European Union, the seal hunt is an occasional activity conducted by fishermen, *incidental* to their fishing activities. The economic benefit derived from seal hunting consists of the elimination of seals "caus[ing] problems to fisheries by damaging gears and catches".[143] Thus, by killing seals, EU fishermen avoid incurring the costs (and losses) that would ensue from seals' attacks, and derive a net economic benefit in the form of an improved fishing activity. They do not need to earn a profit from sealing, because sealing improves the return on their fishing activities. Moreover, COWI found that the seal hunt in Sweden "has the sole aim to contribute to sustainable marine management",[144] and reached the same conclusion for Finland.[145]

91. By contrast, as explained in Norway's first written submission,[146] the inherent characteristics of the Norwegian seal hunt prevent seal products originating in Norway from meeting the "non-profit" and "sole purpose" conditions. Norway's exploitation of living marine resources includes harvesting on all levels of the ecosystem and makes an important contribution to the Norwegian economy. In this way, Norway seeks to make use of its

[142] 2010 COWI Report, Exhibit JE-21, annex 4, p. 4.
[143] See, e.g. Member States' Comments on the Proposed Regulation (19 January 2009), Exhibit JE-10, pp. 16 ("Seals cause problems to fisheries by damaging gears and catches") and 18 ("small scale, statutory controlled hunting with the main purpose to reduce damages from [sic] fisheries").
[144] 2010 COWI Report, Exhibit JE-21, annex 4, p. 6.
[145] 2010 COWI Report, Exhibit JE-21, p. 79.
[146] Norway's FWS, paras. 444-448, 742.

marine resources in a manner that is both environmentally and economically sustainable. As a result of the different approach to seal hunting in Norway, COWI found that <u>*no*</u> products from Norway qualify under these aspects of the SRM requirements.[147]

92. In sum, the result of the "non-profit" and "sole purpose" conditions is that while seal products from the European Union have access to the EU market, seal products from Norway do not. As a result, the conditions in question modify the competitive opportunities for seal products to the detriment of products imported from non-EU countries such as Norway, resulting in "less favourable treatment" inconsistent with Article III:4 of the GATT 1994.

III. THE EU SEAL REGIME IS INCONSISTENT WITH ARTICLE XI:1 OF THE GATT 1994 AND ARTICLE 4.2 OF THE *AGREEMENT ON AGRICULTURE*

93. Norway submits that the Personal Use ("PU") requirements constitute quantitative import restrictions on seal products, other than taxes, duties, or other charges, inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the *Agreement on Agriculture*. This aspect of the EU Seal Regime applies exclusively to imported products.

94. In addition, the EU Seal Regime operates *de facto* as a border measure which restricts imports of seal products from Norway, but, by virtue of the permissive elements of the SRM requirements, does not apply to "like" domestic products. Viewed in this way, the EU Seal Regime constitutes a quantitative restriction on imports inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the *Agreement on Agriculture*. Norway confirms that this aspect of its Article XI claim is alternative to Norway's claim under Article III:4 of the GATT 1994 that the SRM requirements result in *de facto* discrimination in favour of seal products originating in the European Union.[148]

95. In essence, if the Panel finds that the EU Seal Regime is an internal measure that applies *both* to domestic seal products and, at the border, to seal products imported from Norway, it should rule on this aspect of the measure under Article III:4. If, however, the Panel finds that the EU Seal Regime does *not* restrict the placing on the EU market of domestic seal products, it should rule under Article XI:1.

[147] 2010 COWI Report, Exhibit JE-21, annex 5, p. 15.
[148] See paras. 79 to 92 above.

96. Norway also clarifies that its claim under Article I:1 of the GATT 1994 in relation to the discriminatory effect of the IC requirements is not affected by the way in which the Panel analyses issues arising under Article XI:1 and Article III:4.

A. Legal standard under Article XI:1 of the GATT 1994

97. Article XI:1 of the GATT 1994 forbids all "prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, … on the importation of any product of the territory of any other contracting party".

98. In its 1988 report, the GATT panel in *Japan – Semi-Conductors* noted that the wording of Article XI:1 "was comprehensive", as "it applied to all measures instituted or maintained by a contracting party prohibiting or restricting the importation ... of products other than measures that take the form of duties, taxes or other charges".[149]

99. Numerous panels thereafter have repeated the same view, stressing, amongst other things, that the term "restriction" includes a condition that limits importation.[150] In this vein, the panel in *India – Quantitative Restrictions* concluded that the word "restriction" encompasses "a limitation on action, a limiting condition or regulation"; and, in *India – Autos*, the panel noted that the word covers conditions that have a "limiting effect … on importation itself".[151]

100. Most recently, the Appellate Body in *China – Raw Materials* noted that the noun "restriction" "refers generally to something that has a limiting effect".[152] With reference to the title of Article XI, "General Elimination of Quantitative Restrictions", the Appellate Body further noted that the use of the adjective "quantitative" in the title "informs the interpretation of the words 'restriction' and 'prohibition'",[153] and "suggests that Article XI of the GATT 1994 covers those prohibitions and restrictions that have a limiting effect on the quantity or amount of a product being imported or exported".[154]

[149] GATT panel report, *Japan – Semi-Conductors*, para. 104.
[150] Panel Report, *Colombia – Ports of Entry*, paras. 7.232-7.241.
[151] Panel Report, *India – Quantitative Restrictions*, para. 5.128; Panel Report, *India – Autos*, para. 7.270.
[152] Appellate Body Report, *China – Raw Materials*, para. 319.
[153] Appellate Body Report, *China – Raw Materials*, para. 320.
[154] Appellate Body Report, *China – Raw Materials*, para. 320.

101. The *Ad* Note to Article III of the GATT 1994 provides that any internal regulation or requirement "which applies to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation" is to be regarded as an internal regulation or requirement, subject to the provisions of Article III.[155] Article XI:1 thus does not apply to internal regulations affecting imported products that also apply to the like domestic products; instead, these are dealt with under Article III of the GATT 1994.

102. However, the panel in *India – Autos* recognized that "different aspects of a measure may affect the competitive opportunities of imports in different ways, making [such different aspects] fall within the scope of either Article III … or Article XI".[156] It may thus be appropriate to examine different aspects of the measure to determine whether some aspects fall within Article XI (for instance because those aspects of the measure restrict imports but do not apply to like domestic products) and others within Article III (because those aspects apply to domestic and imported products).

103. On occasion, distinguishing a border measure (such as a quantitative restriction on imports or an ordinary customs duty) from an internal measure (such as an internal charge or regulation of certain products) requires an in-depth examination on the part of a panel. For instance, the Appellate Body in *China – Auto Parts* conducted a thorough "examination of whether a particular charge [was] an internal charge or a border measure" in order to establish whether the charge in question fell within the scope of Article II:1 or Article III:2 of the GATT 1994.[157] The Appellate Body in that dispute observed that such an examination:

> must be made in the light of the characteristics of the measure and the circumstances of the case. In many cases this will be a straightforward exercise. In others, the picture will be more mixed, and the challenge faced by a panel more complex. A panel *must thoroughly scrutinize the measure before it, both in its design and in its operation, and identify its principal characteristics*. Having done so, the panel must then seek to *identify the leading or core features of the measure at issue, those that define its "centre of gravity"* for purposes of characterizing the charge that it imposes … . In making its objective assessment of the applicability of specific provisions of the covered agreements to a measure properly before it, a

[155] See Norway's response to Panel question No. 3, para. 17.
[156] Panel Report, *India – Autos*, para. 7.222.
[157] Appellate Body Report, *China – Auto Parts*, para. 141.

> panel must identify all relevant characteristics of the measure, and recognize which features are the most central to that measure itself, and which are to be accorded the most significance for purposes of characterizing the relevant charge and, thereby, properly determining the discipline(s) to which it is subject under the covered agreements.[158]

104. Significantly, the Appellate Body considered that "[i]t is not surprising, and indeed to be expected, that the same measure may exhibit *some* characteristics that suggest it is a [border measure], and *others* suggesting it is [an internal measure]".[159]

105. Accordingly, in addressing which GATT provisions are applicable to the EU Seal Regime, the Panel should: (i) consider all the aspects of the EU Seal Regime that may restrict imports of seal products – that is, the restrictive aspects of the IC, SRM, and PU requirements imposed by the measure; and (ii) consider whether the EU Seal Regime (or certain aspects of it) apply, in fact, to like domestic products. In undertaking this second inquiry, the Panel should thoroughly scrutinize each set of requirements, looking both at the design and the way in which the requirements will operate, to identify the principal characteristics that define the "centre of gravity" of the measure and its different aspects.

106. In conducting this analysis in relation to Norway's claim under Article XI:1 of the GATT 1994, it is appropriate to consider different aspects of the measure under different provisions, since the different aspects may affect the competitive opportunities of imports "in different ways".

107. Accordingly, for aspects of the EU Seal Regime that operate as an internal regulation or requirement, "which applies to … the like domestic product", it is appropriate to analyse the matter under Article III:4 of the GATT 1994. However, for restrictions on imports that do not operate in this way, Norway's claim under Article XI:1 must be addressed.[160]

B. Legal standard under Article 4.2 of the *Agreement on Agriculture*

108. The *Agreement on Agriculture* applies, pursuant to Article 2 and Annex I, to a defined list of products. In its first written submission, Norway showed that a wide range of seal

[158] Appellate Body Report, *China – Auto Parts*, para. 171 (footnotes omitted, emphasis added).
[159] Appellate Body Report, *China – Auto Parts*, para. 171 (emphasis added).
[160] See Norway's response to Panel question No. 3, para. 18.

products fall within the scope of the *Agreement*,[161] and this point is not contested by the European Union.[162]

109. Under Article 4.2 of the *Agreement on Agriculture*, "Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties, except as otherwise provided for in Article 5 and Annex 5".

110. In Article 4.2, the drafters ensured that certain types of measure, which were required to be converted into ordinary customs duties during the Uruguay Round, "could not be maintained, by virtue of [Article 4.2], from the date of entry into force of the WTO Agreement on 1 January 1995".

111. Footnote 1 of the *Agreement on Agriculture*, which is attached to Article 4.2, expressly states that the measures subject to the prohibition in Article 4.2 include "quantitative import restrictions".

112. In terms of the relationship between Article XI:1 of the GATT 1994 and Article 4.2, the panel in *Korea – Various Measures on Beef* noted that:

> … the general prohibition against import restrictions contained in Article XI and its Ad Note find a more specific application in Article 4.2 of the Agreement on Agriculture together with its footnote with regard to agricultural products.[163]

113. Accordingly, when a measure affecting trade in agricultural products violates Article XI:1 of the GATT 1994, it also violates Article 4.2 of the *Agreement on Agriculture*.[164]

C. The Personal Use requirements are inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the *Agreement on Agriculture*

114. Under the PU requirements laid down in the Basic Seal Regulation:

> the *import* of seal products shall [] be allowed where it is of an occasional nature and consists exclusively of goods for the personal use of travellers or their families. The nature and

[161] See Norway's FWS, paras. 468-471.
[162] See EU's FWS, paras. 620-627.
[163] Panel Report, *Korea – Various Measures on Beef*, fn 400 to para. 748.
[164] *See* Panel Report, *Korea – Various Measures on Beef*, paras. 762 and 768; and Panel Report, *India – Quantitative Restrictions*, paras. 5.241-5.242.

> quantity of such goods shall not be such as to indicate that they are being imported for commercial reasons.[165]

115. Seal products that do not fall under these terms, and which do not benefit from the provisions of the IC or SRM requirements may not be imported. The Implementing Regulation sets forth further limitations to the import of seal products under these requirements. For instance, it prescribes that, in order to import products containing seal, EU residents must travel abroad and acquire them "on site",[166] and cannot import them without having travelled abroad. As another example, it requires that, in order to be lawfully imported into the European Union, seal products be "either worn by the travellers, or carried or contained in their personal luggage".[167] If the seal products are imported into the European Union at a later date, the travellers must present to the customs authorities of the Member State concerned a written notification of import and a document giving evidence that the products were acquired in the third country concerned.[168]

116. As the wording of the Basic and Implementing Regulations suggests, the PU requirements restrict *imports* of seal products by laying down conditions as to "personal use" and the "nature and quantity" of those imports. By their very terms, these conditions apply only at the point of importation in respect of products originating outside the EU territory. By definition, these conditions do not apply "to the like domestic product" in the sense of the *Ad* Note to Article III. Accordingly, the "core features" of the PU requirements – a specific constitutive element of the EU Seal Regime – constitute *de jure* a border measure, which should be analysed under Article XI:1 of the GATT 1994.

117. The PU requirements constitute limiting conditions on importation, expressed in terms of "quantity".[169] They are, therefore, "restrictions other than taxes, duties or other charges" prohibited by Article XI:1.

118. For the same reasons, the PU requirements constitute a "quantitative import restriction" on agricultural products that is prohibited by Article 4.2 of the *Agreement on Agriculture*.[170]

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[165] Basic Seal Regulation, Exhibit JE-1, Article 3(2)(a) (emphasis added).
[166] Implementing Regulation, Exhibit JE-2, Article 4(3).
[167] Implementing Regulation, Exhibit JE-2, Article 4(1).
[168] Implementing Regulation, Exhibit JE-2, Article 4(3).
[169] See Panel Report, *Colombia – Ports of Entry*, paras. 7.232-7.241.
[170] See Norway's FWS, paras. 468-472.

D. The SRM requirements are inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the *Agreement on Agriculture*

119. Whilst the SRM requirements ostensibly refer to the "placing on the market" of conforming seal products,[171] they operate *de facto* as a border measure.[172]

120. This is because, as explained in paragraphs 84 to 92 above, evidence of the design, structure, and expected operation of the EU Seal Regime suggests that "all seal products produced in the European Union will meet the conditions of the Sustainable Resource Management Requirements", whilst the three sets of market access requirements under the EU Seal Regime will have a limiting effect on trade from Norway.[173]

121. As explained above, three of the conditions comprised in the SRM requirements – namely, the "non-systematic", "non-profit" and "sole purpose" conditions – are tailored to meet the characteristics of seal hunting as it is carried out in Sweden and Finland,[174] as shown by COWI's statement that seal products from Sweden and Finland are expected to qualify under the SRM requirements.[175] As a consequence, *all* seal products originating in the EU territory are eligible for market access under those requirements.[176]

122. At the same time, virtually *none* of Norway's seal products would qualify under any of the conditions that allow placing on the market under the EU Seal Regime.[177]

123. Viewed in this way, none of the restrictive conditions set forth under the EU Seal Regime effectively "applies to … the like domestic product" in the sense of the *Ad* Note to Article III of the GATT 1994, since products of EU origin are effectively granted access to the EU market by virtue of the SRM requirements. At the same time, the various restrictive conditions of the EU Seal Regime effectively *ban virtually all imports* of seal products originating in Norway. Stated differently, the "fundamental thrust"[178] – or the "centre of

[171] Basic Seal Regulation, Exhibit JE-1, Article 3(2)(b).
[172] Norway's FWS, para. 457.
[173] Norway's FWS, paras. 458-459.
[174] See paras. 84, 85, and 90 above.
[175] COWI, *Traceability systems for trade in seal products – Briefing note for workshop participants*, 20 October 2009, in 2010 COWI Report, Exhibit JE-21, annex 5, p. 15.
[176] See paras. 84, 85, and 90 above. See also Norway's FWS, paras. 430, 431, 443; Norway's response to Panel question No. 22, para. 154.
[177] See paras. 86, 87, and 91 above. See also Norway's FWS, paras. 432-440, 444-448; Norway's response to Panel question No. 22, para. 155.
[178] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 215.

gravity"[179] – of the EU Seal Regime is one that imposes a restriction – indeed, a complete ban – in relation to imports of seal products from Norway, whereas it effectively does not restrict the internal sale of domestic seal products by virtue of the SRM requirements.

124. In light of the above, the EU Seal Regime constitutes a quantitative restriction on imports. On this view, the EU Seal Regime operates *de facto* as a border measure that solely restricts imports in seal products, inconsistent with Article XI:1 of the GATT 1994, and which does not fall under the *Ad* Note to Article III. However, if the Panel finds that the EU Seal Regime is an internal measure that applies both to domestic seal products and, at the border, to seal products imported from Norway, the measure violates Article III:4 because it affords less favourable treatment to seal products from Norway than the treatment afforded to like products from the European Union.

125. If the Panel finds a violation of Article XI:1 of the GATT 1994, for the same reasons, it should find that the measure constitutes a "quantitative import restriction" on agricultural products that is prohibited by Article 4.2 of the *Agreement on Agriculture*.[180]

IV. THE DISCRIMINATORY TREATMENT INTRODUCED BY THE EU SEAL REGIME IS NOT JUSTIFIED UNDER ARTICLE XX

126. The EU Seal Regime violates Article I:1 of the GATT 1994, through the IC requirements, and Article III:4 of that Agreement, through the SRM requirements. The European Union has invoked the exceptions provided by Articles XX(a) and XX(b) of the GATT 1994 to justify the so-called "General Ban".

127. The European Union bears the burden of presenting arguments and evidence to prove that each of the conditions in Articles XX(a) and/or XX(b) is met.[181] Moreover, in satisfying its burden, it must demonstrate that *the aspects of the measure that give rise to the findings of discrimination* under Articles I:1 and III:4 meet those conditions.[182] So far, the European

[179] Appellate Body Report, *China – Auto Parts*, para. 171.
[180] See Norway's FWS, paras. 468-472.
[181] See Norway's first OS, para. 49; and, e.g. Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 176.
[182] See, e.g. Appellate Body Report, *Thailand – Cigarettes (Philippines)*, paras. 177 and 179 ("in putting forth its defence, Thailand sought to justify administrative requirements relating to VAT liability generally, rather than to justify the *differential treatment* afforded to imported versus domestic cigarettes under its measure"); and GATT Panel Report, *US – Section 337 Tariff Act*, para. 5.27.

Union has failed to offer any defense that seeks to demonstrate that the *discriminatory* aspects of the EU Seal Regime satisfy Articles XX(a) and/or XX(b).[183]

128. In its first written submission, the European Union focused exclusively on what it calls a "General Ban",[184] arguing that the trade-restrictive "General Ban" is justified by Articles XX(a) and/or XX(b). The European Union did not address the IC and SRM requirements, which give rise to the discrimination. It continues to suggest that these so-called "exceptions do not restrict trade", which means, of course, that they do not require justification.[185]

129. In its responses to the Panel's questions, the European Union has shifted position in respect of its Article XX defense, recognizing that it must justify the differential treatment of seal products under the "General Ban" and the IC and SRM "exceptions".[186] Specifically, the European Union argues that, to justify discrimination,

> ... the following would have to be shown: (1) *that* the treatment provided to seal products subject to *the General Ban is "necessary"* in order to achieve the objectives set out in Article XX(a) and/or Article XX(b) at the selected level of protection; *and* (2) *that it is <u>not "necessary"</u>*, in order to achieve those objectives at the same level of protection, *<u>to extend</u> the same treatment* provided under the General Ban to seal products falling under the MRM exception or the IC exception.[187] (emphasis and underlining added)

130. Although the European Union now appears to accept that it must justify the differential treatment of seal products from different origins under Articles XX(a) and/or XX(b), it has failed to do so. So far, it has simply offered an argument under Article XX in respect of the "General Ban". Norway regrets that, at this advanced stage of the proceedings, the European Union has not articulated arguments and evidence, in respect of the contested discriminatory aspects of the measure, in terms of the specific conditions that apply under the defenses that the European Union invokes. The responsibility for this shortcoming lies with the respondent, and not the complainants.

[183] See Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 179.
[184] EU's FWS, para. 586.
[185] EU's response to Panel question No. 45, para. 155. See also Norway's first OS, paras. 51-52.
[186] EU's response to Panel question No. 43, para. 148.
[187] EU's response to Panel question No. 43, para. 148.

131. The European Union's response to Panel question No. 43 reveals that it continues to base its arguments on an incorrect understanding of the conditions that apply under Articles XX(a) and/or XX(b). As noted in the quotation in paragraph 129, the European Union suggests that it must prove that it is not "*necessary* … to *extend*" the "General Ban" to the seal products covered by the IC and SRM exceptions.

132. However, under Articles XX(a) and/or XX(b), the European Union must show that the *violation* of the GATT 1994 resulting from the IC and SRM exceptions meets the conditions of Articles XX(a) and/or XX(b). Specifically, it must show the following:

- Article XX(a) – the discriminatory treatment of seal products in favour of Denmark (Greenland) and the European Union is (1) necessary (2) to protect (3) public morals (in the sense of standards of right and wrong conduct within the European Union);
- Article XX(b) – the discriminatory treatment of seal products in favour of Denmark (Greenland) and the European Union is (1) necessary (2) to protect (3) human, animal or plant life or health;
- Under the chapeau – the measure is not applied in a manner that constitutes (1) arbitrary or unjustifiable discrimination between countries where the same conditions prevail or (2) a disguised restriction on international trade.

133. So far, the European Union has not presented arguments and evidence under Article XX of the GATT 1994 that addresses these issues. Accordingly, the European Union has not even attempted to meet its burden under Article XX.

134. We note that, under Article 2.2 of the *TBT Agreement*, the European Union has asserted that the EU Seal Regime pursues a range of public morals, which conflict with each other. Before turning briefly to those arguments, Norway notes that the legal standards, and the allocation of the burden of proof, are not the same under Articles XX(a) and (b) of the GATT 1994 and Article 2.2 of the *TBT Agreement*.

135. Under Article 2.2, the European Union alleges that the EU Seal Regime addresses moral concerns of the EU public regarding the treatment of seals. However, it contends that different moral norms apply in the case of different types of seal hunts, such that sometimes the EU public cares deeply about the welfare of seals and sometimes it does not (under the IC, SRM, and PU requirements).

136. Furthermore, different moral norms also apply in respect of different types of EU trade: (1) in respect of placing seal products on the EU market, trade in seal products is sometimes permitted (under the IC, SRM, and PU requirements) and sometimes banned, depending on the moral norm at issue (IC and SRM requirements[188]) or administrative convenience (PU requirements); (2) in respect of transit trade across the European Union, trade in seal products is permitted;[189] (3) in respect of inward processing within the European Union for export, trade in seal products is permitted;[190] and (4) in respect of sale at EU auction houses for export, trade in seal products is permitted.

137. Under Article 2.2, Norway has addressed these arguments, showing that the European Union has failed to provide evidence to show that this patchwork of alleged moral norms reflects standards of right and wrong conduct within the European Union. Norway has also addressed the other aspects of the legal standard applicable under Article 2.2, meeting its burden of proof.

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

138. In its first written submission to the Panel, Norway explained why the EU Seal Regime qualifies as a technical regulation, within the meaning of Annex 1.1 of the *TBT Agreement*, based on the three-pronged criteria previously specified by the Appellate Body, namely that: (i) it applies to identifiable products; (ii) it sets out product characteristics, including applicable administrative provisions; and (iii) compliance with its requirements is mandatory.[191]

139. The European Union continues to dispute only the second of these three elements, conceding that the EU Seal Regime qualifies under the first and third elements. Norway, therefore, focuses on the arguments canvassed by the European Union in support of its argument that the EU Seal Regime fails to prescribe, or lay down, product characteristics, including applicable administrative provisions. In addition, Norway addresses a related argument by the EU that the EU Seal Regime does not prescribe "related processes",[192]

[188] EU's responses to Panel questions Nos. 10, paras. 44, 45, 48; and 39, paras. 130, 131, 136. See also EU's FWS, paras. 40, 41, 268, 300, 308, and 329.
[189] EU response to Panel question No. 75, para. 227.
[190] EU response to Panel question No. 79, para. 231.
[191] See Norways's FWS, para. 478 (referring to Appellate Body Report, *EC – Sardines*, para. 176; Appellate Body Report, *EC – Asbestos*, paras. 66-70); and paras. 494-516.
[192] See EU's FWS, paras. 209-236.

within the meaning of Annex 1.1, which equally qualifies the measure as a technical regulation.

A. The EU Seal Regime Lays Down Product Characteristics

1. The European Union's argument that none of the three "exceptions" to the measure "lays down product characteristics" is misplaced

140. The European Union submits that "none of the three exceptions lays down product characteristics" and that for this "decisive" reason the measure is not a technical regulation.[193] The European Union relies on what it considers to be supportive case law from the *EC – Asbestos* where the Appellate Body stated that "the scope and generality of [the prohibitions in the Asbestos measure] can only be understood in the light of the exceptions to it".[194] There, the exceptions to the ban on all varieties of asbestos products covered "certain existing materials, products or devices containing chrysotile fibre". For the European Union, the fact that the exceptions in that measure referred specifically to particular product characteristics – that is, chrysotile fibre – means that the scope of a technical regulation, and exceptions to it, must always be similarly crafted to refer to specific characteristics of products.

141. In this regard, the European Union submits, the IC "exception" sets out the conditions concerning the type of hunters and the traditions of communities and the purpose of the hunt which are not intrinsic to, and do not relate to the intrinsic features of, the product. Similarly, requirements specified under the SRM "exception" concern the size, intensity and purpose of the hint and do not set out any intrinsic or related features of the product.[195]

142. The European Union mischaracterizes the operation of its own EU Seal Regime viewed as a whole, and misconstrues the case law of the Appellate Body in *EC – Asbestos*.

143. *First*, as Norway has been at pains to stress, the EU fails to examine the measure as an "an integrated whole", taking account holistically of both the prohibitive and permissive elements of the measure.[196] The EU's emphasis on the three "exceptions" leads to a fragmented or segmented analysis of the EU Seal Regime, and implies that the terms of the individual "exceptions" can transform the legal character of a measure viewed as a whole.

[193] EU's FWS, para. 219. See also ibid., paras. 220-222.
[194] EU's FWS, para. 217 (referring to Appellate Body Report, *EC – Asbestos*, para. 64).
[195] EU's FWS, paras. 220-221.
[196] Appellate Body Report, *EC – Asbestos*, para. 64.

The Appellate Body has rejected any such artificial parsing of a measure when applying Annex 1.1.

144. Insisting on such artificial parsing, the European Union contends that it is "decisive" that "none of the three exceptions lays down product characteristics".[197] Yet, the issue is not whether an individual component or provision of a measure – whether styled as an "exception" or not – lays down product characteristics. The issue is whether, *taking all components of the measure together*, the measure as a whole lays down product characteristics. For a measure as a whole to lay down product characteristics, it is not necessary that the "exceptions" do so individually, provided that the "exceptions" combine with other elements of the measure to lay down product characteristics.

145. In that regard, a proper characterization of the EU Seal Regime must consider the prohibitive and permissive elements in combination, and not in isolation. Such a holistic analysis reveals that the measure regulates, in positive and negative terms, when and under what conditions products marketed in the European Union may, and may not, be derived or obtained from seal. If the conditions of one of the three "permissive" marketing requirements are met, products may possess this product characteristic. If the conditions are not met, then the prohibitive element of the measure kicks in, and they may not.

146. Hence, taking the measure as a whole, the legal situation is the same as the one confronting the Appellate Body in *EC – Asbestos*, in which the measure established when and under what conditions products marketed in the European Union may, and may not, contain asbestos. By any standard, establishing whether and when a product may or may not contain *seal* (or asbestos) relates to the "intrinsic" features of the product, defining an aspect of its "composition".[198]

147. The European Union suggests that the measure in *EC – Asbestos* was different because "the exceptions permitted certain products which were identified according to their intrinsic characteristics".[199] It suggests that the situation is different in respect of the EU Seal Regime. Norway has just explained that this argument is misplaced, because it is incorrect to analyse the exceptions in isolation from the totality of the measure, considering all components of the measure in combination.

[197] EU's FWS, para. 219. See also ibid., paras. 220-222.
[198] Appellate Body Report, *EC – Asbestos*, para. 67.
[199] EU's response to Panel question No. 19, para. 67.

148. However, even considering the "permissive elements" (or "exceptions") in isolation for the sake of argument, the European Union draws an incorrect distinction between this dispute and *EC – Asbestos*. As the European Union notes, in *EC – Asbestos*, the scope of the permissive element did not extend to *all* three varieties of asbestos (amosite, crocodilite and chrysotile), but applied to one narrowly defined group of asbestos products (chrysotile asbestos) because of its different and particular properties.[200] For the European Union, the decisive feature of the exceptions is that they lay down characteristics for products in respect of a sub-set of asbestos.

149. However, the legal situation under Annex 1.1 would be no different if the exceptions had applied to two or, even, three categories of asbestos. Through the exception, the measure would have laid down the circumstances in which identifiable products could contain defined inputs (i.e., amosite, crocodilite or chrysotile asbestos). In short, the inclusion of two other categories of asbestos within the exception would not mean that the exception – even if it should be viewed in isolation – *ceases* to lay down product characteristics. Rather, laying down that a product may contain amosite, crocodilite or chrysotile asbestos, as opposed to just chrysotile asbestos, would relate just as much to the "intrinsic" features of the product, defining an aspect of its "composition".[201]

150. In this dispute, the permissive elements lay down that a product may contain seal inputs. Whether that aspect of the measure is compared with an exception for one, two or three categories of asbestos does not change the analysis of this component, viewed in isolation under Annex 1.1. In each case, the permissive elements of the seal or asbestos measure lay down when products may have defined characteristics (i.e., they may contain seal or asbestos).

151. It is also noteworthy that the conditions in the exceptions in *EC – Asbestos* included non-product related conditions. Specifically, it had to be shown that there was no acceptable alternative fibre for incorporation into a permitted product.[202] Similarly, in *US – Tuna*, the measure set out non-product related requirements, or conditions, for when tuna products

[200] EU's response to Panel question No. 19, para. 67 (referring to the Appellate Body Report, *EC – Asbestos*, para. 74) . See also, EU's FWS, para. 224. The panel recorded that the three types of asbestos "have different physical and chemical properties" (Panel Report, *EC – Asbestos*, para. 2.1).
[201] Appellate Body Report, *EC – Asbestos*, para. 67.
[202] Appellate Body Report, *EC – Asbestos*, para. 73.

could contain the tuna label.[203] Hence, it is perfectly acceptable for a technical regulation to include conditions that do not, in themselves, lay down product characteristics, provided that, viewed as a whole, the combination of elements in the measure do so.

2. The EU wrongly argues that the EU Seal Regime does not lay down characteristics of the product because it prohibits placing on the market products that "exclusively" contain seal

152. The European Union submits that, to the extent that the EU Seal Regime prohibits the marketing of products consisting "exclusively" of seal, such as "pure" seal meat, oil, blubber, organs and fur skins, whether processed or not, it does not prescribe product characteristics.[204] The EU bases its argument on a statement by the Appellate Body in *EC – Asbestos* that a prohibition on asbestos *fibres*, which did not, "in itself", prescribe or impose any "characteristics" on asbestos fibres, but banned them in their natural state, "might not" qualify as a technical regulation.[205]

153. The European Union's reliance on the Appellate Body's statement in *EC – Asbestos* is misplaced. First, the Appellate Body's statement is not as categorical as the EU makes it out to be since it carefully selected the words "might not", thereby indicating that, in some circumstances, a regulation that applied to articles in their raw form "might" qualify as a technical regulation.

154. In any event, by comparing asbestos fibres, in their natural state, to the range of seal products derived purely from seal, the European Union makes a flawed analogy. In the paragraph following the statement referred to by the European Union, the Appellate Body elucidated that the reason that the measure qualified as a technical regulation was because it did not seek to regulate asbestos fibres, in their "raw mineral form", for which there were no "known uses"; rather, the measure regulated asbestos contained *in products*, that is, processed asbestos.[206] Recalling that the *TBT Agreement* regulates only "products"[207], this

[203]Specifically, the Appellate Body noted that they condition eligibility for a "dolphin-safe" label upon certain documentary evidence that varies depending on the area where the tuna contained in the tuna product is harvested and the type of vessel and fishing method by which it is harvested. Appellate Body Report, *US – Tuna II (Mexico)*, para. 172.
[204] EU's FWS, paras 212-213 (quoting Appellate Body Report, *EC – Asbestos*, para. 71).
[205] EU's FWS, para. 212 (quoting Appellate Body Report, *EC – Asbestos*, para. 71).
[206]Appellate Body Report, *EC – Asbestos*, para. 72.
[207] Article 1.3 of the *TBT Agreement* provides that industrial and agricultural *products* fall within the scope of that Agreement. The term "product" is defined in the Oxford English Dictionary as: "an article or substance that is manufactured or refined for sale (more recently also applied also to services)" (see http://www.oed.com/view/Entry/151988?rskey=NJv2go&result=1#eid).

observation by the Appellate Body was correct. The EU Seal Regime does not, for instance, regulate live seals or unprocessed seal carcasses, which would be the appropriate analogues to the "raw mineral form" asbestos. Rather, the articles that fall within the scope of the EU Seal Regime which exclusively derive from seal are (i) "products"[208] which have known uses and (ii) not in their raw seal form in that they undergo, to varying degrees, some sort of processing before they are sold to consumers.[209]

155. Moreover, as pointed out in Norway's opening statement to the Panel, the majority of seal products regulated under the EU Seal Regime are in fact "mixed products",[210] meaning that they must be combined with other products or articles that have been derived from other sources. They include: 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.[211] Thus, the EU's argument, which seeks to carve out the "pure" seal products from the "mixed" ones, would not be relevant to the vast majority of the relevant products.

B. The EU Seal Regime lays down "applicable administrative provisions"

156. While the European Union accepts that the certification requirements for seal products under the EU Seal Regime cited by Norway are administrative provisions,[212] it contends that these provisions are not "applicable" within the meaning of Annex 1.1. This is because, in the European Union's view, the substantive provisions of the EU Seal Regime do not lay down product characteristics or their related processes and production methods, but rather are "procedural provisions of the Implementing Regulation, which merely concern the operation of the three exceptions".[213] The European Union's argument, therefore, hinges, in part, on its flawed interpretation that the EU Seal Regime does not lay down product characteristics.

157. Given our explanation above that the EU Seal Regime does, indeed, lay down product characteristics, the European Union argument must be rejected. Moreover, and in any event,

[208] Article 2.2 of the Basic Seal Regulation speaks of seal "*products*"; Article 3.1 of Basic Seal Regulation conditions the placing on the market of seal "*products*".
[209] As explained in Norway's FWS, even seal meat must undergo processing, through, for instance, salting and other means of preservation. See Norway's FWS, para. 86.
[210] See Norway's first OS, para. 59.
[211] A number of seal products, including the production process, are described at Norway's FWS, paras. 85-102.
[212] Norway's FWS, paras. 502-503.
[213] EU's FWS, para. 235.

as Norway noted in its opening statement at the first meeting of the Panel,[214] the situation here is akin to the one in *EC – Asbestos* where the Appellate Body found that the administrative provisions were "applicable" to products identifiable on the basis of "certain objective 'characteristics'",[215] namely they contained (chrysotile) asbestos.[216] In that dispute, the provisions were applicable in order to demonstrate that a product with that characteristic could be placed on the market.

158. The administrative provisions were "applicable", through the "exceptions", in order to demonstrate that a product with those characteristics could be placed on the market. Similarly, the administrative provisions under the EU Seal Regime are "applicable", through what the EU calls "exceptions", to products that are identifiable on the basis of "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.

C. The EU Seal Regime also lays down "related processes"

159. For a measure to qualify as a technical regulation, Article 1.1 requires that the document lay down product characteristics *or* their related processes and production methods. Norway takes the view that, in order to make out its case that the EU Seal Regime is a technical regulation, it need only demonstrate one of these two criteria, which Norway has successfully done by demonstrating that the EU Seal Regime lays down product characteristics.

160. Should this argument fail, Norway argues that the EU Seal Regime *also* prescribes processes related to the product characteristics specified in the measure.[217]

161. As noted in Norway's opening statement to the panel at the first meeting, the panel in *EC – GIs*, helpfully defined a "process" as a "a systematic series of actions or operations directed to some end, as in manufacturing …".[218] The IC and SRM requirements lay down "processes" that "relate" to defined product characteristics, that is, when a product containing

[214] Norway's first OS, para. 62.
[215] Appellate Body Report, *EC – Asbestos*, para. 74.
[216] See, e.g. Appellate Body Report, *EC – Asbestos*, paras. 64 and 74.
[217] Norway notes that, in addition, Canada defines and makes arguments to support the view that the EU Seal Regime also prescribes related "production methods". See, e.g. Canada's response to Panel question No. 21, paras. 108-110. Norway associates itself also with these arguments.
[218] Norway's first OS, para. 64 (citing to 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 …".

seal can be marketed. The IC requirements prescribe a "process" involving a particular course of action (a traditional seal hunt by specified persons) with a defined end (the production of seal products for community subsistence). For the SRM requirements, the course of action concerns the purpose of the hunt (sustainable management of marine resources); the way in which the hunt is conducted (it must be regulated at national level pursuant to an SRM plan); and the way in which the seal products are marketed (not-for-profit, non-commercial nature and quantity); and the action also has a defined end (the sale of SRM by-products).

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

A. Introduction

1. Summary of Norway's claim under Article 2.2 of the *TBT Agreement*

162. In a nutshell, Norway's central arguments under Article 2.2 may be summarized as follows:

- The European Union pursues a patchwork of objectives, certain of which are not legitimate (discriminatory trade preferences for indigenous communities and internal EU market harmonization) under Article 2.2;
- The European Union alleges that it pursues public morals relating to seal hunting, but has failed to demonstrate the existence of the various separate moral norms alleged to exist;
- A ban on seal products from Norway is not necessary on animal welfare grounds because Norway implements and consistently enforces high animal welfare standards;
- The EU Seal Regime undermines its animal welfare objective by allowing market access to seal products under the IC, SRM, and PU requirements, which could satisfy the entire EU demand, in particular through the IC requirements; as a result, the EU market is reserved for seal products from IC hunts that involve poor animal welfare outcomes;
- Hence, whatever level of protection the EU legislators thought they were pursuing, the measure makes no contribution to animal welfare; the alternative measure put forward by Norway, including animal welfare requirements and labelling, makes *at least* an equivalent contribution to the animal welfare objectives;
- The EU Seal Regime subjects the SRM requirements to conditions that are rationally disconnected from the SRM objectives of those requirements, in

particular the requirements that hunts be non-profit and non-systematic, and that they have sustainable resource management as their sole purpose; an alternative without these specific conditions would make a greater contribution to sustainable resource management.

2. Requirements of Article 2.2

163. To recall, under Article 2.2 of the *TBT Agreement*, a panel must: (i) ascertain the objectives of the EU Seal Regime; (ii) assess whether those objectives are legitimate; and (iii) assess whether the EU Seal Regime is "necessary" to pursue its legitimate objectives, which involves, a relational analysis of: (a) the trade restrictiveness of the measure; (b) its contribution to the fulfilment of legitimate objectives; and (c) the risks non-fulfilment would create. Norway undertakes this analysis of necessity using (d) the "conceptual tool" of less trade restrictive alternative measures.[219]

3. The structure of this section

164. The following discussion is structured with these elements in mind. Norway has discussed each of these elements of the analysis extensively in earlier submissions. Further, the European Union has presented its own views in its first written submission, at the first hearing, and in answering the Panel's questions after the hearing. In this submission, we aim to synthesize the threads of the analysis and arguments exchanged so far, rebutting, as necessary, new points raised by the European Union in its responses to questions from the Panel.

165. Accordingly, this section is structured as follows. We begin by discussing the objectives of the EU Seal Regime, in light of the arguments presented to date. Next, we consider whether certain of the European Union's objectives – particularly the objective of protecting the economic and social interests of indigenous communities – are "legitimate" in the sense of Article 2.2. We then proceed to consider the "necessity" of the trade restrictions imposed by the EU Seal Regime for the fulfilment of its legitimate objectives, including through consideration of the less-trade restrictive alternative measures proposed by Norway.

[219] Norway's FWS, para. 542. For a fuller description of the legal test, see Norway's FWS, paras. 536-587.

B. Identification of the objectives of the EU Seal Regime

1. Objectives revealed by the measure, the legislative history and other evidence

166. On the basis of "the texts of statutes, legislative history, and other evidence regarding the structure and operation of the measure",[220] Norway has shown that the measure pursues six objectives: (i) the protection of animal welfare, including responding to consumer concerns regarding animal welfare; (ii) the protection of the economic and social interests of indigenous communities; (iii) the encouragement of the sustainable management of marine resources; (iv) harmonizing the internal market; (v) allowing consumer choice; and (vi) preventing consumer confusion.[221]

167. The European Union argues that it is *not* pursuing *two* of these six objectives, namely, consumer choice and the prevention of consumer confusion.[222] In its opening statement at the first hearing, Norway responded to the European Union's arguments that it is not addressing these two objectives and, in the interest of brevity, will not repeat those arguments.[223] In short, irrespective of the arguments the European Union has made to the Panel, the preamble and operative part of the Basic Seal Regulation, respectively, show that these two are among the six objectives of the measure.[224]

168. The European Union's arguments confirm that, *in substance*, the European Union is pursuing the other *four* objectives identified by Norway.[225] First, the European Union agrees that the harmonization of the internal market is an "immediate objective" of the EU Seal Regime.[226] However, Norway and the European Union agree that there is no need for it to address this objective further.[227]

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[220] Appellate Body Report, *US – Tuna II (Mexico)*, para. 314.
[221] Norway's FWS, paras. 591-630.
[222] See Norway's first OS, paras. 70-75.
[223] Norway's first OS, paras. 73-74.
[224] See Norway's FWS, para. 595 and Basic Seal Regulation, Exhibit JE-1, recital 7 (with regard to the prevention of consumer confusion); and Norway's FWS, paras. 607-608 and Basic Seal Regulation, Exhibit JE-1, Article 3(2)(a) (with regard to the promotion of consumer choice).
[225] The European Union formally purports to disagree, but the substance of its arguments confirms Norway's analysis. See Norway's first OS, paras. 70-75.
[226] EU's FWS, para. 32. See also ibid., para. 47.
[227] EU's response to Panel question No. 13, para. 55 ("the European Union does not contend that the aspects of the EU Seal Regime challenged by the Complainants are necessary in order to achieve that objective"); and Norway's response to Panel question No. 13. Norway's arguments on harmonization, prior to the EU admission that the harmonization does not justify the EU Seal Regime under Article 2.2, were set out in Norway's FWS, paras. 658-660.

169. Further, the arguments presented by the European Union confirm that it is pursuing the three remaining objectives identified by Norway (briefly stated, animal welfare, indigenous communities, and sustainable resource management). In particular, the arguments and evidence presented by the European Union confirm the prominence of animal welfare among the measure's objectives: for example, the European Union has devoted 45 pages of its first written submission to the alleged "Scientific grounds for the public moral concerns" about animal welfare.[228]

170. However, the European Union attempts to place a moral gloss over these objectives. Specifically, in an attempt to present multifarious and competing objectives as a single, coherent objective, it describes them as traits of an umbrella "public morals" objective.[229] As we have set out in our first oral statement, responses to the Panel's questions, the evidence shows that the European Union has not succeeded in identifying any coherent and consistent standard of right and wrong conduct held within the European Union.[230]

2. The European Union has not shown that it pursues the protection of public morals

a. The contours of the alleged moral norms

171. As described by Norway in its response to Panel question No. 18, the European Union asserts the existence of several public morals, with very particular and nuanced normative contours. Specifically, the European Union claims that the EU public has an alleged moral abhorrence to the presence of seal products on EU shop shelves because it is supposedly impossible to hunt seals in a manner that consistently respects animal welfare. The strength of the moral sentiment regarding the presence of seal products on shop shelves is asserted to be akin to taking part in ("aiding and abetting") the commission of a crime, although no evidence is offered to support this vivid comparison.[231]

[228] Norway's response to Panel question No. 14, para. 88.
[229] See, e.g. Norway's first OS, para. 69 and 76-99; and EU's response to Panel question No. 10, paras. 46 ("the EU Seal Regime pursues two closely related objectives: first, addressing the moral concerns of the EU population with regard to the welfare of seals; and second, contributing to the welfare of seals by reducing the number of seals killed in an inhumane way") and 48 (asserting that that the concerns relating to indigenous communities and sustainable resource management are articulations of the same "standard of morality").
[230] Norway's first OS, paras. 76-99; Norway's responses to Panel questions Nos. 9, 15, 17, 18, and 48. See also Section IV above.
[231] See EU's response to Panel question No. 9, para. 33.

172. However, those strong moral sentiments vanish entirely in the six instances in which trade in seal products is permitted *irrespective* of animal welfare considerations.[232] In *each* of six defined instances, trade in seal products (placing on the market under either the IC, SRM or PU requirements; transit; auction sale for export; or production for export) is permitted irrespective of animal welfare concerns. Indeed, the pursuit of trade in these instances even becomes a *moral good*, depending on the type and size hunt and irrespective of the treatment of the seals.

173. To summarize the position of the European Union, its decision to *deny* market access to certain seal products is driven by alleged moral norms regarding the treatment of seals. Yet, its decision to *allow* market access for seal products under the IC and SRM requirements, irrespective of animal welfare, is also driven by alleged moral norms. In respect of the PU requirements, the European Union further argues that its decision to *allow* market access is driven by the need to avoid "inequitable results" for travellers, which it says is *not* a moral concern.[233]

174. The European Union further contends that it admits seal products to the EU market under the SRM, IC and PU requirements, irrespective of animal welfare considerations, because it considers that the seal products in question are derived from seal hunts that are not primarily or exclusively "commercial", whereas other seal products are derived from hunts that have commercial dimensions.[234] This distinction allegedly reflects an additional contour of the public morals at stake.[235]

[232] Placing on the market is thus permitted if: (1) the seal hunt is conducted by an indigenous community with a seal hunting tradition and the seal hunt serves partly subsistence purposes, even if the hunt also serves commercial purposes; (2) the seal hunt is conducted solely for sustainable resource management purposes (which the European Union understands as eliminating seals as pests to fisheries), provided, among others, that the sale of the resulting seal products is not profitable and not systematic; and (3) the seal products are imported by individual travellers for their personal use in limited quantities. In addition, trade in seal products is allowed in the following circumstances: (4) seal products may transit across the European Union; (5) seal products may be sold for export at EU auction houses; and (6) seal products may be produced in the European Union for export, using either domestic seal inputs or inputs processed under an inward processing scheme.
[233] EU's FWS, para. 42.
[234] EU's FWS, paras. 39-42; EU's response to Panel question No. 30, para. 103.
[235] EU's FWS, paras. 39-42.

175. Finally, the European Union has not identified the moral (or other) basis for its decision to *allow* trade in seal products for transit, sale for export or EU production for export.[236]

b. The European Union proposes a lax burden of proof

176. As the party asserting the existence of the alleged public morals, the European Union bears the burden of proving the existence of the different moral norms alleged.[237] Before examining the evidence provided by the European Union to prove the existence of these diverse public morals, Norway observes that the European Union proposes a very lax standard by which a respondent should fulfil its burden to prove the existence of the "public morals" objectives that it claims are pursued by the measure at issue. In response to a question from the Panel on the particular evidence provided by the European Union to substantiate the different public morals alleged, it contends:

> ... once it is established that the *basic standard of conduct* which the EU Seal Regime seeks to uphold is part of the European Union's 'public morals', *it is not necessary to prove that each of the individual outcomes from the application of that rule in specific situations is regarded by the EU public as a separate rule of public morality on its own*. Instead, the mere fact that the EU legislator has made a proper application of the basic rule of morality would be sufficient to confer upon each of those outcomes the status of 'public morals'.[238]

177. The European Union asks the Panel to accept that "separate rule[s] of public morality" exist based on its own assertion. However, such a standard is not consistent with the Panel's duty under Article 11 of the DSU to make an objective assessment of the matter, including the facts. A panel must establish that the specific facts alleged to provide the basis for discrimination or other trade restriction are proved; a panel cannot simply assume their existence on the basis of the partisan and, hence, subjective assertions of the respondent (or, indeed, the complainant).

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[236] Contrary to the measure as finally adopted, the Proposed Regulation would have also regulated transit and export of seal products: European Commission, *Proposal for a Regulation of the European Parliament and of the Council Concerning Trade in Seal Products*, COM/2008/0469, 2008/0160 COD (23 July 2008) ("Proposed Regulation"), Exhibit JE-9, Article 1. See also Norway's response to Panel question No. 1, para. 8.
[237] 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").
[238] EU's response to Panel question No. 31, para. 107 (emphasis added).

178. In this case, the alleged facts include the existence of several different, conflicting, moral norms. The European Union must prove the existence of these moral norms, including their inter-relation. This is particularly important in the case of public morals because, as the European Union's own evidence shows, "virtually anything can be characterized as a moral issue".[239]

179. The European Union refers to an alleged "basic standard of conduct". However, Norway recalls that the European Union has ***no*** basic standard in respect of the treatment of seals, because sometimes seal welfare has decisive importance and, other times, it is not even relevant.

180. Instead, very fine distinctions are drawn that seek to justify banning the seal products of some seal hunts but not others. These distinctions have nothing to do with animal welfare, because products from hunts with poor animal welfare outcomes are admitted and products from hunts with good animal welfare outcomes are prohibited. The distinctions purport to reflect the commercial dimensions of seal hunting; yet, as Norway has shown, all seal hunting has commercial dimensions.[240]

181. Thus, the European Union relies on several "separate rule[s] of public morality" with radically different normative content but which apply in very similar circumstances in which seals face the risk of unacceptable animal welfare outcomes. The European Union has failed to prove the existence of these "separate" rules and now argues that such proof is unnecessary.

182. However, as noted, given the character of the European Union's arguments, it is particularly important for the Panel to make an objective assessment of the existence of the alleged "separate rule[s] of public morality".

183. The European Union, which, as the party alleging the existence of the "public morals" is invoked, bears the burden of proving that existence, has offered the following evidence: (i) the measure at issue; (ii) surveys of the EU public opinion; and (iii) scientific evidence.[241]

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[239] A. Linzey, "Public Morality and the Canadian Hunt", Exhibit EU-35, para. 8.4 (quoting Steve Charnowitz (emphasis added)).
[240] Norway's first OS, paras. 92-93. See also ibid., paras. 90-94 and 104.
[241] See Norway's first OS, para. 81.

i. The measure at issue is not evidence of the existence of the public morals invoked

184. However, first, the measure at issue, as set out in our opening statement, provides no evidence of the existence of the "public morals" invoked: far from it, it reflects no "standard of right and wrong conduct" to be consistently applied, but a variety of different and inconsistent standards applying to the treatment of seals and the commercial exploitation of seal products.[242]

185. The European Union argues that adoption of a measure is itself evidence of the existence of the invoked public morals "[w]here, as in the present case, the measure at issue has been adopted in accordance with a democratic and open process by representative political institutions".[243] The European Union's argument is unacceptable. Institutions, including democratic institutions, can take action in pursuit of a vast variety of objectives. The mere fact that the institutions in question, or the decision-making process, are "democratic and open", does not in the least demonstrate that the measure pursues the protection of "public morals". If this argument were valid, a WTO Member with a democratic and open system of government could simply invoke "public morals" to justify any act or omission taken by one of its legislative bodies.

186. Indeed, the European Union effectively confuses legal and moral norms, contending that any legislative act of a democratic institution reflects a moral norm if the Member in question so asserts. Moral norms become a self-defining and self-serving justification for trade-restrictive legal norms that are chosen by elected politicians.

ii. The EU's surveys do not reveal the existence of the public morals invoked

187. Second, the surveys do not evidence the existence of the "public morals" invoked by the European Union. Instead, as Norway has laid out in its opening statement, the surveys generally: (1) highlight an extremely low level of knowledge about seal hunting; (2) did not use techniques that would provide information on the moral views respondents; and (3) do not even elicit information on the different public morals that the European Union invokes.[244]

[242] Norway's first OS, paras. 82-94.
[243] EU's response to Panel question No. 48, para. 163. See also EU's FWS, para. 189.
[244] Norway's first OS, paras. 97-98.

(1) Low level of knowledge

188. The most striking feature of the surveys relied upon by the European Union is that they highlight an extremely low level of knowledge about seal hunting.[245] The vast majority of respondents were either not aware of, or not familiar with, the topic. For instance, in one survey, only 29 per cent of respondents reported to be aware of issues relating to seal hunting.[246] Similarly, in other surveys, 50 to 95 per cent of respondents claimed to have no or rudimentary pre-existing knowledge concerning sealing.[247] Answers to questions on hunting methods also laid bare a "knowledge gap" among respondents.[248] In the European Union's own words, "public morals" are "deeply woven into the fabric of society".[249] The extremely low level of professed knowledge regarding seal hunting indicates that there are no such "public morals" "deeply woven into the fabric of society" in the European Union.

189. Moreover, the extremely low level of knowledge of the topic also affects the reliability of surveys. Surveys on topics that are either unknown or unfamiliar to respondents (i.e., where the topic is not salient) are susceptible to various systematic measurement biases. This is particularly the case for surveys that take the form of interviewer-administered surveys like the ones submitted by the European Union, since this mode of questionnaire administration itself affects data quality.[250] These dynamics render low the validity of the responses given to the surveys submitted by the European Union. Put another way: since the vast majority of respondents professed not to understand the underlying topic they were addressing, little weight can be given to the results of the surveys.

[245] See Norway's first OS, para. 97.
[246] Public opinion survey by Dedicated Research for IFAW, May 2006 (Belgium), Exhibit EU-53.
[247] See Exhibits EU-49, 50, 52, 55, 56, 57 and 59. 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 Lithuania, Poland, and Romania. Public opinion survey by IPSO-Mori for IFAW and HSI, June 2011 (Belgium, France, Germany, United Kingdom, Italy, Lithuania, Netherlands, Poland, Romania, Spain and Sweden), Exhibit EU-59. See Norway's first OS, fn 97 to para. 127.
[248] COWI, *Assessment of the Potential Impact of a Ban of Products Derived from Seal Species* (April 2008) ("2008 COWI Report"), Exhibit JE-20, Executive Summary, p. 5, section 6.1.1, p. 126, and section 6.3, p. 132. See also Norway's first OS, para. 127.
[249] EU's response to Panel question No. 48, para. 171.
[250] See, e.g. A. Bowling, "Mode of questionnaire administration can have serious effects on data quality", *Journal of Public Health* (2005), 27(3), pp. 281-291, Exhibit NOR-160. All the surveys submitted by the European Union where the survey methodology was specified (i.e., those submitted as Exhibits EU-49, EU-50, EU-52, EU-53, EU-54, EU-55, EU-57, and EU-59) were administered by the interviewer either by telephone or face-to-face.

(2) The surveys do not elicit information on the moral views of respondents

190. None of the NGO-commissioned surveys relied upon by the European Union appear to elicit relevant information that would allow an analyst to draw valid inferences about public morals as such within the European Union.[251] The questions are formulated in terms of support for a ban on seal products as a policy initiative, rather than in terms of moral norms regarding seal hunting and/or seal products. Hence, the surveys provide no basis for any valid inferences regarding community-wide standards of right and wrong conduct and are simply not apt to demonstrate the existence of a public moral.

(3) The surveys provide no evidence of the specific public morals invoked

191. Moreover, the surveys relied upon by the European Union do not support the existence of the peculiar "public morals" invoked by the European Union.

192. Generally, the surveys in question did not even elicit answers on the different internally inconsistent morals the European Union invokes.

193. Further, in the very few cases in which the surveys included questions bearing some relation to the particular public morals invoked, the survey results suggest that the internally inconsistent morals alleged by the European Union do not even reflect public *opinion*. In the survey provided as Exhibit EU-52, respondents in Portugal and Slovenia were surveyed for their support for an EU ban on seal products, with separate questions regarding support for a ban affecting, or not affecting, Inuit people. The respondents' opinions regarding a ban were almost identical under the two scenarios, i.e., their opinion did not differ according to whether a ban would affect, or not affect, Inuit people.[252] Further, a survey of opinion in Belgium, submitted as Exhibit EU-53, found that respondents' opinions do not differ as between the "commercial seal hunt in Canada" and "the seal hunt in general".[253]

194. The European Union's responses to the Panel's questions confirm that the EU-based surveys do not provide *prima facie* evidence of the existence of the particular "public morals" that the European Union alleges exist. Asked by the Panel about the evidentiary basis for the

[251] See Exhibits EU-49 to EU-59.
[252] Public opinion survey by Ipsos-MORI for IFAW, 11 October 2007 (Portugal and Slovenia), Exhibit EU-52, pp. 2-3, Q3 for "split sample version 1", "split sample version 2", and "combined version".
[253] Public opinion survey by Dedicated Research for IFAW, May 2006 (Belgium), Exhibit EU-53, p. 11 ("la chasse commerciale au Canada n'est pas différenciée de la chasse aux phoques en general").

"public morals" invoked, the European Union can only resort to unsupported assertions[254] and argues that, once a "basic public moral" is established, it is not even necessary for a Member to prove the existence of the "separate rule[s] of public morality" alleged.[255] Norway has addressed this argument further in paragraphs 176 to 182 above.

195. The European Union also argues that two findings of the surveys reviewed by Canada's Royal Commission on Sealing in 1986 provide proof of the existence of the particular "public morals" invoked.[256] The first set of findings relates to a survey in 1984 of roughly 800 *Canadian* nationals (the "CSA poll").[257] This is not evidence of public morals within the European Union in 2013. Moreover, the questions posed in the survey did not elicit the Canadian respondents' opinions on the specific distinctions drawn by the European Union. Additionally, the questions pertained to *all wild animals* generally, and not to seals specifically.[258]

196. The second set of findings in part simply restates the results of the CSA poll; in addition, it refers to the results of a poll conducted by the Royal Commission itself, covering over 6,000 respondents including 46% from three EU countries (the "RC poll").[259] Again, this survey does not provide evidence of public morals held in 2013 in a European Union of 27 Member States. In any event, in terms of the survey findings, the Royal Commission explains that, whereas high proportions of respondents supported hunting by indigenous people for food and clothing, they did not support hunting for cash, *even when that cash enabled them to carry out the hunting and fishing essential to their survival*.[260] Yet, this hunting "for cash" is precisely what the IC requirements allow – indigenous communities may access the EU market, selling seal products for commercial purposes, provided that some part of the seal hunt contributes to subsistence.[261]

[254] EU's response to Panel question No. 31, para. 106.
[255] EU's response to Panel question No. 31, para. 107.
[256] EU's response to Panel question No. 31, para. 109, referring to Canadian Royal Commission, Seals and Sealing in Canada ("1986 Canadian Royal Commission Report"), Exhibit EU-48, pp. 160 and 185.
[257] 1986 Canadian Royal Commission Report, Exhibit EU-48, p. 151.
[258] 1986 Canadian Royal Commission Report, Exhibit EU-48, p. 160.
[259] 1986 Canadian Royal Commission Report, Exhibit EU-48, p. 185; the RC poll is described ibid. p. 150.
[260] 1986 Canadian Royal Commission Report, Exhibit EU-48, p. 185.
[261] The European Union explains that "[i]ndeed, otherwise the IC exception would have been useless". EU's response to Panel question No. 32, para. 112.

197. Finally, the European Union states that, in assessing the existence of the particular "public morals" invoked, "reference can be made"[262] to a European Commission summary of the "public consultation" conducted by way of the Internet during the legislative process. The Commission summary highlights that a large proportion of respondents was from Canada and the United States, meaning that it does not even provide a basis for assertions regarding public opinion, much less "public morals", within the European Union.[263] The survey again uncovered a "knowledge gap" regarding seal hunting and, as Norway has said, ill-informed public opinion cannot form the basis for a public moral.[264]

198. Furthermore, as highlighted by COWI, the EU public consultation does not provide a *representative* picture of public opinion in the European Union.[265] The public consultation was *not* based on sampling methodologies that would allow for the extrapolation of findings to a larger population. Instead, respondents selected themselves by voluntarily completing the Internet survey. As explained in reference scientific literature on survey research,

> These self-selected pseudosurveys resemble reader polls published in magazines and do not meet standard criteria for legitimate surveys admissible in court. Occasionally, proponents of such polls tout the large number of respondents as evidence of the weight the results should be given, but the size of the sample cannot cure the likely participation bias in such voluntary polls.[266]

There is considerable evidence that non-governmental organizations, including celebrities, solicited responses and guided answers.[267]

199. Moreover, when asked whether respondents would prioritize the interests of local communities that depend on seal hunting over animal welfare concerns, only 1.3 percent of respondents considered that the interests of local communities were more important than animal welfare.[268] Further, when asked about the influence of the identity of the hunter on the acceptability of seal hunting, 62.1% of respondents answered that seals should not be

[262] EU's response to Panel question No. 31, para. 110.
[263] European Commission, *Impact Assessment on the potential impact of a ban of products derived from seal species*, COM(2008) 469 (23 July 2008) ("Commission Impact Assessment"), Exhibit JE-16, p. 11.
[264] 2008 COWI Report, Exhibit JE-20, Executive Summary, p. 5, section 6.1.1, p. 126 and section 6.3, p. 132.
[265] 2008 COWI Report, Exhibit JE-20, pp. 124-125.
[266] S.S. Diamond, "Reference Guide on Survey Research", in Federal Judicial Center (ed.), *Reference Manual on Scientific Evidence* (3rd ed., National Academies Press 2011), Exhibit NOR-161, pp. 407-408 (footnotes omitted).
[267] 2008 COWI Report, Exhibit JE-20, p. 125. See also, ibid. p. 130.
[268] 2008 COWI Report, Exhibit JE-20, p. 126.

hunted for any reason.[269] This contradicts the European Union's assertions that the inconsistencies in its measure merely reflect the peculiar characteristics of the "public morals" the measure means to address.

iii. Scientific evidence does not support the existence of the public morals invoked

200. In its first written submission the European Union invoked scientific evidence as "grounds for the public moral concerns".[270] Again, the scientific evidence, including the evidence that was before the European Union during the legislative process, does not support the existence of the invoked public morals regarding animal welfare. To the contrary, as Norway has shown in earlier submissions, the scientific evidence shows that the hunts to whose products the EU Seal Regime grants market access pose the greatest animal welfare problems.[271]

201. In reply to the Panel's questions, the European Union suggests that there is very little evidence of adverse animal welfare outcomes in the IC hunts.[272] This is entirely disingenuous, ignoring the assessment provided to the European Union by EFSA. Norway has detailed, at length, the considerable evidence of animal welfare problems in the IC hunt.[273]

202. The European Union's arguments are symptomatic of its approach to the respective hunts. As Norway explained in its opening statement at the first meeting with the Panel, the European Union fails to consider the evidence from the Norwegian hunt as a whole, and bans trade despite high animal welfare standards.[274] Yet, it ignores evidence of animal welfare problems in the favoured Greenlandic hunt.

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[269] 2008 COWI Report, Exhibit JE-20, p. 126.
[270] EU's FWS, section 2.4.
[271] See Norway's FWS, paras. 679-684; Norway's first OS, paras. 117-121; Norway's responses to Panel questions Nos. 14, paras. 101-102; and 73, paras. 402-410. By contrast, COWI noted that "[s]eal hunting is comprehensively regulated in Norway and [Norway] has the most developed management system [for seal hunting]". 2008 COWI Report, Exhibit JE-20, p. 133. See also ibid., pp. 63 and 70.
[272] EU's response to Panel question No. 73, para. 224.
[273] See Norway's FWS, paras. 679-684. See also Norway's first OS, paras. 117-121; Norway's response to Panel question No. 73, paras. 402-410.
[274] See Norway's first OS, paras. 148-150.

c. Conclusion

203. In summary, the evidence provided by the European Union does not support its assertion that the EU Seal Regime responds to the "public morals" held in the European Union. Instead, the legislative history shows that the peculiar choices made by the EU legislator were motivated by political expediency and not public morals;[275] and the measure itself lays bare the *absence* of a standard of right and wrong conduct relating to the killing of seals and the sale in the EU market of products containing seal.[276]

204. In any event, even assuming, for the sake of argument, that the objectives in question rose to the status of "public morals" (*quod non*), Norway notes that an examination, under Article 2.2, of the necessity of the measure to achieve its public morals objectives still requires an analysis of the measure's contribution to fulfilling the normative *content* of the alleged public morals.[277]

205. Thus, arguing that a measure's objectives are a matter of public morals does not excuse the parties or the Panel from an analysis of the substantive concerns animating the public morals.[278] For example, it is not sufficient to refer generically to "moral feelings that prompted the adoption"[279] of the measure. The measure must contribute to legitimate objectives, which are the alleged moral norms, and there must be no less trade restrictive alternative.

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[275] For example, the choice to allow on the market products from "small-scale" SRM hunts was motivated by the desire to allow fishermen in the European Union to "carry on as before" killing seals and placing on the market seal products. European Parliament Debates, Exhibit JE-12, p. 72. See also Member States' Comments on the Proposed Regulation (19 January 2009), Exhibit JE-10, pp. 16-18. The European Union now argues this choice was a matter of public morals. EU's response to Panel question No. 10, para. 48. Similarly, the choice of granting discriminatory trade preferences to products from indigenous communities, now described as a matter of public morals, was motivated by the desire to preserve their economic interests by allowing them to trade internationally the products of their hunt. Proposed Regulation, Exhibit JE-9, Explanatory Memorandum, p. 5, "Grounds for and objectives of the proposal". See also Norway's FWS, para. 616.

[276] See Norway's first OS, paras. 78-94; Norway's responses to Panel questions Nos. 14, para. 95; 18, paras. 124-132, 136-141; and 52, paras. 287-289.

[277] See Norway's first OS, paras. 115-123. See also Norway's response to Panel question No. 9, para. 76. For example, in *US – Gambling*, the panel examined whether the challenged measure contributed to "*each of the interests* identified by the United States, except for organized crime. In particular, the Panel found such a link in relation to money laundering, fraud, compulsive gambling, and underage gambling". Appellate Body Report, *US – Gambling*, para. 313 (footnotes omitted, emphasis added).

[278] For example, if the public morals relate to animal welfare, a measure that protects animal welfare also protects the corresponding public morals; and, *vice versa*, a measure that fails to protect animal welfare also fails to protect the public morals relating to animal welfare. See Norway's response to Panel question No. 9, paras. 73 and 76.

[279] See the EU's response to Panel question No. 44, para. 152.

206. Norway now turns to consider those issues. In the present case, the *content* of the alleged public morals has multiple facets, which correspond to those that Norway has identified as distinct objectives.[280] Accordingly, the objectives of the EU Seal Regime, relevant for the Panel's consideration, are:

- animal welfare;
- protecting the economic and social interests of indigenous communities;
- promoting the sustainable management of marine resources;
- promoting the personal choice of travelling EU consumers; and,
- preventing consumer confusion.

207. The further objective of the EU Seal Regime, namely, harmonization of the internal market, need not be addressed by the Panel.[281]

C. The legitimacy of certain objectives pursued by the EU Seal Regime

1. The objective of discriminating in favour of particular communities is not "legitimate" within the meaning of Article 2.2

208. Having discussed the objectives pursued by the EU Seal Regime, Norway now turns to the question whether one of the objectives – the protection of the economic and social interests of indigenous communities – is a legitimate objective in the sense of Article 2.2 of the *TBT Agreement*. Norway argues that it is not. Through pursuit of this objective, the European Union aims to excuse seal products produced by indigenous communities from the trade restrictions that it has placed on like products from other sources because of animal welfare concerns. In this way, the European Union seeks to introduce a regulatory trade preference for products that conform with the IC requirements, which predominantly come from Denmark (Greenland), to the detriment of products from other sources, such as Norway.

209. The granting of discriminatory trade preferences is not a "legitimate" objective within the meaning of Article 2.2. In other words, it is not an objective that justifies trade restrictions resulting from the preparation, adoption or application of technical regulations.

[280] Norway's first OS, paras. 69-75.
[281] See Norway's response to Panel question No. 13; and EU's response to Panel question No. 13.

As Norway has explained in its first written submission, opening statement, and responses to questions from the Panel:[282]

- The non-discrimination principle is a cornerstone of WTO law, reflected in the *TBT Agreement* itself;[283] and
- If a Member wishes to infringe that principle by granting special and differential treatment to products from some sources because of economic or social considerations, it must obtain express authorization *within* the WTO legal system, in the form of a WTO waiver or of specific provisions of the covered agreements, such as the Enabling Clause.[284]

210. Under a harmonious interpretation of the covered agreements, that yields coherence and gives effect to all relevant treaty provisions,[285] an objective that violates a cornerstone principle of WTO law, is not "legitimate" under Article 2.2 of the *TBT Agreement*, in the absence of a WTO legal instrument in which all WTO Members have agreed to that violation.

211. As Norway has explained,[286] this conclusion is not affected by the existence of international instruments that, *first*, have not been incorporated into WTO law,[287] and, *second*, do not require the granting of discriminatory trade preferences.

212. In its responses to the Panel's questions, the European Union asserts that instruments of international law, such as those at issue, "inform and support" the existence of a public moral within the European Union.[288] The European Union is thereby conflating legal norms (and declarations) of the international legal order with moral norms within the European Union, much as it seeks to conflate domestic legal and moral norms. This is fallacious.

[282] Norway's FWS, paras. 644-657; Norway's first OS, paras. 106-11; and Norway's response to Panel question No. 39, paras. 213-215.
[283] See, e.g. Norway's response to Panel question No. 39, paras. 207-208.
[284] See, e.g. Appellate Body Report, *EC – Bananas III*, para. 191 ("Non-discrimination obligations apply to all imports of like products, except when these obligations are specifically waived or are otherwise not applicable as a result of the operation of specific provisions of the GATT 1994"). See also Norway's 647-653 and 657; Norway's first OS, paras. 106-110; and Norway's response to Panel question No. 39, paras. 210-211.
[285] See, e.g. Appellate Body Report, *US – Continued Zeroing*, para. 273.
[286] Norway's response to Panel question No. 39, paras. 203-211.
[287] See, with reference to the Lomé Convention and Lomé Waiver, Appellate Body Report, *EC – Bananas III*, para. 167.
[288] See, e.g. EU's response to Panel question No. 39, paras. 131-132.

213. The fact that a declaration has been made, or a legal norm adopted, at the international level provides no evidence in itself that a moral norm "is deeply woven into the fabric of society" within a *particular* State (or political grouping of States).[289]

214. The European Union also says that international instruments, such as the *ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries* ("ILO Convention") or the *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP"), "confirm the legitimacy of protecting Inuit and indigenous communities' interest".[290] This is not correct, because, as Norway has explained,[291] permitting legitimate objectives under Article 2.2 of the *TBT Agreement* to be derived from non-WTO sources of international law would mean that the scope of justifications for discriminatory trade restrictions under the *TBT Agreement* could extend *beyond* those foreseen in the totality of the other covered agreements by WTO negotiators.

215. If other sources of international law could serve as a basis for justifying discriminatory trade restrictions under Article 2.2 of the *TBT Agreement*, the lack of harmony between the *TBT Agreement* and the other covered agreements would also prejudice one of the cornerstone principles of WTO law, namely, the non-discrimination principle that is reflected, *inter alia*, in Articles I:1 and III:4 of the GATT 1994.[292] Thus, the mere fact that instruments of international law call for the favourable consideration of certain producers does not, and cannot, result in unfettered authority for a WTO Member to grant discriminatory trade preferences through technical regulations.

216. 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. Otherwise, as Norway has noted, a vast range of instruments of international law would provide Members with a basis for unilateral exceptions in the name of domestic public morals.[293] That is not the case. If it were, there would be no need for waivers for preferences to least developed and developing country Members, no need for negotiations on special and

[289] See EU's response to Panel question No. 48, para. 171.
[290] EU's response to Panel question No. 39, para. 128; EU's FWS, paras. 54-56.
[291] Norway's response to Panel question No. 39.
[292] See, e.g. Appellate Body Reports, *EC – Tariff Preferences*, para. 101; *Canada – Autos*, para. 69; *US – Section 211 Appropriations Act*, para. 297.
[293] See Norway's first OS, para. 110; and Norway's response to Panel question No. 39, para. 209.

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.

2. The European Union's alleged distinction between "commercial" and "non-commercial" sealing does not reflect an objective that is "legitimate" within the meaning of Article 2.2

217. Norway also notes that, in its submissions, the European Union has repeatedly referred to the alleged distinction between "commercial" and "non-commercial" hunts. It is not clear whether the European Union argues that prohibiting the "commercial" exploitation of a natural resource is a legitimate objective pursued under Article 2.2. In any event, Norway considers that the alleged distinction is illusory and cannot be an objective that is "legitimate" under Article 2.2.[294]

218. To recall, with respect to animal welfare, the European Union notes that seals may be "killed in a way that causes them excessive pain, fear or other forms of suffering".[295] These concerns apply equally to all seal hunts, irrespective of the type and purpose of the hunt. From the perspective of the seal, the profitability of the hunt does not make its treatment any better or worse. Nonetheless, the European Union opens its market to seal products from both IC 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" tolerated for the latter.[296] In other words, whereas the EU public is concerned by animal welfare with respect to commercial hunting, those concerns disappear entirely with non-commercial hunting.

219. As shown by Norway in its first opening statement,[297] the purported distinction between commercial and non-commercial seal hunting is illusory, because so-called non-commercial seal hunts have commercial dimensions. Thus, according to the Greenland

[294] See Norway's first OS, paras. 102-105.
[295] EU's FWS, para. 2.
[296] EU's FWS, para. 39.
[297] Norway's first OS, paras. 92-93

Government, the indigenous hunt in that country is "both subsistence oriented and a *commercial activity*".[298] In other words, it is conducted for profitable financial returns.

220. The SRM requirements allow fishermen to kill seals as "pests that endanger fish stocks"[299] and that "cause problems to fisheries by damaging gears and catches".[300] Fishermen who kill seals for these purposes have commercial motives: they are killing seals to benefit commercial fishing activities by protecting "fish stocks" and "gear and catches". The legislative history also suggests that the fisherman is entitled to earn "income" compensating for the cost of his time.[301] Further, other commercial parties in the supply chain, such as processors, distributors, and retailers, can earn profits from the sale of the seal products.[302]

221. In its responses to the Panel, the European Union argues that the hunts it labels "non-commercial" (i.e., IC and SRM hunts) are "less conducive to *inhumane* animal welfare outcomes".[303] As noted, it even argues that there is very little evidence of adverse animal welfare outcomes in the IC hunts.[304] The European Union then argues that the EU Seal Regime "rests on the premise […] that in the context of *commercial* hunts seals cannot be killed humanely on a consistent basis".[305]

222. However, the evidence plainly contradicts the argument that the hunts qualifying for market access under the IC and SRM requirements are more acceptable from an animal welfare perspective than the hunts whose products are excluded from access to the EU market.[306] As confirmed by the European Union's own admissions elsewhere in its

[298] 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. In its responses, the European Union recognizes that qualifying IC hunts "have a commercial dimension", and that otherwise the IC requirements would have served no purpose. EU's response to Panel question No. 32, para. 112.
[299] EU's FWS, para. 309, quoting the European Parliament's Committee on Agriculture and Rural Development.
[300] EU's FWS, para. 310, quoting a statement from Finland during the legislative process.
[301] 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").
[302] For discussion, see Norway's FWS, paras. 694, 695 and 740.
[303] EU's response to Panel question No. 8, para. 19 (emphasis added).
[304] EU's response to Panel question No. 73, para. 224.
[305] EU's response to Panel question No. 14, para. 60 (emphasis added).
[306] See Norway's FWS, paras. 679-684, 685-687, 696-704; Norway's first OS, paras. 117-123; Norway's responses to Panel questions Nos. 14, paras. 101-102; and 73, paras. 402-410.

responses,[307] the hunts that the European Union labels "non-commercial" pose severe animal welfare problems. Other evidence confirms that the IC hunt results in considerably greater animal welfare problems than other hunts.[308]

223. Instead, the illusory distinction between "commercial" and "non-commercial" exploitation of seals 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.

224. Norway also considers that a prohibition on animal welfare grounds applied *solely* to the "commercial" exploitation of natural resources cannot be *legitimate* under Article 2.2, when so-called "non-commercial" exploitation is permitted, if seals in both types of hunt are vulnerable to the same animal welfare risks. The preambles 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".[309] Restricting the trade of "commercial" operators who wish to improve their standard of living, while permitting the trade of "non-commercial" operators, is not compatible with these objectives and, hence, is not "legitimate" under Article 2.2.

D. The EU Seal Regime is more trade-restrictive than necessary to meet its legitimate objectives

225. Having considered, *first*, the objectives of the EU Seal Regime and, *second*, the legitimacy of these objectives (concluding that certain of the European Union's objective are not legitimate), we now turn to consider whether the EU Seal Regime is "more trade-restrictive than necessary" to fulfil its legitimate objectives.

226. The assessment of the necessity of a technical regulation requires a weighing and balancing of: (i) the trade-restrictiveness of the technical regulation; (ii) the degree to which it contributes to its legitimate objectives; and (iii) the risks non-fulfilment would create. In weighing and balancing these different elements, the panel is typically aided by a comparison with less trade-restrictive alternatives put forward by the complainant.[310] If a less trade-

[307] EU's response to Panel question No. 8, paras. 22-23.
[308] See, e.g. Norway's FWS, paras. 680 to 684; and Norway's response to Panel question No. 73, para. 408.
[309] 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").
[310] Norway's FWS, para. 542. See also Norway's FWS, paras. 553 ff.

restrictive alternative is reasonably available, and makes a contribution to the measure's objectives that is at least equivalent to that of the challenged measure, the challenged measure is more trade restrictive than necessary for purposes of Article 2.2.

1. Trade-restrictiveness

227. The European Union does not dispute the trade-restrictiveness of the measure it has adopted.[311] Instead, the European Union asks the Panel to ignore the fact that the EU Seal Regime forms an integrated whole, and it characterizes the measure as a "General Ban" and "exceptions". The "exceptions", it suggests, "do not restrict trade",[312] and must therefore be excluded from the examination of the measure under Article 2.2.

228. We have addressed this argument in our first opening statement, to which we refer.[313] We recall, in particular, that under the EU Seal Regime, the *legal source of the EU determination on whether to admit or exclude a seal product* is always the conditions comprising the IC, SRM or PU requirements. There is no "General Ban" or other provision restricting trade: the IC, SRM and PU requirements are the only gateway to market access.[314]

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[311] See EU's FWS, para. 357.

[312] See, for a recent restatement of this point, EU's response to Panel question No. 45, para. 155. See also EU's FWS, paras. 358, 362 and 416.

[313] Norway's first OS, paras. 8-15 and 113-114. For Norway's arguments on trade-restrictiveness, see also Norway's FWS, paras. 550-560 and 662-674.

[314] The European Union notes that Norway's panel request refers to the EU Seal Regime as a ban and exceptions. EU's response to Panel question No. 1, paras. 8-9. Norway notes that the European Union itself has described the measure in different ways. When notifying the draft measure following the amendments introduced to the Proposed Regulation, the European Union indicated that the revised measure would "prohibit[]" trade, with "exemptions". Committee on Technical Barriers to Trade, *Notification – European Communities – Seal products – Addendum*, G/TBT/N/EEC/249/Add.1 (6 July 2009), p. 1.

In its request for consultations, on 5 November 2009, Norway accordingly described the measure as a prohibition with exceptions, and maintained this description in its addendum to the request for consultations, and in its request for the establishment of a panel of 14 March 2011. See Norway's request for consultations (WT/DS401/1) and addendum 1 thereto (WT/DS401/1/Add.1); and Norway's request for the establishment of a panel (WT/DS401/5).

On the other hand, on 3 May 2010, when notifying the Implementing Regulation to the WTO TBT Committee, the European Union described the measure as "further specif[ying] conditions that need to be fulfilled for the placement on the EU market of seal products as laid down [in the Basic Seal Regulation]". Committee on Technical Barriers to Trade, *Notification – European Union – Seal products*, G/TBT/N/EEC/325 (3 May 2010).

In drafting its first written submission, for the reasons Norway has articulated, Norway recognized that the measure was properly understood as three sets of requirements that determine whether or not seal products may be placed on the EU market. These restrictions combine both formally and substantively the prohibitive and permissive elements of the measure. In any event, Norway considers that it is for the Panel to make an objective assessment of the proper legal character of the measure, based on the terms of the measure itself. Norway sees no deficiencies in its panel request, which identifies the EU Seal Regime as the measure, specifies the legal provisions violated by that measure, and plainly connects those claims with the measure.

2. Contribution

229. The parties differ widely on the extent to which the EU Seal Regime contributes to its legitimate objectives. To recall, of the six objectives (or elements of the alleged public morality) pursued by the European Union, two are not relevant to this part of the analysis: *first*, the European Union recognizes that the harmonization of the internal market should not be considered as a legitimate objective justifying trade restrictions in the EU Seal Regime because it can be equally achieved by less trade restrictive alternatives;[315] and, *second*, Norway has shown that discrimination in favour of indigenous communities is not a legitimate objective within the meaning of Article 2.2.[316]

230. Hence, Norway examines the contribution of the EU Seal Regime to the four remaining objectives, namely: (i) protecting animal welfare, including to respond to consumer concerns regarding animal welfare; (ii) encouraging the sustainable management of marine resources; (iii) allowing consumer choice; and (iv) preventing consumer confusion.

a. The EU Seal Regime fails to contribute to animal welfare or the alleged public morals relating to animal welfare

231. The EU Seal Regime does not contribute to the welfare of seals, whether considered as a distinct objective or as a component of the alleged "public morals".

232. *First*, the EU Seal Regime does not condition market access on compliance with animal welfare requirements. The result is that products derived from seals killed in an inhumane manner can be placed on the EU market or be imported by EU travellers.[317] Thus, under the EU Seal Regime, it is possible to place on the EU market, for example, products from seals killed by drowning, seals shot in the water, and seals killed in a hunt with extremely high struck and lost rates. There is simply nothing in the measure to ensure that seal products on the EU market are animal welfare compliant. And, conversely, animal welfare-compliant products, among others from Norway, are unable to access the EU

[315] See para. 168 above.
[316] See paras. 208 to 216 above.
[317] See Norway's FWS, paras. 679-704; Norway's first OS, paras. 84-85, 117-123; Norway's responses to Panel questions Nos. 14, paras. 101-102; and 73, paras. 402-410.

market.[318] Therefore, the measure does not address animal welfare or the alleged "moral concerns of the EU population with regard to the welfare of seals".[319]

233. *Second*, contrary to the European Union's allegations,[320] once the EU Seal Regime is fully implemented, eligible seal products from Denmark (Greenland) will match or exceed the total size of the EU market prior to the ban.[321] Thus, rather than provoking a reduction in the overall quantity of seal products available on EU shop shelves, the EU Seal Regime simply reduces the list of *countries* from which such products may be sourced. The list of eligible origins now includes sources where a number of seals are hunted inhumanely and excludes sources ensuring high animal welfare standards. Therefore, the measure does not, as the European Union contends, "contribut[e] to the welfare of seals by reducing the number of seals killed in an inhumane way".[322]

234. *Third*, also contrary to the EU's arguments, the EU Seal Regime does not "shield[] the EU public from being confronted"[323] with seal products, including seal products derived from "an immoral act (the killing of seals in an inhumane way)".[324] For the European Union, confronting consumers with seal products on shop shelves is akin to the consumer aiding and abetting a crime.[325] Yet, seal products may be placed on the EU market or imported under the EU Seal Regime and, as acknowledged by the European Union itself,[326] consumers are not even informed of the fact that the products in question contain seal, let alone of whether the seals were caught humanely.[327] We revisit this issue below, addressing consumer confusion.

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[318] This is despite the evidence to the effect that it is possible to hunt seals in conformity with animal welfare requirements: see, e.g. Norway's responses to Panel questions Nos. 14, paras. 93, 97; 69, paras. 367-376; and 72, paras. 392-400.
[319] EU's response to Panel question No. 10, para. 46, describing the alleged objectives of the measure.
[320] See EU's FWS, para. 365.
[321] See Norway's response to Panel question No. 41, para. 222. As explained in that response, based on Eurostat data analyzed by COWI, the total size of the EU market in 2006 was approximately 110,000 skins. 2008 COWI Report, Exhibit JE-20, p. 106, Table 5.2.3, total of the figures under "Import to EU-27" (including intra-community trade). In 2006, 109,201 were traded in Greenland. 2012 Management and Utilization of Seals in Greenland, Exhibit JE-26, p. 27, Table 3. Export figures for 2004 are even higher, with 115,723 skins sold, of which 71% were sold in the European Union (ibid., p. 28, Table 4), even in the presence of competition from supplies from non-Greenland sources.
[322] EU's response to Panel question No. 10, para. 46, describing the alleged objectives of the measure.
[323] EU's response to Panel question No. 10, para. 42.
[324] EU's response to Panel question No. 10, para. 42.
[325] EU's response to Panel question No. 9, para. 33.
[326] EU's FWS, para. 43.
[327] Norway's FWS, paras. 705-716; Norway's first OS, paras. 88, 135.

235. *Fourth*, also contrary to the EU allegations, the EU Seal Regime does not prohibit the "commercial exploitation" of seal products "within the EU territory":[328] seal products may be placed on the EU market or imported regardless of compliance with animal welfare requirements. As noted above,[329] product eligible for market access under the IC or SRM requirements may be hunted for commercial purposes. In this regard, Norway notes that the EU maintains that, for both IC and SRM hunts, the "benefits to humans"[330] of such hunting outweighs the risk of suffering inflicted on seals. In both cases, some or all of the "benefits to humans" stem from commercial considerations, such as earning income and improving the profitability of fisheries.

236. In addition, the EU Seal Regime does not restrict transit across the European Union, processing for export in the European Union under an inward processing procedure, production for export, or sale at auction houses for export, for *any* seal product irrespective of the type of hunt.[331] All these are cases of "commercial exploitation" of seal products within the EU territory, subject to no conditions other than placement under the appropriate customs procedure. In other words, EU citizens are allowed to participate in, and earn money from, the commercial exploitation of seal resources.

237. *Fifth*, with regard to the alleged moral dimension of the objective pursued, the European Union explains that the measure prevents "the moral feelings that prompted the adoption of the EU Seal Regime".[332] This appears to be the risk of non-fulfilment: absent the measure, EU consumers may suffer certain vague moral "feelings". However, nothing suggests that the measure is necessary to "***protect***" public morals. In other words, the measure does not contribute to the preservation or safeguard ("protection") of morals, which Article XX(a) of the GATT 1994 (being relevant context where "public morals" are invoked

[328] EU's response to Panel question No. 10, para. 42.
[329] Para. 219 above; see also Norway's first OS, paras. 92-93.
[330] EU's responses to Panel questions No. 9 and 10, paras. 32, 44 and 45.
[331] Norway's FWS, paras. 160, 696; Norway's first OS, para. 94; Norway's responses to Panel questions Nos. 18, paras. 127, 128, 131, 139, 141; 29, para. 185; and 52, para. 288. See also fn 236 above, and Norway's response to Panel question No. 1, para. 8. In responding to questions from the Panel, the European Union is forced to concede that such activities occur under the EU Seal Regime: see EU's responses to Panel questions Nos. 75 and 79, paras. 227 and 231.
[332] EU's response to Panel question No. 44, para. 152.

as an objective for purposes of Article 2.2 of the *TBT Agreement*) shows is the relevant public morals objective.[333]

238. The relevant public moral – if it exists – will not be *threatened* by making seal products available on shop shelves. Hence, a ban is not needed to "protect" that moral – it would remain anyway. If a public moral will not be threatened by trade, a trade ban cannot be justified simply by the need to avoid certain negative "feelings" on the part of consumers. In that regard, Norway recalls that these "feelings" on the part of EU consumers could already be engendered under the EU Seal Regime for consumers who feel strongly about seal welfare irrespective of the type of hunt, because seal products can be sold on the EU market.[334]

b. Contribution to sustainable resource management

239. In our first written submission, we have shown that three of the conditions in the SRM requirements do not contribute to, and even undermine the objective of sustainable resource management.[335] These three conditions are that sustainable resource management be the "sole" purpose of the hunt, that the products of the hunt be placed on the market "non-systematically", and that hunters obtain no profit from the hunt, but only the recovery of their costs. These conditions are unnecessary for the purpose of achieving the sustainable management of marine resources; their only purpose is to tailor the SRM requirements to the reality of the EU seal hunts,[336] in order to allow seal hunting in the European Union to "carry on as before".[337] Yet, as the European Union itself recognizes, the "management of natural marine resources should be based on scientific knowledge and research";[338] it cannot be based on the political expediency of favouring domestic products over imported products.

240. The European Union and Norway adhere to the same legislative principles regarding the purpose and the scope of sustainable marine resources management, including the centrality of the concepts of conservation and exploitation of natural resources for the benefit

[333] See Oxford English Dictionary, OED Online, Oxford University Press, accessed 27 March 2013, http://www.oed.com/view/Entry/153127?redirectedFrom=protect&, *protect*.
[334] Norway notes, of course, that, under the EU Seal Regime, many consumers may not experience such "feelings" simply on the basis that they do not know whether a product they are consuming contains seal, since no labelling is required under the EU Seal Regime.
[335] Norway's FWS, paras. 717-753.
[336] Member States' Comments on the Proposed Regulation (19 January 2009), Exhibit JE-10, pp. 16-18; European Parliament Debates, Exhibit JE-12, p. 72.
[337] European Parliament Debates, Exhibit JE-12, p. 72.
[338] EU's response to Panel question No. 80, para. 234.

of mankind.[339] The EU Seal Regime presents an aberration from these principles, postulating a number of conditions which do not contribute to or undermine the purpose of sustainable marine resource management as it is defined in both Norway's[340] and the EU's legislation.[341]

241. The European Union has offered no rebuttal to Norway's arguments. Initially, it argued, unconvincingly, that it is *not* pursuing the objective of *sustainable resource management* by admitting seal products from hunts conducted for the sole purpose of *sustainable resource management*.[342] In its responses to the Panel's questions, the European Union has not repeated this argument; rather, it confirms again that the SRM requirements allow for the disposal of seal products derived from hunts that contribute to the management of marine resources.[343]

242. However, the SRM requirements do not allow for the placing on the market of *all* seal products derived from such hunts. Rather, the European Union draws an arbitrary line between seal products from so-called small-scale SRM hunts complying with the sole purpose, non-systematic and non-profit conditions – which happen to be conducted in the European Union – and all other SRM hunts.

243. If a Member pursues an objective, such as the sustainable management of natural resources, it must pursue that objective in an even-handed and coherent manner. If a Member pursues more than one objective (for example, animal welfare and sustainable management) all such objectives must similarly be pursued in a manner that is even-handed and coherent. This means that if one objective (say, animal welfare) is used as a basis to exclude imported products, a Member may not, simultaneously, use another objective (e.g. sustainable resource management) to permit marketing of domestically produced goods, without regard to the first objective. This is particularly so when arbitrary further conditions are imposed that undermine the contribution of the measure to its additional objective.

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[339] See Norway's FWS, para. 725.
[340] *Act on the Management of Wild Living Marine Resources*, promulgated by the Norwegian Parliament as Act of 6 June 2008 No. 37, available at http://www.regjeringen.no/upload/FKD/Vedlegg/Diverse/2010/MarineResourcesAct.pdf (last checked 12 October 2012) ("Norwegian Marine Resources Act"), Exhibit NOR-44.
[341] Council of the European Union, *Regulation (EC) No 2371/2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy*, Official Journal of the European Union (2002) L 358/59 (20 December 2002), Exhibit NOR-90.
[342] See, e.g. EU's FWS, paras. 308 and 521.
[343] See, e.g. EU's response to Panel question No. 29, para. 100, third bullet.

244. In response to a question from the Panel on the requirements for a natural resource management plan, the European Union asserts that "management of marine resources should be based on scientific knowledge and research", making particular reference to the work of the International Council for Exploration of the Seas or "ICES".[344] Norway has explained that it establishes an annual quota on the basis of scientific recommendations made by ICES, including through the use of population models.[345] It is not contested that Norway's seal hunt, therefore, meets this aspect of the EU Seal Regime.[346]

245. Moreover, in its responses, the European Union also states that trade in seal products is permitted under the SRM requirements "because *the benefits to humans and other animals which are part of the ecosystem* outweigh" the animal welfare concerns.[347] Norway is at a loss to understand why the "benefits" just described apply when seal hunts are conducted on the basis of *some* scientifically-based natural resource management plans but *not others*. Either these perceived "benefits" are real and tangible or they are not.

246. Given that the European Union argues that the "benefits" are real for seal hunts conducted pursuant to *some* scientifically-based natural resource management plans (i.e., those in the European Union), it must logically accept that the same "benefits" accrue irrespective of the size of the hunt that is authorized pursuant to sound scientific resource management principles. Indeed, the larger the seal hunt that is justified on the basis of sound scientific resource management principles, the larger the resulting "benefit", which is then available to "outweigh" other interests, such as those of seals.

247. In short, the three contested conditions frustrate, in an arbitrary manner, the pursuit of sustainable resource management because they prohibit the placing on the market of seal products resulting from some seal hunts conducted pursuant to scientifically-based natural resource management plans. Norway has outlined detailed arguments in this regard that have

[344] EU's response to Panel question No. 80, para. 234.
[345] See Norway's FWS, paras. 263-265, 435-436; and the following exhibits: 2011 WGHARP Report, Exhibit NOR-12; 2012 NAFO Scientific Council Meeting, Exhibit NOR-19; T. Haug et al., *Report from Surveys to Assess Harp and Hooded Seal Pup Production in the Greenland Sea Pack-Ice in 2012* (Institute of Marine Research, 2012), NOR-67; ICES Advice 2012, Exhibit NOR-68, ICES, *Report of the ICES Advisory Committee 2011*, Book 3 – "The Barents Sea and the Norwegian Sea" (2011), NOR-69.
[346] See paras. 81 to 82 above.
[347] EU's response to Panel question No. 10, para. 45 (emphasis added).

never been addressed by the European Union. Instead, the European Union argues that the SRM requirements are not trade-restrictive and do not require justification.[348]

248. The European Union also suggests that the three contested conditions are necessary to promote seal welfare. However, in so doing, it draws an arbitrary and discriminatory line between circumstances in which seal welfare prevails (large hunts) and circumstances in which seal welfare is irrelevant (small hunts). It also suggests that the latter have no commercial dimensions, which Norway has explained is false.[349]

249. It bears repeating that the European Union postulates a false choice between pursuit of resource management and the pursuit of animal welfare. The European Union could allow the placing on the market of seal products from SRM hunts that *respect* animal welfare requirements. However, it has chosen not to attach sufficient importance to animal welfare in the case of some SRM hunts. Having made that choice, it cannot insist on animal welfare for other SRM hunts, particularly when the distinction involves discrimination on grounds of origin. To do so, as we discuss further below,[350] involves arbitrary and unjustifiable discrimination between countries where the same conditions prevail – seals are vulnerable in all hunts to adverse animal welfare outcomes. Hence, the treatment of this universal animal welfare risk is decidedly uneven and parochial.

c. Contribution to consumer choice and to the prevention of consumer confusion

250. The European Union has also not rebutted Norway's arguments that the EU Seal Regime does not prevent consumer confusion[351] and undermines consumer choice.[352] To recall, seal products allowed onto the EU market under the IC or SRM requirements *do not even have to bear a label indicating that they contain seal*, let alone provide information on compliance with animal welfare.

251. In substantiating the need for the EU Seal Regime, the European Union explained:

> Given the nature of [seal] products, it is difficult or impossible for consumers to distinguish them from similar products not derived from seals.

[348] See EU's FWS, paras. 358, 362 and 416. See also, e.g. EU's response to Panel question No. 45, para. 155.
[349] Norway's first OS, para. 93.
[350] See paras. 266 to 268 below.
[351] Norway's FWS, paras. 705-716.
[352] Norway's FWS, paras. 758-766.

> […]
>
> The existence of [differences between national provisions] may further *discourage consumers from buying products not made from seals, but which may not be easily distinguishable from similar goods* made from seals, or products which may include elements or ingredients obtained from seals without this being clearly recognisable, such as furs, Omega-3 capsules and oils and leather goods.[353]

252. However, the European Union has failed to prevent the consumer confusion it described with respect to seal and non-seal products. Indeed, it has made the situation worse for many consumers, because those consumers will now believe that trade in seal products is banned.[354] As a result, those EU consumers that care whether they purchase seal products may unwittingly purchase unlabelled seal products. The European Union has not addressed Norway's detailed arguments on this issue.[355]

253. Further, in respect of consumer choice, the EU Seal Regime allows consumers to exercise their personal choice provided they travel abroad, by purchasing seal products that do not conform to the IC or SRM requirements and introducing them into the European Union for their "personal use" or that of "their families",[356] but does not allow consumers the same choice within the European Union.

254. The European Union has suggested administrative convenience of customs authorities dictates that EU consumers should sometimes be allowed to consume seal products within the European Union (if purchased abroad) but not other times. If administrative convenience justifies importation by individuals, this suggests that the European Union does not attach great importance to the values pursued by the trade restriction on seal products in other situations. In any event, the measure contributes only very partially to its objective of allowing personal choice, because it grants personal choice solely to EU consumers that travel abroad.

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[353] Basic Seal Regulation, Exhibit JE-1, recitals 3 and 7 (emphasis added).
[354] The situation is not unlike the one arising before the panel in *US – COOL*, where the panel noted, in findings upheld by the Appellate Body, that labels under a measure which were supposed to give consumers information about the origin of meat products, but which did not accurately reflect the origin of the meat, did not contribute to fulfilling the objective of the measure: see Panel Report, *US – COOL*, paras. 7.702-7.706.
[355] See Norway's FWS, paras. 705-716; and Norway's first OS, para. 74.
[356] Basic Seal Regulation, Article 3(2)(a).

d. Arbitrary or unjustifiable discrimination

i. Arbitrary or unjustifiable discrimination is relevant to the ascertainment of contribution under Article 2.2 of the TBT Agreement

255. As discussed in Norway's first written submission,[357] the Appellate Body reasoned that the sixth recital of the preamble – which both forms part of the context of Article 2.2, and sheds light on the object and purpose of the *TBT Agreement*[358] – reflects an important aspect of the balance between the *TBT Agreement's* trade liberalizing objective and its objective to allow Members to retain regulatory freedom. In particular, the Appellate Body in *US – Clove Cigarettes* interpreted the sixth recital as suggesting that

> Members' right to regulate should not be constrained if the measures taken are necessary to fulfil certain legitimate policy objectives, and <u>provided that they are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade</u>, and are otherwise in accordance with the provisions of the [*TBT Agreement*].[359]

256. Thus, just as the trade liberalizing provisions of the GATT 1994 are counterbalanced by the general exceptions found in Article XX which allows Members to pursue the objectives reflected in the subparagraphs to that provision, so long as the measures taken are "not [] applied as a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail", so too is this same balance reflected in the provisions of the *TBT Agreement*. Specifically, Article 2.2 *permits* Members to adopt trade-restrictive technical regulations in order to contribute to the legitimate objectives of the regulation at a certain level of protection. However, this authority is not unfettered, since, in taking measures to achieve its legitimate objectives, a Member is "subject to the requirement that such measures are not applied in a manner that would constituted a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail".

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[357] Norway's FWS, paras. 568-577.
[358] Appellate Body Report, *US – Clove Cigarettes*, para. 89.
[359] Appellate Body Report, *US – Clove Cigarettes*, para. 95 (underlining added).

ii. The EU Seal Regime introduces arbitrary or unjustifiable discrimination between countries where the same animal welfare conditions prevail

257. Norway contends that the EU Seal Regime involves arbitrary or unjustifiable discrimination between countries where the same *animal welfare conditions* prevail, and constitutes a disguised barrier to international trade. The European Union asserts that it bans Norwegian seal products for animal welfare reasons. However, the European Union is not even-handed in its treatment of animal welfare risks in different countries.

258. As Norway has explained,[360] the regulatory distinctions drawn by the EU Seal Regime between products that conform with the IC or SRM requirements, and products that do not, bear no rational relationship whatsoever to animal welfare. The same animal welfare conditions prevail in all countries where seals are hunted because all seals are equally vulnerable to hunting that does not respect animal welfare. Seals in Denmark (Greenland) are *not* less susceptible to unnecessary pain, distress and suffering than seals hunted elsewhere, such as in Norway. Indeed, they face greater animal welfare risks where regulatory conditions do not prevent practices such as netting or shooting in the water. This same "condition" relating to the vulnerability of seals is common to the circumstances of *all* countries.

259. This situation is similar to one described by the panel in *US – Tuna II (Mexico)*. That panel agreed with the United States that "certain fishing techniques seem to pose greater risks to dolphins than others",[361] but noted that "even assuming that … certain environmental conditions in the [Eastern Tropical Pacific] (such as the intensity of tuna-dolphin association) are unique, the evidence submitted to the Panel suggests that the *risks* faced by dolphin populations in the ETP are *not*".[362] These findings of the panel were quoted with approval by the Appellate Body.[363]

260. By disregarding animal welfare in some contexts, but giving decisive regulatory significance to the risks in other contexts, the EU Seal Regime constitutes discriminates arbitrarily and unjustifiably between countries where the same conditions prevail in respect of the regulated risk – animal welfare.

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[360] Norway's FWS, paras. 698-703.
[361] Panel Report, *US – Tuna II (Mexico)*, para. 7.438.
[362] Panel Report, *US – Tuna II (Mexico)*, para. 7.552. (original emphasis)
[363] Appellate Body Report, *US – Tuna II (Mexico)*, para. 288.

261. In addition, in failing to deal in an even-handed manner with the vulnerability of seals to animal welfare concerns, the EU Seal Regime also fails to consider the different *regulatory conditions* pertaining to animal welfare in different sealing countries. As discussed below, Norway enforces a stringent regulatory regime through its sealing Conduct Regulation that prioritizes good animal welfare outcomes, for instance through prohibiting the shooting of seals in the water and catching of seals in nets. Other countries, notably Denmark (Greenland), have a different regulatory regime and do not prohibit such practices. Nonetheless, all or virtually all seal products from Denmark (Greenland) are expected to qualify for access to the EU market under the IC requirements. By contrast, virtually all Norwegian seal products are denied market access by the EU Seal Regime. In this way too, the EU's regulatory distinction reflects arbitrary and unjustifiable discrimination.

262. In its responses to Questions 8, 30, and 72 from the Panel, the European Union seeks to draw a distinction between the "conditions under which the hunts within [the] scope [of the IC and SRM requirements] take place" and "those prevailing in the commercial seal hunts".[364] It adds that the conditions in IC and SRM hunts are "less conducive to *inhumane* animal welfare outcomes".[365] Norway disagrees. As outlined above, the vulnerability of seals to adverse animal welfare outcomes is the *same* in all hunts; however, the regulatory conditions under which different hunts take place mean that Norway's "commercial" hunt achieves *high* animal welfare outcomes, whereas the evidence shows that hunts qualifying under the IC or SRM requirements frequently do not.

263. The point is illustrated by the European Union's own analysis. The European Union characterizes Norway's "commercial" hunting as being: of large scale; highly organized and systematic; and concentrated within a short time period.[366] The European Union contrasts IC and SRM hunting as: dispersed, opportunistic and non-competitive and, in the case of indigenous hunting, occurring all year round and making use of methods such as netting.[367]

264. The comparison made by the European Union shows precisely why the EU Seal Regime makes an *arbitrary*, and indeed *irrational*, distinction when it comes to animal

[364] EU's response to Panel question No. 8, para. 19. See also EU's responses to Panel questions Nos. 30, paras. 103-105; and 72, paras. 216-219.
[365] EU's response to Panel question No. 8, para. 19 (emphasis added).
[366] EU's responses to Panel questions Nos. 8, para. 20; and 30, para. 103. The European Union also states that the Norwegian hunt is conducted at "frenetic pace"; and suggests that under adverse weather conditions negatively affect animal welfare outcomes. These statements are incorrect, as demonstrated in para. 295 below.
[367] EU's response to Panel question No. 8, paras. 21-23 and 26

welfare. It is precisely the scale, organization and systematicity of the Norwegian seal hunt that makes it possible to adopt and enforce sound regulations to protect animal welfare, including through provision for training and inspection of the hunt.

265. The European Union strangely ignores the evidence on adverse animal welfare outcomes in Denmark (Greenland) when it states that there is "little evidence on the animal welfare outcomes" for seal hunts there, whilst in the same paragraph providing reference to the very pages of Exhibit JE-26 that highlight the prevalence in Denmark (Greenland) of hunting seals with nets and shooting seals in open water.[368]

iii. The EU Seal Regime introduces arbitrary or unjustifiable discrimination between countries where the same resource management conditions prevail

266. Similarly, the "not for profit", "sole purpose" and "non-systematic" sale requirements are rationally disconnected from the objective of allowing the sustainable management of marine resources, and thus introduce arbitrary or unjustifiable discrimination between countries that have sound, science-based management plans that establish quotas for seal hunting.[369] These restrictive conditions make no contribution to sustainable marine resource management, but instead simply serve to block trade in seal products if the hunt yields a profit, has a purpose in addition to sustainable resource management, or whose products are placed on the market in a "systematic" way.[370]

267. Norway recalls that the European Union's attempted distinction between commercial and non-commercial hunting, including the "small scale" hunting whose products may be marketed under the SRM requirements, is illusory, because the hunting that qualifies under the SRM requirements has commercial dimensions.[371]

268. In any event, whether or not "commercial" ends are pursued through hunting seals bears *no rational relationship* with the sustainable management of marine resources, and may in fact undermine such management by frustrating the ability of hunters to place sustainably harvested seal products on the EU market. Thus, in this way too, the EU Seal Regime

[368] See EU's response to Panel question No. 73, para. 224 (referring to 2012 Management and Utilization of Seals in Greenland, Exhibit JE-26, pp. 18-20).
[369] Norway's FWS, para. 731; and Norway's response to Panel question No. 35, para. 198.
[370] Implementing Regulation, Exhibit JE-2, Article 5(1)(c).
[371] See Norway's first OS, para. 93.

reflects arbitrary and unjustifiable discrimination between countries where the same conditions prevail in respect of the regulated risk – i.e., unsustainable resource management.

3. Risks non-fulfilment would create

269. The EU Seal Regime shows acceptance for very high risks of non-fulfilment.[372] As we explained in our first written submission, under the EU Seal Regime "animals may suffer unnecessarily; natural resources may not be managed sustainably; consumers may be confused; and consumers may be denied choice".[373]

270. As regards, in particular, animal welfare, the "available scientific and technical information"[374] indicated that methods used, for example, in the Norwegian hunt are conducive to good animal welfare outcomes, whereas some methods used in indigenous hunts are not.[375] In responding to the Panel's questions, the European Union concedes that it has chosen to accept non-fulfilment of the animal welfare objective: the European Union in essence explains that the EU legislator's choice (which it describes as "public morals") to grant privileged market access to seal products from indigenous communities and EU fishermen "outweighs", in both cases, "the risk of suffering being inflicted upon seals".[376]

271. In response to questioning from the Panel on the risks of non-fulfilment of the alleged "public morals" objective,[377] the European Union explains, first, that since the invoked public morals match exactly the challenged measure, "withdrawal … of the General Ban would without further mediation cause precisely the moral impact it is meant to prevent".[378] This explanation merely highlights the self-referential nature of the alleged "public morals" objective: the *objective*, says the EU, is one that *matches exactly the measure* as adopted; *therefore,* the *measure* as adopted *matches the objective*, and *withdrawal* of the measure *would "cause precisely" non-fulfilment* of the objective.

272. More specifically, the European Union explains that the risks non-fulfilment would create are "that the EU public would experience the same moral feelings that prompted the

[372] Norway's FWS, paras. 769-772.
[373] Norway's FWS, para. 770.
[374] *TBT Agreement*, Article 2.2.
[375] Norway's FWS, para. 771 (citing 2007 EFSA Scientific Opinion, Exhibit JE-22).
[376] EU's response to Panel question No. 10, para. 44, and ibid., para. 45.
[377] EU's response to Panel question No. 44.
[378] EU's response to Panel question No. 44, para. 152.

adoption of the EU Seal Regime".[379] Norway notes that the prevention of certain "moral feelings" is a remarkably undefined basis on which to base a measure that is both restrictive and discriminatory, and does not suggest that the measure is necessary to "*protect*" public *morals* themselves. Rather, the measure appears to be necessary to *protect* EU *consumers* from certain negative "feelings" that they might not like when shopping.

273. In addressing another aspect of the Panel's questions, the European Union suggests that the "moral concerns" that the EU Seal Regime seeks to address have two prongs: "moral concerns about the inhumane killing of seals as such"; and "moral concerns about the EU public's contribution, as consumers, to the inhumane killing of seals".[380] As we have set out above and in previous submissions[381] and the European Union has failed to rebut, the EU Seal Regime *accepts* both the inhumane killing of seals, and the exposure of consumers to inhumanely killed seals. Indeed, through its decision to provide *no information* to consumers on whether products on the EU market contain seal,[382] the European Union knowingly prevents consumers from being able to act upon their alleged moral concerns about their "contribution, as consumers, to the inhumane killing of seals".

4. Less trade restrictive alternatives

274. If less trade restrictive, and reasonably available, alternatives make at least an *equivalent* contribution to the challenged measure's objectives, the measure in question is not "necessary" within the meaning of Article 2.2 of the *TBT Agreement*. Norway has offered three less trade-restrictive alternatives that would make an equivalent contribution to the objectives of the EU Seal Regime.[383]

275. Although not required, one of these alternative measures (i.e., making market access conditional on compliance with animal welfare requirements) would make a *greater* contribution to the objective of protecting animal welfare than the EU Seal Regime – which is allegedly at the heart of the "public morals" invoked by the European Union – and would uphold a consistent standard of conduct more fitting with the notion of "public morals" invoked by the European Union. A second less trade restrictive alternative (i.e., removing the

[379] EU's response to Panel question No. 44, para. 152.
[380] EU's response to Panel question No. 44, para. 153.
[381] See Norway's FWS, paras. 679-704; Norway's first OS, paras. 84-85, 117-123; Norway's responses to Panel questions Nos. 14, paras. 101-102; and 73, paras. 402-410.
[382] Norway's FWS, paras. 705-716; Norway's first OS, paras. 88, 135. See also EU's FWS, para. 43.
[383] See, e.g. Norway's first OS, para. 130. See also Norway's FWS, paras. 773-917; and Norway's first OS, paras. 128-202.

three conditions from the SRM requirements that do not contribute to and/or undermine the SRM objective) would make a *greater* contribution to the sustainable management of marine resources than the EU Seal Regime. Norway's third alternative is removing the three sets of restrictive conditions altogether.

a. Conditioning market access on compliance with animal welfare requirements

276. One alternative would consist of conditioning market access on compliance with animal welfare requirements.[384] If the chosen animal welfare requirements were met, products containing seal would have access to the EU market, irrespective of their origin; otherwise, they would not be allowed onto the EU market. Under this alternative, there would be no discrimination on the basis of criteria unrelated to animal welfare. In addition, the measure would also provide for labelling, to inform consumers about the seal content of the products on the EU market and allow them to act on their beliefs, which would presumably dampen demand for seal products if the beliefs are widespread.

i. An animal welfare-based alternative is reasonably available

277. In our first written submission, we have shown that it is possible to design, enforce, and certify compliance with, animal welfare requirements.[385] The European Union denies this,[386] arguing that commercial seal hunts are "inherently inhumane".[387] In responding to the Panel's questions, it concedes that "it might be possible to design a genuinely humane method for killing seals";[388] however, it explains, it is *impossible to apply* such a standard consistently in "commercial" seal hunts.[389]

[384] Norway's FWS, paras. 793-911; and Norway's first OS, paras. 131-136.
[385] Norway's FWS, paras. 795-884. See also ibid., paras. 171-257, providing background on "Animal Welfare Aspects of the Killing of Animals"
[386] See, e.g. EU's FWS, para. 373; and EU's response to Panel question No. 14, para. 60.
[387] EU's FWS, paras. 54, 85, 329; EU's responses to Panel questions Nos. 8, paras. 21, 26; 28, paras. 97, 98; 48, para. 169; 71, para. 215; and 72, para. 216.
[388] EU's response to Panel question No. 63, para. 200.
[389] In responding to the Panel's questions, the European Union also insinuates that SRM and IC hunts present more favourable animal welfare situations. The European Union presents no evidence for this insinuation, which Norway has shown to be wrong. See EU's responses to Panel questions Nos. 8, paras. 21, 26; and 72, para. 216; Norway's FWS, paras. 679-684, 685-687, 696-704; Norway's first OS, paras. 117-123; Norway's responses to Panel questions Nos. 14, paras. 101-102; and 73, paras. 402-410.

278. In addressing this alternative, Norway notes that the European Union has in place systems to control conformity with regulatory requirements for the roughly 360,000,000 pigs, sheep, goats and cattle, and more than 4,000,000,000 poultry, killed in EU slaughterhouses each year.[390] The assertion, therefore, that there are insurmountable obstacles to implementing satisfactory regulatory requirements for an industry that, in Norway, catches less than 20,000 animals a year, under the permanent supervision of a government-employed veterinarian, is simply not a credible basis to justify the adoption of an arbitrary, irrational and discriminatory regime that does not even attempt to pursue an animal welfare objective.

279. It also bears repeating, at the outset of the discussion of this alternative, that the level of protection for the animal welfare of seals that is actually reflected in the EU Seal Regime falls far short of perfection or zero tolerance. Indeed, having regard to the products permitted to be placed on the market under the EU Seal Regime, Norway maintains that it makes no contribution to animal welfare at all.

280. With this in mind, when the Panel considers alternative measures that make at least an equivalent contribution to the animal welfare of seals, it is not appropriate – as the European Union seems to propose – to require that alternative measures achieve *perfect* animal welfare outcomes in relation to the killing of seals.

281. When the benchmark is the contribution made by the EU Seal Regime to the animal welfare of seals, the European Union is simply not entitled to argue that the alternative must achieve perfect animal welfare outcomes that the measure itself does not achieve. Yet, we also note that, although this is not required, the alternative measure we are proposing makes a considerably *greater* contribution to animal welfare than the EU Seal Regime.

(1) It is possible to lay down and enforce animal welfare standards for seal hunting

282. Norway has shown that the EU argument that it is impossible to apply humane killing methods in the seal hunt is not supported by the facts.[391] In fact, it is possible to lay down and enforce appropriate animal welfare standards for seal hunting.

[390] European Commission, *Summary of Impact Assessment Report for Council Regulation on the Protection of Animals at the Time of Killing*, SEC(2008) 2425 (18 September 2008), Exhibit NOR-39, p. 2.
[391] Norway's first OS, paras. 140 ff.

283. It is not Norway's task to show precisely what standards should be adopted by the European Union in order to address animal welfare through a technical regulation conditioning access to the regulator's market. What Norway needs to show is that it is possible to lay down and enforce appropriate standards. While a regulator, such as the European Union, may look to the science and practice from another country, such as Norway, to determine appropriate animal welfare standards for the hunting of seals, it is free to choose its own standards, provided that a technical regulation embodying such standards conforms with the requirements of Article 2.2 of the *TBT Agreement*.

284. With this in mind, Norway once again stresses that this case is not about whether Norway's regulatory framework should be the basis for an alternative EU measure. The Norwegian framework is not the measure at issue; the EU Seal Regime is the measure at issue.

285. Norway contests the European Union's view that "the crucial question before the panel is ... whether the EU's view that a genuinely humane method cannot be applied effectively and consistently in the circumstances of Canada's and Norway's hunts finds adequate support from qualified scientific evidence".[392] This question not directly pertinent because it is premised on the regulatory conditions applied in each country, which would not necessarily be those featuring in an alternative EU measure. In any event, the European Union's view does not find support from qualified scientific evidence.[393]

286. Nevertheless, in Norway's view, the Norwegian experience demonstrates that it is possible for seals to be killed rapidly and effectively without causing avoidable pain, distress, fear and other forms of suffering, through the application of sound regulatory conditions. Norway also notes that the European Union consistently criticizes the standards of the Norwegian hunt through reference to materials that do not support such criticisms. Norway considers it appropriate, therefore, to address in the following paragraphs the various arguments raised by the European Union about the "impossibility" of killing seals humanely in general, and in the course of the Norwegian hunt, in particular.

[392] EU's first OS, para. 11.
[393] Norway addresses each of the European Union's erroneous factual assertions below. Moreover, for the reasons explained by Dr Knudsen in her further statement ("Knudsen Second Statement", Exhibit NOR-162), all of the studies relied on by the European Union (with the exception of papers by Daoust), lack scientific methodology and are the basis for erroneous conclusions by the European Union. See Knudsen Second Statement, Exhibit NOR-162, paras. 4-32.

(a) It is possible to lay down appropriate animal welfare standards

287. The EU concedes that it might be "possible" to lay down appropriate standards to protect animal welfare in the killing of seals.[394] Indeed, the argument that it is impossible to kill seals humanely is contradicted by the legislative history;[395] and by similar situations that show it is possible to lay down and enforce acceptable levels of animal welfare protection.[396]

(b) There are no "inherent obstacles" to acceptable animal welfare outcomes

288. Furthermore, contrary to the European Union's argument, there are no "inherent obstacles" to the achievement of acceptable animal welfare outcomes during the Norwegian seal hunt. Norway has already addressed factors raised by the European Union including: various environmental factors, such as wind and cold;[397] aspects of shooting;[398] and the significance of delay between shooting and administration of further fail-safe killing steps.[399]

289. None of the factors identified by the European Union are insurmountable barriers to acceptable animal welfare outcomes. Wind and cold, for instance, need not adversely affect hunters or the accuracy of shooting, and in practice steps are taken on the Norwegian hunt to ensure they do not.[400] In relation to delay, Norway has shown that this is of little relevance

[394] EU's response to Panel question No. 63, para. 200.
[395] Norway's first OS, paras. 142
[396] Norway's first OS, paras. 145-146.
[397] See, e.g. Norway's OS, paras. 176 ff. See also Expert Statement of Mr Jan Vikars Danielsson (13 March 2013) ("Danielsson Second Statement"), Exhibit NOR-128, paras. 4-29.
[398] See, e.g. Norway's OS, paras. 186 ff. See also Danielsson Second Statement, Exhibit NOR-128, paras. 30-37. Regarding the impact on ballistics of environmental factors such as wind and cold, see below, fn 400.
[399] See, e.g. Norway's OS, paras. 154 ff; Knudsen Second Statement, Exhibit NOR-162, paras. 33-54; Expert Statement of Mr Jan Vikars Danielsson (26 March 2013) ("Danielsson Third Statement"), Exhibit NOR-163, paras. 9-10.
[400] In addition to Mr Danielsson's comments at the hearing (see Norway's first OS, paras. 177-182), see also Danielsson Second Statement, Exhibit NOR-128, paras. 15-23. In relation to the impact on shooting trajectories of wind ("wind drift"), Norway also provides Exhibit NOR-164, which contains the results of wind drift calculations conducted on an application on the web site of Norma Precision AB (http://ballistics.norma.cc/javapage_metric2.asp?Lang=2), a Swedish manufacturer of hunting ammunition.

Using this application, Norway assessed the wind drift caused by three different wind speeds of, respectively, 5 m/s (described as "gentle breeze" on the Beaufort scale), 10 m/s (a "fresh breeze" on the Beaufort scale), and 15 m/s (a "light gale" on the Beaufort scale and typically exceeding the winds with which Norwegian hunting would be carried out). Norway entered these wind speed variables; entered a wind angle of 90 degrees to the boat (i.e., the angle at which the effect of the wind would be *maximized*); entered a shooting range of 50 metres (a relatively long-range shot compared with the normal distances experienced on the Norwegian seal hunt of 30-40 metres); and selected an example of ammunition with a 9 gram bullet with an impact energy exceeding 2700 joules, which meets Norway's regulations. The results provided in Exhibit NOR-164 show that at a wind speed of 5 m/s, the wind drift is 6 mm; at a wind speed of 10 m/s, the wind drift is 13 mm; and at a wind speed of 15 m/s, the wind drift is 19 mm.

since shooting of seals should be regarded as a "combined stun/kill" method,[401] and not, as the European Union again suggests,[402] a simple "stun" method that needs to be followed by a killing method to ensure animal welfare.

(c) Animal welfare outcomes on Norway's seal hunt are not worse than those in the slaughterhouse

290. The European Union, in its response to Question 64 from the Panel, again seeks to contrast seal hunting with the similar situation prevailing in abattoirs. It suggests that in order to be able to attest that all seals are killed humanely "an inspector would have to observe the entire killing process" in every case.[403] In the next paragraph it draws a contrast with the similar situation of the slaughterhouse, where: animals are "restrained and stunned at close range"; a "trained operator" can observe the animal closely and re-stun if necessary; supervisors and veterinary inspectors "can inspect the entire process of humane killing"; and any problems can be remedied through training, equipment improvements, changes to methods and increased supervision.[404]

291. Norway contests that animal welfare outcomes in the slaughterhouse are better than those in seal hunts.[405] To summarise briefly points already made by Norway: the European Union completely ignores in its argument the issue of pre-slaughter stress of farmed animals;[406] restraint of animals during slaughter is an animal welfare *problem*;[407] mis-stun rates in EU slaughterhouses are far from negligible;[408] and, in practice, only a fraction of kills are actually supervised or overseen by an inspector.[409]

This information confirms Mr Danielsson's assessment that, in his experience, wind is not an impediment to accurate shooting during the seal hunt (see Norway's first OS, paras. 177-182; see also Danielsson Second Statement, Exhibit NOR-128, paras. 15-23).

[401] See Norway's OS, paras. 176 ff. See also Knudsen Second Statement, Exhibit NOR-162, paras. 33-54.

[402] EU's response to Panel question No. 60, para. 186.

[403] EU's response to Panel question No. 64, para. 208.

[404] EU's response to Panel question No. 64, para. 209.

[405] For general discussion, see Norway's response to Panel question No. 56.

[406] For discussion, see Norway's response to Panel question No. 56, para. 319. See also Knudsen Second Statement, Exhibit NOR-162, paras. 85-91.

[407] For discussion, see Norway's response to Panel question No. 56, para. 311.

[408] For discussion, see Norway's response to Panel question No. 56, para. 320. See also Knudsen Second Statement, Exhibit NOR-162, paras. 85-91.

[409] See, e.g. UK Food Standards Agency, *Manual for official control*, Chapter 2.3, "Animal Welfare" (February 2013), available at http://www.food.gov.uk/multimedia/pdfs/mocmanualch2part3rev52.pdf (last checked 27 March 2013), Exhibit NOR-165, p. 3-5, which refers to the duties of official veterinarians in UK slaughterhouses and states: "Some aspects require observing several times each day: Example: Effectiveness of

292. By contrast, in the Norwegian seal hunt, animals do not suffer significant pre-slaughter stress and are unrestrained at the time of killing. Shooting is accurate, notwithstanding shooting distance and ocean movements,[410] and, if a hunter has any doubt about the effectiveness of a first shot, he or she shoots again.[411] Contrary to the European Union's suggestion that observation is not possible at the distances at which seals are shot,[412] the seal are readily observed through telescopic sights[413] and it is possible for hunters and veterinary inspectors to distinguish between a seal that is effectively stunned/killed and one that is not.[414]

293. Just as in the slaughterhouse context described by the European Union, "operators" (hunters) can be (and in the Norwegian hunt are) "trained" and tested. Further, *unlike* in the slaughterhouse context, there is very close and regular supervision of hunting by both the captain and a veterinary inspector.[415] Accordingly, any problems can quickly be remedied through correction by the inspector, by ensuring that regulated equipment is used, and through improved methods or increased focus by the inspector on particular elements of the hunting.

294. Moreover, the scope of the hunting activities is much more limited on the seal hunt. Compared with a typical slaughterhouse, a much smaller number of animals is killed in a day and all hunting takes places in the open, visible by the inspector. In slaughterhouses, the

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stunning, bleeding operations". For discussion, see Knudsen Second Statement, Exhibit NOR-162, paras. 94-98. See also Danielsson Third Statement, Exhibit NOR-163, para. 25.

[410] Norway's first OS, para. 177-182 and 187. For further discussion, see Danielsson Second Statement, Exhibit NOR-128, paras. 13-26. Norway also notes that in its response to Panel question No. 72, the European Union states that a study from Dr Egil Øen in 1995 indicated that there is a "stun failure rate of 15.5%" in the context of the Norwegian hunt. Norway provides Dr Øen's study to the Panel as Exhibit NOR-166 ("1995 Øen Report"). The study concludes "The results showed that 98,3% of the pups shot during the hunt of individual seals died or lost consciousness momentarily. This is very high and better than what is recorded for other forms of fishing, hunting or slaughtering of livestock". 1995 Øen Report, Exhibit NOR-166, p. 5. This conclusion is cited by EFSA in the passage to which the European Union refers. See 2007 EFSA Scientific Opinion, Exhibit JE-22, p. 66. The study provides no support for the European Union's claim that the stun failure rate was 15.5%.

[411] Danielsson Second Statement, Exhibit NOR-128, para. 37.

[412] See EU's response to Panel question No. 64, para 209.

[413] For discussion, see Expert Statement of Mr Jan Vikars Danielsson (7 November 2012) ("Danielsson Statement"), Exhibit NOR-4, para. 29; see also Danielsson Third Statement, Exhibit NOR-163, para. 5.

[414] For discussion, see Norway's response to Panel question No. 57; see also Knudsen Second Statement, Exhibit NOR-162, paras. 46, 74-84.

[415] See, for example, Danielsson Statement, Exhibit NOR-4, paras. 35-39; and Danielsson Third Statement, Exhibit NOR-163, paras. 24-27.

activities occur throughout the slaughterhouse, behind walls through which inspectors cannot see.[416]

(d) The European Union makes a number of statements about Norway's hunt that are unsupported by evidence and are incorrect

295. As Norway has already shown, the European Union's arguments about the effectiveness of the hakapik or the absence of a check for unconsciousness under Norway's regulations are not correct.[417] Nor is its suggestion that the Norwegian hunt proceeds at "frenetic pace"[418] or otherwise involves a competitive race between sealers.[419] Similarly, the European Union's suggestion that seals are shot in the water during "commercial" hunting in Norway[420] is wrong, and indeed this practice is specifically *prohibited* under Norway's sealing Conduct Regulation.[421] Likewise, the European Union is wrong in suggesting that shooting seals near open water results in high struck and lost rates during the Norwegian hunt,[422] since evidence indicates that struck and lost rates for Norway are much lower than the 5% that the European Union attributes to Canada.[423] In practice, Norwegian hunters avoid shooting seals when there is a risk of missing them.[424]

296. The European Union asserts, but provides no evidence, that "there is a strong incentive to breach [Norway's] regulations".[425] It has not established the existence of this incentive, or how breaches are achieved in view of the presence of inspectors watching the hunters. Norway contests this assertion. As Norway has shown, non-compliant conduct is not tolerated, and, in appropriate cases, will be referred to the police, who may – as the EU

[416] See Danielsson Third Statement, Exhibit NOR-163, para. 25.
[417] Norway's OS, paras. 163-172 ; see also Knudsen Second Statement, Exhibit NOR-162, paras. 56-70; and Danielsson Third Statement, Exhibit NOR-163, paras. 11-18.
[418] EU's response to Panel question No. 8, para 8.
[419] See Norway's first OS, para. 188.
[420] See EU's responses to Panel questions Nos. 64, para. 209; and 72, para. 219.
[421] See *Regulation Relating to the Conduct of the Seal Hunt in the West Ice and East Ice*, adopted by the Norwegian Ministry of Fisheries and Coastal Affairs as Regulation of 11 February 2003 No. 151, amended by the Regulation of 11 March 2011 No. 272 ("Conduct Regulation"), Exhibit NOR-15, section 6(2)(c).
[422] EU's response to Panel question No. 64, para. 209.
[423] See Danielsson Second Statement, Exhibit NOR-128, para. 43 and Annex.
[424] Danielsson Third Statement, Exhibit NOR-163, paras. 22-23.
[425] EU's response to Panel question No. 64, para. 204.

has acknowledged[426] – prosecute cases of non-compliance. This culture of enforcement creates a *strong disincentive* to breaching Norway's regulations and promotes compliance.

(e) The European Union's criticisms of Norway's system of inspection are unfounded

297. The European Union states that inspectors are no "guarantee of compliance".[427] Again Norway contests the way in which the European Union's characterises of its system of inspection, and offers two comments. *First*, the European Union's suggestion that there should be "guarantees" of compliance assumes that the level of protection sought is perfection or zero tolerance. That is, of course, *not* the level of protection achieved by the EU Seal Regime, and is, therefore, *not* the correct benchmark by which to measure the significance of Norway's system of inspection for ensuring appropriate animal welfare outcomes. A more appropriate comparison is compare the Norwegian situation of permanent *presence* during the hunt of a trained, government-mandated veterinary inspector, who reports to the Directorate of Fisheries, on the one hand, with the *absence* of any inspection or oversight of the hunting whose products may be placed on the EU market under the IC and SRM requirements, on the other.

298. *Second*, Norway notes that a key plank of the European Union's argument about the ineffectiveness of inspection on the Norwegian seal hunt is the suggestion that inspectors "easily compromise and tolerate practices that are against the regulations" due to social pressure.[428] Norway rejects this suggestion. There is nothing particularly unusual about the social context for sealing inspectors on the Norwegian hunt, which is similar to the environment in which other observers or inspectors on vessels under fishing programmes, as well as veterinary inspectors in slaughterhouses, normally operate.

299. Norway notes that the European Union participates in similar fisheries observation and inspection schemes, for instance the observer program of the Northwest Atlantic Fisheries Organization ("NAFO"), under which mandatory observers are placed on vessels for extended periods, addressing compliance with the NAFO conservation and enforcement

[426] See EU's FWS, para. 188.
[427] EU's response to Panel question No. 64, para. 205 (referring to EU's FWS, paras. 181-182).
[428] EU's FWS, para. 182.

measures.[429] This is a similar situation to that prevailing in the Norwegian seal hunt. The conditions experienced by NAFO observers on EU vessels are very similar to that faced by sealing inspectors. There is geographical isolation, the same climatic conditions prevail, and they remain on board with the crew for long periods of time.

300. Moreover, as Mr Danielsson explains,[430] inspectors have a duty to protect animals, recognize the importance of maintaining an appropriate relationship with the crew, can contact the Directorate of Fisheries at any time, and exercise a role that contributes to their authority on board.

(f) The European Union exaggerates hooking as an animal welfare problem on the Norwegian hunt

301. The European Union also states that it is necessary "in many cases" to "gaff" seals when they are shot in the water or the sea ice will not support a hunter.[431] The European Union is wrong in suggesting that seals on the Norwegian hunt may be shot in the water. That practice is prohibited under Norway's sealing Conduct Regulations.[432] Moreover, the suggestion that the lifting of seals on board Norwegian vessels, before being hakapiked and bled out, occurs "in many cases" is also incorrect. As a general rule, seals must be bled out on the ice.[433] It is only in exceptional cases where (i) a seal is less than one year old; (ii) there is "no doubt" that the seal is "dead" and therefore insensible to any pain or suffering, and (iii) where ice conditions make it inadvisable to walk on the ice, that hooks may be used to lift seals on board.[434] As reflected in the requirement that the seal must be "dead", the rule on hooking is not an exception from the fundamental rule of the Norwegian regulations that "hunters must show the greatest possible consideration and use hunting methods that prevent animals from suffering unnecessarily".[435]

[429] For discussion, see NAFO web site, *Monitoring, Control and Surveillance (MCS)*, available at http://www.nafo.int/fisheries/frames/fishery.html (last checked 27 March 2013), Exhibit NOR-167.
[430] Danielsson Third Statement, Exhibit NOR-163, paras. 28-33.
[431] EU's response to Panel question No. 64, para. 209.
[432] Conduct Regulation, Exhibit NOR-15, section 6(1)(c).
[433] Conduct Regulation, Exhibit NOR-15, section 7.
[434] Conduct Regulation, Exhibit NOR-15, section 10.
[435] Conduct Regulation, Exhibit NOR-15, section 1.

(2) It is possible to establish a system of certification with animal welfare requirements

302. The European Union also argues that *certification* of compliance with animal welfare requirements is impossible. In our first written submission, and in answering questions from the Panel, we have described existing certification schemes, which show that it is possible, and indeed common practice, to define criteria for which certification is sought, including animal welfare criteria, and to design and apply monitoring systems to verify compliance with such criteria.[436]

303. The European Union's dismissal of this evidence turns crucially on the observation that none of the existing certification schemes pertains to the *same* products, the *same* criteria *and* the *same* alleged level of protection as the alternative measure.[437] However, an alternative measure need not currently be in existence; indeed, the very fact that the measure is an *alternative* suggests that it is not in existence, at least not in the respondent's legal system.

304. In any event, existing certification schemes each contain elements of the alternative measure proposed and, taken together, show that it is perfectly feasible to include any or all of the elements of the proposed measure in a certification scheme. In particular, the schemes identified by Norway in its response to Panel question No. 94 include the following aspects that are key to Norway's proposed alternative. They variously: condition market access (or access to a label) by reference to animal welfare criteria; provide for verification of compliance; aim to ensure consumers are adequately informed about the level of product compliance with certain regulatory requirements. Moreover, they extend to certification of products caught at sea or in the wild, similar to the seal hunt. [438]

[436] Norway's FWS, paras. 855-883; and Norway's response to Panel question No. 94.
[437] EU's response to Panel question No. 94, paras. 262-270.
[438] Norway's response to Panel question No. 94, paras. 434-439.

ii. An animal welfare-based alternative would make an equivalent (and greater) contribution to the measure's legitimate objectives

305. Norway has shown that conditioning market access on compliance with animal welfare requirements would make a contribution to the measure's objectives at least *equivalent*, and indeed *greater*, than that made by the EU Seal Regime.[439]

306. The European Union has responded to Norway's arguments by arguing that it has chosen to pursue a "higher level of protection" of seals from suffering.[440] This response is groundless.

307. *First*, despite the statements made by the European Union, and whatever the EU legislator desired as its level of protection, the EU Seal Regime does not achieve a high animal welfare standard. Instead, it accepts "the risk of suffering inflicted upon seals",[441] and imposes no requirements to avoid such suffering.[442]

308. *Second*, under the alternative proposed by Norway, seals killed without respecting animal welfare requirements would *not* have access to the EU market.[443] This measure's contribution to animal welfare would therefore be greater than that made by the EU Seal Regime. Moreover, by enforcing a uniform animal welfare standard, the measure would also contribute to the alleged "public morals" relating to animal welfare, and would prevent the negative "moral feelings" of EU citizens,[444] by ensuring they are not "accomplices" in the act of "inflict[ing] suffering upon an animal".[445]

309. Indeed, the measure would not only make a greater contribution to animal welfare and the alleged moral concerns relating to animal welfare. As COWI found, in the light of evidence, a measure that promotes good animal welfare practices and avoids bad animal welfare practices is the measure that is *best apt* to address the animal welfare concerns invoked by the European Union.[446]

[439] Norway's FWS, paras. 885-908; and Norway's first OS, paras. 131-136.
[440] EU's FWS, paras. 373-374.
[441] See, e.g. EU's response to Panel question No. 10, para. 44; see also, ibid., para. 45.
[442] See Norway's first OS, paras.132-133.
[443] See Norway's first OS, para. 134. See also, e.g. Norway's FWS, para. 851.
[444] EU's response to Panel question No. 44, para. 152.
[445] EU's response to Panel question No. 10, para. 38.
[446] 2008 COWI Report, Exhibit JE-20, section 7.2, p. 136, "Recommendations".

310. Moreover, under the alternative measure, the selected "standard of right and wrong conduct" relating to the welfare of seals would apply consistently to all seal products. As a result, products from SRM hunts would be allowed onto the EU market, provided they complied with the standard in question.[447] And because the suggested alternative would include labelling of seal products, it would also prevent consumer confusion and allow consumers to exercise their personal choice, acting upon the beliefs that are allegedly "deeply woven into the fabric" of EU society.[448]

311. Therefore, considering all legitimate objectives (or elements of the alleged public morals) together, the alternative measure's contribution would be markedly greater than that made by the EU Seal Regime.

312. Finally, the alternative measure in question would also allow market access to products from indigenous communities, without, however, introducing a discriminatory trade preference in their favour: indigenous communities could place their products on the EU market, provided they complied with the animal welfare standard adopted by the European Union.

b. Removing the conditions that undermine the sustainable management of marine resources

313. Another alternative would maintain market access for products caught in conformity with sustainable resource management plans, but without subjecting such access to the additional three contested conditions that currently do not contribute to, and even undermine, the sustainable resource management objective. For clarity, Norway notes that, should the European Union adopt an animal welfare-based system, and withdraw the SRM requirements, this additional alternative measure would not be necessary. In such a case, it would be possible to pursue sustainable resource management, provided that SRM hunts complied with the prescribed animal welfare requirements.

314. Norway has discussed the SRM-based alternative measure in earlier submissions.[449] In its responses to the Panel questions, the European Union has not presented new arguments

[447] See, e.g. Norway's FWS, para. 904.
[448] See, e.g. Norway's FWS, para. 906. In para. 171 of its response to Panel question No. 48, the EU describes "public morals" as matters that are "woven deeply in to the fabric of society".
[449] Norway's FWS, paras. 912-917; and Norway's first OS, para. 138, responding to the arguments made by the European Union in its FWS.

in this regard,[450] and therefore Norway refers to its earlier submissions. Instead, the European Union has recognized that

> *The management of natural marine resources should be based on scientific knowledge and research* taking into account those species that are really relevant and for which scientific data are available.[451]

315. Norway welcomes this recognition that sustainable resource management must be based on science – and not, as is the case in the current EU Seal Regime, on political expediency regarding arbitrary distinctions between small hunts conducted in the European Union and larger hunts conducted elsewhere.[452]

c. Removing the three sets of marketing requirements

316. Finally, Norway points out that the absence of the EU Seal Regime would contribute more to the measure's objectives than its presence. In a nutshell, the EU Seal Regime is a discriminatory regime that is rationally disconnected from the objectives it purports to pursue, to such an extent that the absence of the EU Seal Regime (i.e., the absence of the three sets of marketing requirements comprising the measure) would contribute more to those objectives than the presence of the EU Seal Regime. Since no new arguments have been presented in this regard, Norway simply refers back to earlier submissions.[453]

VII. THE EU SEAL REGIME VIOLATES ARTICLES 5.1.2 AND 5.2.1 OF THE *TBT AGREEMENT*

317. Norway submits that the European Union's conformity assessment procedure aimed at ensuring compliance with the IC and SRM requirements[454] creates an unnecessary obstacle to international trade in seal products and is, therefore, inconsistent with Article 5.1.2 of the *TBT Agreement*. Moreover, the conformity assessment procedure fails to ensure that the procedures concerned are undertaken and completed as expeditiously as possible, inconsistently with Article 5.2.1 of the *TBT Agreement*.

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[450] The European Union argues that this approach "would enlarge" market access. EU's FWS, para. 417. For Norway's response to the European Union's argument, see Norway's first OS, para. 138.
[451] EU's response to Panel question No. 80, para. 234 (emphasis added).
[452] As indicated in our first written submission, this means, among others, that the *size* of SRM hunts must be dictated by science rather than determined a priori by a requirement that the products of the hunt be placed on the market "non-systematically". Norway's FWS, paras. 721-723.
[453] See Norway's FWS, paras. 783-792; EU's FWS, para. 190; and Norway's first OS, para. 139.
[454] Implementing Regulation, Exhibit JE-2, Articles 3(2), 5(2), 6(1), 6(2), 7(1), 7(6), 7(7) and 9(1).

318. Norway examines its claims under Article 5.1.2 and Article 5.2.1 in turn.

A. The European Union's conformity assessment procedure is inconsistent with Article 5.1.2 of the *TBT Agreement*

1. Legal standard under Article 5.1.2

319. Under the *chapeau* of Article 5.1, read together with its second subparagraph, WTO Members shall ensure that, in cases where a positive assurance of conformity with technical regulations or standards is required, their central government bodies do not *prepare, adopt or apply conformity assessment procedures with a view to or with the effect of creating unnecessary obstacles to international trade*. Article 5.1.2 further explains that this obligation "means, *inter alia*, that conformity assessment procedures *shall not be more strict or be applied more strictly than is necessary* to give the importing Member adequate confidence that products conform with the applicable technical regulations or standards, taking account of the risks non-conformity would create". (emphasis added)

320. The purpose of ensuring that conformity assessment procedures do not create unnecessary obstacles to international trade constitutes one of the fundamental objectives of the *TBT Agreement*, and is reflected in the fifth recital of the preamble[455] and in the disciplines on conformity assessment.[456]

321. As explained in Norway's first written submission,[457] the obligation set forth in Article 5.1.2 has broad scope, covering the *preparation, adoption and application* of conformity assessment procedures by any central government bodies. In particular, it covers the entire lifetime of conformity assessment procedures, starting with their *conception and design* ("preparation"), extending through their *promulgation* ("adoption"), and encompassing their *administration* ("application").[458] As stated by Article 5.1.2, conformity assessment procedures must not be prepared, adopted and applied "with a view to or *with the effect of* creating unnecessary obstacles to international trade". In other words, the preparation, adoption and application of conformity assessment procedures may not be

[455] As expressed in the fifth preambular recital, the *Agreement* reflects the intention of the negotiators to "ensure that technical regulations and standards, including packaging, marking and labelling requirements, and *procedures for assessment of conformity with technical regulations and standards* do not create unnecessary obstacles to trade". (emphasis added) See also, e.g. Panel Report, *US – Tuna II (Mexico)*, para. 7.225.
[456] Article 5.1.2, incorporated by reference into Articles 7.1, 7.4, 8.1, 8.2, 9.2 and 9.3.
[457] See Norway's FWS, para. 934.
[458] See Norway's FWS, para. 936.

conducted in a manner that *brings about the result* ("with the effect") of unnecessary obstacles to international trade.

322. In the phrase "unnecessary obstacle to international trade", the word "*obstacle*" refers to a "hindrance, impediment, or obstruction".[459] As for the meaning of the term "*unnecessary*", the European Union observes that Article 5.1.2 "appears to set forth a *necessity test* with respect to conformity assessment procedures" similar, in certain regards, to that under Article 2.2 of the *TBT Agreement*.[460]

323. Norway observes that, in light of the similarities that exist between the text of Article 5.1.2 and Article 2.2 of the *TBT Agreement*, the analytical framework and the case law concerning Article 2.2 may provide useful guidance for the interpretation of Article 5.1.2.[461] In particular, Norway considers it is appropriate for the Panel to refer to the Appellate Body's reasoning in *US – Tuna II (Mexico)*, which lays down the core elements of a panel's "relational analysis"[462] of "necessity" under Article 2.2:

> [W]e consider that an assessment of whether a technical regulation is "more trade-restrictive than necessary" within the meaning of Article 2.2 of the TBT Agreement involves an evaluation of a number of factors. A panel should begin by considering factors that include: (i) the degree of contribution made by the measure to the legitimate objective at issue; (ii) the trade-restrictiveness of the measure; and (iii) the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective(s) pursued by the Member through the measure. In most cases, *a comparison of the challenged measure and possible alternative measures should be undertaken*.[463]

324. Despite similarities, the text of Articles 5.1.2 and 2.2 also present some differences. While the language in Article 5.1.2 refers to the conformity assessment procedure being more "strict" or being "applied more strictly" than necessary, Article 2.2 specifies that the technical regulation must not be more *trade* restrictive than necessary. In practical terms, though, the

[459] The Oxford English Dictionary, OED Online, Oxford University Press, accessed 8 November 2012, http://www.oed.com/view/Entry/129940?isAdvanced=false&result=1&rskey=JZQw0w&, *obstacle*, Exhibit NOR-110.
[460] EU's FWS, para. 424 (original emphasis).
[461] See Norway's response to Panel question No. 49, para. 256. See also Japan's third party submission ("TPS"), paras. 43-44.
[462] Appellate Body Reports, *US – Tuna II (Mexico)*, para. 318. See also Appellate Body Report, *US – COOL*, para. 374.
[463] Appellate Body Report, *US – Tuna II (Mexico)*, para. 322 (footnotes omitted, emphasis added). See also ibid., paras. 318-321.

enquiry is similar given the reference in the first sentence of Article 5.1.2 to the fact that the "obstacles" in question are those "to international *trade*". Further, whilst technical regulations under Article 2.2 may be adopted with a view to fulfilling a *range* of legitimate policy objectives,[464] Article 5.1.2 admits only *one* specific objective, namely, it requires that conformity assessment procedures be not more trade-restrictive than is necessary "to give the importing Member adequate confidence that products conform with the applicable technical regulations or standards, taking account of the risks that non-conformity would create".

325. In light of the above, a panel's evaluation of the consistency of the European Union's conformity assessment procedures with Article 5.1.2 implies the weighing and balancing of a number of different factors as part of a "relational analysis",[465] including: the strictness of such procedures or the way they are applied; the level at which the procedures contribute to giving importing Members adequate confidence that products will conform with the IC and SRM requirements; and, the gravity of the consequences that would arise in case of non-conformity. The panel should also rely on the "conceptual tool"[466] of reasonably available less-trade restrictive (i.e., less-strict) alternatives in conducting its analysis of these factors.

2. The conformity assessment procedure laid down in the EU Seal Regime creates an unnecessary obstacle to international trade in seal products

326. The European Union does not contest that the procedure for assessing product conformity with the IC and SRM requirements set forth in the EU Seal Regime falls within the scope of the *chapeau* of Article 5 of the *TBT Agreement*. Nor does it contest that, for purposes of Article 5 of the *TBT Agreement*, the Commission is a "central government body" of the European Union, given that it serves as the central executive agency of the European Union under the Treaty on the European Union.[467]

327. Against that background, Norway recalls the features of the conformity assessment procedure under the EU Seal Regime.

328. Under Article 3 of the Basic Seal Regulation and Articles 3(2) and 5(2) of the Implementing Regulation, trade in conforming seal products is, in principle, permitted,

[464] See, e.g. Norway's response to Panel question No. 7, paras. 40-66.
[465] Appellate Body Reports, *US – Tuna II (Mexico)*, para. 318; *US – COOL*, para. 374.
[466] Appellate Body Report, *US – Tuna II (Mexico)*, para. 320.
[467] See Article 17 of the Treaty on European Union, Exhibit NOR-48. See also Norway's FWS, para. 942.

provided that the products are accompanied by a conformity certificate issued by a recognized body. Thus, through these certificates, the EU Seal Regime requires "a positive assurance of conformity with technical regulations", within the meaning of Article 5.1.

329. Under Article 3(4) of the Basic Seal Regulation, the EU legislator conferred authority on the Commission to prepare and adopt the particular conformity assessment procedures relating to the provision of these certificates, and to administer those procedures.

330. Under the Commission's Implementing Regulation, conformity certificates may be issued solely by bodies that the Commission has recognized for this purpose ("recognized bodies").[468] The conditions for recognition by the Commission include: having "the capacity to ascertain"[469] that the IC or SRM requirements are met; having "the ability to monitor compliance with [these] requirements";[470] and operating "at national or regional level".[471]

331. The European Commission decides whether to recognize a body, based on an application that must contain evidence that the entity applying for recognition fulfils these conditions.[472] A conformity certificate is to be issued by a recognized body to a trader upon request, where the IC or SRM requirements are met.[473]

332. The certificates issued by recognized bodies are subject to control by "competent authorities". Member States of the European Union must each designate "one or several competent authorities",[474] whose specific tasks are to control the issuance of conformity assessment certificates, and to control conformity assessment certificates that have already been issued and on which "enforcement officers" have doubts.[475]

333. Under the conformity assessment procedure adopted, no trade in conforming seal products was possible until an application had been made by a third party to become a recognized body and that application was approved by the Commission. Absent a recognized body, there was no entity competent to assess and certify conformity. Furthermore, even after a third party has been approved as a recognized body, that body could decide at any time

[468] Implementing Regulation, Exhibit JE-2, Article 7(1).
[469] Implementing Regulation, Exhibit JE-2, Article 6(1)(b).
[470] Implementing Regulation, Exhibit JE-2, Article 6(1)(e).
[471] Implementing Regulation, Exhibit JE-2, Article 6(1)(h).
[472] Implementing Regulation, Exhibit JE-2, Article 6(2).
[473] Implementing Regulation, Exhibit JE-2, Article 7(1).
[474] Implementing Regulation, Exhibit JE-2, Article 9(1).
[475] Implementing Regulation, Exhibit JE-2, Articles 7(7) and 9(1).

to cease fulfilling that role, or the Commission could withdraw its approval, again creating a situation where no trade in seal products is possible.

334. Under the EU Seal Regime, the conformity assessment procedure does *not* include the designation of a "default" recognized body able to issue conformity certificates in the absence of third-party recognized bodies. This institutional lacuna makes the effectiveness of its conformity assessment procedures depend entirely on the extent of the willingness of third parties to act as recognized bodies. Traders in conforming seal products have no control whatsoever over whether they will be able to trade in those products, and are reliant on a third party successfully seeking to become a recognized body.

335. The risk that the institutional lacuna created by the EU prevent trade in seal products from occurring is more than hypothetical. Indeed, the Commission's design of the conformity assessment procedure rendered a prohibition on trade in *conforming* seal products an *inevitability*.

336. On 10 August 2010, the Commission adopted the Implementing Regulation, which establishes the procedures for third party application to become a recognized body. This Regulation was published on 17 August 2010 and entered into force three days later, on 20 August 2010.[476] An interested third party, therefore, could not even have applied for recognized body status until *after* 20 August 2010. Yet, the prohibitive elements of the Basic Seal Regulation entered into force that *very same day*.[477] In other words, when the EU Seal Regime entered into force, trade in conforming seal products was *necessarily* prohibited, because the European Union failed to establish a designated recognized body.

337. Following the entry into force of the EU Seal Regime on 20 August 2010, it took the European Union more than two years to establish a recognized body. At the time of the filing of Norway's first written submission (9 November 2012), the Commission had not recognized any such body.[478] On 18 December 2012, the Commission approved 11 County Administrative Boards in Sweden as recognized bodies.[479] It is worth noting that these bodies serve only to issue certificates for seal products from Sweden, and not other origins.

[476] Implementing Regulation, Exhibit JE-2, Article 12.
[477] Basic Seal Regulation, Exhibit JE-1, Article 8.
[478] See Norway's FWS, para. 928.
[479] See EU's FWS, fn 617 to para. 482 (referring to Exhibit EU-77).

338. Hence, for a period of 28 months following entry into force, the European Union's conformity assessment procedures created a ban on trade in seal products that *conform* to the IC and SRM requirements and that, in principle, enjoy access to the EU market. A ban is the most trade-restrictive obstacle to trade in these *conforming* seal products that can be envisaged.[480]

339. Norway's claim centres on the fact that the conformity assessment procedures set forth by the European Union lack an essential element needed to enable trade to occur, namely, the designation of a recognized body to serve in the absence of a third party recognized body. This omission creates an entirely "unnecessary obstacle" to international trade.

340. Norway analyses the "necessity" of this omission through the prism of a "relational assessment" of the following factors: (a) the strictness (or, put another way, trade-restrictiveness) of the measure or its application; (b) the degree of contribution made by the measure to the objective of giving importing Members adequate confidence that their seal products conform with the technical regulations set forth in the EU Seal Regime; and (c) the risks of not fulfilling that objective. We conduct this analysis in light of an alternative measure.

a. The European Union's conformity assessment procedures are trade-restrictive

341. Norway agrees with the European Union "that the very requirement to obtain a certificate under the [EU Seal Regime] ... constitutes an obstacle".[481] Indeed, the European Union refers with approval to the Appellate Body Report's statement, in *US – Tuna II (Mexico)*, that:

> What has to be assessed for "necessity" is the trade-restrictiveness of the measure at issue. We recall that the Appellate Body has understood the word "restriction" as something that restricts someone or something, a limitation on action, a limiting condition or regulation. Accordingly, it found … that the word "restriction" refers generally to something that has a limiting effect. As used in Article 2.2 in conjunction with

[480] Panel Report, *Brazil – Retreaded Tyres*, para. 7.114.
[481] EU's FWS, para. 431.

> the word "trade", the term means something having a limiting effect on trade.[482]

342. In light of the above, there is no disagreement between the parties that the conformity assessment procedures set forth in the EU Seal Regime are, by definition, trade-restrictive. However, in this dispute, the issue is not whether the conformity assessment procedure is, *in itself*, trade restrictive. Rather, the issue is whether the omission to designate a recognized body is unnecessarily trade restrictive.

343. As Norway has explained, on the entry into force of the EU Seal Regime on 20 August 2010, that omission *necessarily* gave rise to a ban on trade in conforming seal products, which could not demonstrate compliance with the IC or SRM requirements.

344. Given that applications to become a recognized body could not be made, much less approved, before entry into force, the procedure adopted *necessarily* gave rise to such a ban, irrespective of the conduct of third parties. Today, given that recognized bodies have been established for just one origin, Sweden, the omission continues to give rise to a ban on trade in conforming seal products from all other sources.

345. The trade restriction resulting from the omission to designate a recognized body is entirely unnecessary. It does contribute to a legitimate objective and could easily be avoided by designating a recognized body.

b. The European Union's conformity assessment procedures do not contribute to the objective of giving importing Members adequate confidence that their seal products conform with the IC and SRM requirements set forth in the EU Seal Regime

i. Contribution to the objective of providing confidence that imported seal products are conforming

346. It bears repeating that the issue is whether the omission to establish a recognized body, which *necessarily* prevented lawful trade in conforming seal products from the date of entry into force of the EU Seal Regime, and which continues to prevent such trade for sources except Sweden, contributes to giving the European Union confidence that conforming seal products meet the requirements of the IC and SRM requirements. In Norway's view, this omission does not contribute to this objective.

[482] EU's FWS, para. 425 (quoting Appellate Body Report, *US – Tuna II (Mexico)*, para. 319).

347. If the legitimate objective of conformity assessment procedures is to establish with confidence that products satisfy the requirements of a technical regulation, the justifiable restrictions are those that are apt to contribute to that objective. However, failing to designate a recognized body is not apt to contribute to that objective. Indeed, rather than ensuring that a conformity assessment system operates effectively to give confidence to the importing Member, the omission necessarily renders the system ineffective.

348. In short, the procedures have been designed in a manner that deprives the European Union of any opportunity to verify, with "confidence", that conforming seal products meet the relevant IC and SRM requirements. Importantly, from the perspective of traders seeking access to the EU market, they are deprived of any opportunity to demonstrate that their products meet the requirements.

ii. Less restrictive alternatives were, and are, available to the European Union

349. Norway recalls that the omission to designate a recognized body when the EU Seal Regime entered into force on 20 August 2010 *necessarily* gave rise to a ban on trade in conforming seal products. Indeed, given that third party applications could not be made until after 20 August 2010, this ban was an *inevitable* consequence of the procedure adopted by the European Union. Moreover, the continuing omission to recognize bodies, other than in Sweden, continues to give rise to a ban on trade in conforming seal products from other sources.

350. Although an inevitable and necessary consequence of the flawed procedure adopted by the European Union, these restrictions were, and remain, entirely avoidable. Indeed, the restrictions could easily be avoided by designating a recognized body.

351. Specifically, the European Union could have adopted a much less trade-restrictive alternative in order to assess compliance with the IC and SRM requirements. Namely, when the EU Seal Regime entered into force, it could have designated a recognized body that would be competent, at all times (or at least in the absence of third-party recognized bodies), to assess and certify conformity. This body could have been designated at the level of the European Union – it could even have been the Commission itself – or the Commission could have established a series of regional bodies within the European Union. As the Panel suggests in Question 86, the competent bodies designated in the EU Member States could

even have served this role, pending successful applications by third parties to become recognized bodies. Whoever the designated body, the financial burden of conformity assessment could, of course, be placed on traders applying for certificates.

352. Such a system would ensure that the Commission's conformity assessment procedures *always* function to enable traders to secure approval for conforming seal products, whether or not a third party is willing and approved to serve as a recognized body. Such a system would facilitate, and not ban, trade in conforming seal products. Moreover, by designating an appropriate body, the European Union would fully achieve its legitimate objective of giving itself confidence that imported seal products meet the requirements of the IC and SRM requirements.

353. Significantly, the European Union has not contested that, as matter of fact, it could designate an appropriate body.

354. Instead, it argues that it is under no legal obligation to designate a recognized body. It considers that Article 5.1.2 of the *TBT Agreement* permits it to adopt and apply a conformity assessment procedure that necessarily bans trade for an extended period. Norway addresses these legal arguments in the next sub-section.

iii. The European Union's flawed arguments to the effect that its conformity assessment procedure may ban trade for an extended period

355. In reply to Norway's claim, the European Union makes a number of counter-arguments based on its interpretation of Article 5.1.2 that are without merit, and that often mischaracterise Norway's arguments.

(1) The European Union wrongly argues that an importing Member need not designate a recognized body at the time when it adopts conformity assessment procedures

356. The European Union argues that an importing Member is not obliged to establish any default recognized body at the time it adopts conformity assessment procedures.[483] Instead, the Member is permitted to wait for a third party to apply and be accepted as a recognized body. As just set forth, Norway disagrees with this position – an importing Member is

[483] EU's FWS, paras. 457 ff.

responsible for ensuring, by means of the alternative measure proposed by Norway, that a body is available to assess conformity from the date of entry into force of a technical regulation.

357. However, even if an importing Member were entitled, at the time when it adopted a conformity assessment procedure, to await a successful application from a third party to serve as a recognized body (*quod non*), any such entitlement for the importing Member to wait for a third party cannot endure *forever*.

358. Article 5.1.2 specifies that the obligation not to create conformity assessment procedures that are unnecessary obstacles to trade applies at the time of their preparation, adoption and/or application. That obligation applies *throughout the lifetime* of conformity assessment procedures. Moreover, Appellate Body has clarified that the factors that are relevant for a "necessity" analysis will depend on the facts of a given case.[484]

359. The *enduring* obligation under Article 5.1.2 applies when procedures are initially designed and adopted; and it continues to apply thereafter, requiring action by the importing Member if conformity assessment procedures prove to create unnecessary obstacles to trade, whether by omission or commission. In that event, an importing Member cannot sit idly, allowing those obstacles to persist. Instead, the Member must act promptly to correct the failings in the procedures, eliminating unnecessary trade restrictions.

360. Hence, if it becomes clear that third parties are unwilling or unable to serve as recognized bodies, an importing Member remains responsible under Article 5.1.2 for implementing a conformity assessment system that functions to allow trade to occur in conforming products, without unnecessary restrictions, for example by designating a recognized body.

361. In this case, even if the European Union was not obliged to designate a recognized body when the conformity assessment procedures were adopted in August 2010 (*quod non*), the failings of the system have since become manifest, compelling the European Union to take action by designating a recognized body. Traders in conforming seal products have no lawful outlet to access the market of the European Union. Indeed, the failure of the EU

[484] Appellate Body Report, *China – Publications and Audiovisual Products*, para. 240.

conformity assessment procedure to perform effectively is highlighted by the European Union's admission that:

> … the Danish authorities have authorized the importation of seal products on the basis of certificates unilaterally issued by the Groenlandic authorities, pending the consideration by the EU Commission of the request filed by the Groenlandic authorities to be approved as a "recognized body".[485]

362. In other words, whereas the conformity assessment procedure should function to give the European Union "confidence" that imported products are conforming, the shortcomings of the procedure under the EU Seal Regime mean that trade is occurring, without products being formally assessed as conforming, in the absence of a recognized body in Denmark (Greenland).

363. In view of the ongoing failure of third parties to apply (successfully) to become recognized bodies, except in the case of Sweden, the European Union is obliged to take action to establish a recognized body capable of issuing certificates for conforming seal products from other sources.

364. In this case, the European Union lays the blame for the failings of its procedures on third parties: the failure of such parties to make successful applications to become recognized bodies "cannot be attributed to the European Union".[486]

365. The European Union's argument is misplaced. A Member cannot "contract out" of its WTO obligations, by making third parties responsible for the performance of those obligations.[487] As the Appellate Body repeatedly stated, the fact that a Member's measure entails some element of choice for third parties does not, in and of itself, relieve that Member from its responsibility under the covered agreements. For instance, in *Korea – Various Measures on Beef*, the Appellate Body rejected Korea's argument that individual retailers of beef could choose freely to sell the domestic product or the imported product according to the so-called "dual retail system". The Appellate Body reasoned that "[t]he legal necessity of making [such] a choice was ... imposed by the measure itself", and concluded that:

[485] EU's response to Panel question No. 98, para. 281.
[486] EU's FWS, para. 484.
[487] See, e.g. Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 117; and Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, paras. 7.309-7.310.

> the intervention of some element of private choice does not relieve Korea of responsibility under the GATT 1994 for the resulting establishment of competitive conditions less favourable for the imported product than for the domestic product.[488]

366. Similarly, in the context of Article 2.1 of the *TBT Agreement*, the Appellate Body in *US – Tuna II (Mexico)* stated that:

> The fact that the detrimental impact on Mexican tuna products may involve some element of private choice does not, in our view, relieve the United States of responsibility under the TBT Agreement, where the measure it adopts modifies the conditions of competition to the detriment of Mexican tuna products.[489]

367. The situation is the same here. The European Union's conformity assessment procedures accord third parties with the choice to apply to become recognition bodies. However, the legal necessity for third parties to make such a choice in order for traders to access the EU market stems from the European Union's adoption of the flawed conformity assessment procedures themselves. The European Union is responsible for creating that entirely unnecessary legal situation, which amounts to ban on trade in conforming seal from all sources except Sweden.

(2) The European Union wrongly argues that designating a default recognized body would prevent other recognized bodies from being designated

368. The European Union wrongly argues that, if Norway's claim is upheld, public or private entities could not serve as recognized bodies:

> If the complaining parties' reading of Article 5.1.2 were to be adopted the only manner in which non-governmental bodies could act as designated certifying bodies would be if designation was unconditional and permanent.[490]
>
> In the view of the European Union there is no basis in the text Article 5.1.2 of the TBT Agreement to argue that WTO Members should not allow government and non-governmental bodies from other WTO Members to apply for designation and

[488] Appellate Body Report, *Korea – Various Measures on Beef*, para. 146.
[489] Appellate Body Report, *US – Tuna II (Mexico)*, para. 240 (footnote omitted). See also ibid., paras. 236-239.
[490] EU's FWS, para. 450.

> subsequently act as recognised conformity assessment bodies.[491]
>
> The European Union submits that Norway's unsupported allegation that the designation of a public entity, such as the European Commission or regional bodies within the European Union, as a "default" recognised body would have been more efficient than allowing any private of public entity to be designated as a "recognised" body is disingenuous.[492]

369. These arguments are both incorrect and a mischaracterization of Norway's position.

370. Norway's argument does not imply that importing Members cannot allow "government and non-governmental bodies from other WTO Members" to serve as recognized bodies. Nor does it imply that non-governmental bodies can only be designated as recognized bodies on an "unconditional and permanent" basis. Norway fully supports the view that any third party, whether public or private, may serve as a body competent to assess conformity with a technical regulation. Moreover, third parties need not accept the task of being recognized bodies on an "unconditional and permanent" basis.

371. Norway also takes no position on the relative "efficien[cy]" of different types of recognized bodies, accepting that any third party, whether public or private, may be an efficient and effective recognized body, capable of ensuring that a conformity assessment procedure does not give rise to unnecessary obstacles to trade.

372. In the process of mischaracterizing Norway's arguments, the European Union entirely misses the point of Norway's claim.

373. The issue is not whether a public or private third party could serve as a more efficient recognized body. Of course, either could. The issue, rather, is two-fold:

> (1) whether an importing Member can, in initially adopting a conformity assessment procedure, effectively ban trade in products conforming to the requirements of a technical regulation because there is no recognized body capable of issuing conformity certificates, pending a successful

[491] EU's FWS, para. 453. The original paragraph includes the following fn 592: "The European Union notes that Canada and Norway did not explicitly make such an argument, but submits that such a reading can be implied in their argument that to comply with Article 5.1.2, a 'default' body must exist at all times for as long as a conformity assessment procedure is in place".
[492] EU's FWS, para. 464.

> application by a third party to become a recognized body; and, if the answer to this first question is "yes",
>
> (2) whether an importing Member is subsequently required to establish a recognized body if it becomes clear that third parties from some sources are unwilling or unable to become recognized bodies.

374. In Norway's view, the answer to the first question is "no". As noted, WTO Members cannot make compliance with their WTO obligations depend on actions of third parties, whether public or private. Instead, in designing and adopting conformity assessment procedures, an importing Member is obliged to ensure that the system functions *from the date of its entry into force*, without severe restrictions on trade that could be easily avoided by designating a recognized body.

375. Hence, in adopting conformity assessment procedures, the European Union was obliged to establish a recognized body that would be capable of issuing conformity assessment certificates. At the same time, of course, the European Union was entitled to retain the flexibility of allowing interested third parties to apply to become recognized bodies. Such third party bodies, after appointment, could function alongside (or even instead of) the designated body.

376. In this regard, the circumstances of this dispute are, again, revealing. As Norway has noted, the Implementing Regulation was adopted on 10 August 2010, published on 17 August 2010, and entered into force three days later, on 20 August 2010.[493] The prohibitive elements of the EU Seal Regime entered into force that *very same day*.[494]

377. In other words, any third party that was interested in becoming a recognized body could only apply to become such a body *after* the EU Seal Regime had taken effect. Hence, the design of the conformity assessment procedures was fatally flawed from the outset, because it was *impossible* for traders in conforming seal products to continue with that trade when the Regime took effect. This is because the European Union had omitted *both* to designate a recognized body *and* to give third parties sufficient time to become recognized bodies.

[493] Implementing Regulation, Exhibit JE-2, Article 12.
[494] Basic Seal Regulation, Exhibit JE-1, Article 8.

378. If the European Union did not wish to establish a recognized body capable of functioning from 20 August 2010, it should – by way of alternative – have given interested third parties an adequate opportunity to apply sufficiently far in advance of the entry into force of the EU Seal Regime, so as to allow recognized bodies to be established *before* the Regime entered into force on 20 August 2010. If no third party had become a recognized body by that date, the European Union was obliged to designate a recognized body no later than the entry into force of the EU Seal Regime.

379. The European Union's failure to do so necessarily converted its conformity assessment procedures into an entirely unnecessary and avoidable prohibition on trade in conforming seal products.

380. In Norway's view, the answer to the second question is "yes". An importing Member cannot allow trade in conforming products to be prohibited simply because third parties are unwilling or unable to become a recognized body. This restriction on trade is not necessary to give the importing Member confidence that imports satisfy the requirements of a technical regulation, because the importing Member could achieve that same objective by designating a recognized body. The WTO Member itself is responsible for establishing a conformity assessment procedure that functions effectively, without entirely avoidable trade restrictions, and it cannot blame third parties for the failure of its conformity assessment procedures to enable trade in conforming products.

B. The European Union's conformity assessment procedure is inconsistent with Article 5.2.1 of the *TBT Agreement*

1. Legal standard under Article 5.2.1

381. Under the *chapeau* of Article 5.2 of the *TBT Agreement* and its first subparagraph together read, "[w]hen implementing the provisions of paragraph 1, Members shall ensure that ... conformity assessment procedures are *undertaken* and *completed as expeditiously as possible*" (emphasis added).

382. Article 5.2.1, just like all other subparagraphs of Article 5.2, lays down a specific obligation that applies to Members "when *implementing* the provisions" set forth in Article 5.1. In other words, Article 5.2.1 sets out a detailed rule for Members to follow in order to ensure that their conformity assessment procedures, *inter alia*, do not amount to unnecessary obstacles to international trade. Accordingly, a conformity assessment procedure may be

inconsistent with *both* Article 5.1.2 (because it results in an unnecessary obstacle to international trade) and Article 5.2.1 (because the *particular manner* in which the measure creates an unnecessary obstacle to international trade runs afoul the detailed obligation set forth in that provision).[495]

383. The ordinary meaning of the term "expeditiously" refers to action taken as speedily as possible, without compromising the quality or effectiveness of the action at issue. Hence, the obligation that conformity assessment procedures be undertaken and completed as expeditiously as possible does not require exaggerated haste. At the same time, the phrase does not allow any unjustified delay. In this sense, the requirements of Article 5.2.1 of the *TBT Agreement* are similar to those of Annex C(1)(a) of the *SPS Agreement*, which require control, inspection and approval procedures to be undertaken and completed without "undue delay".[496]

384. The panel in *EC – Biotech* held that assessing compliance with this timeliness requirement calls for consideration of whether a delay is reasonable in the circumstances, having regard to what is required to be assessed under the relevant procedure. Thus, the time taken to commence and complete an approval procedure may include the time "reasonably needed to check and ensure fulfilment of its relevant SPS requirements"; however, taking more time than reasonably needed to conduct an approval process would cause "undue delay".[497]

385. The same holds true under the *TBT Agreement*. Under Article 5.2.1, a conformity assessment procedure may be permitted to take the time needed reasonably to check and ensure that relevant requirements of a technical regulation are fulfilled. However, a Member would fail in its duty under Article 5.2.1 to ensure that conformity assessment procedures "are undertaken and completed as expeditiously as possible" if, through the Member's inaction, the procedure is prevented from *ever* being undertaken and completed, or is otherwise slowed beyond what is reasonably necessary to check and ensure the conformity of particular products with relevant requirements. Indeed, in order to honour the obligation set forth in Article 5.2.1, it is not sufficient that the procedures be *commenced* as expeditiously as possible; they must also be *completed* as expeditiously as possible.

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[495] See Norway's response to Panel question No. 50, para. 262.
[496] The European Union agrees with Norway on this point. See EU's FWS, paras. 474-475.
[497] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1499.

386. As noted in paragraph 325 above, an analysis of whether the time needed to check and ensure that relevant requirements of a technical regulation are fulfilled is "reasonable" must be conducted in light of the legitimate objective of conformity assessment procedures, that is, "giving importing Members adequate confidence that products conform with the applicable technical regulations, taking account of the risks that non-conformity would create". Undue delay is not necessary to give an importing Member confidence that products conform to a technical regulation.

2. The conformity assessment procedure laid down in the Implementing Regulation results in an undue delay inconsistent with Article 5.2.1 of the *TBT Agreement*

387. As already explained in paragraph 334 above, the Commission's conformity assessment procedures suffer from an institutional lacuna because no conformity assessment body has been designated to receive, examine, or approve applications for certification. As a result of this institutional lacuna, for a period of more than two years since the entry into force of the EU Seal Regime, *no* entity capable of assessing conformity was recognized, meaning *no* lawful trade in conforming seal products was possible.

388. Even now, only Sweden benefits from the existence of recognized bodies, whereas trade in conforming seal products from other countries is still blocked. Norway notes that, on 23 February 2011, Denmark submitted a request for the Greenland Department for Fisheries, Hunting and Agriculture ("APNN") to be approved as a recognized body.[498] More than *two years* later, that application is still pending, and APNN has not yet been included in the list of recognized bodies. In the interim, Denmark (Greenland) has taken to issuing certificates that have been accepted by Denmark and resulted in indigenous seal products entering the EU market.[499]

389. The European Union attempts to justify this delay by referring to the fact that, after various exchanges between APNN and the Commission, APNN has not yet provided additional documentary evidence necessary to prove the fulfilment of some of the requirements set out in Article 6(1) of the Implementing Regulation.[500] However, the European Union has not disclosed to the Panel and the other parties the nature of the missing

[498] See email of 23 February 2011 from Caspar Stenger Jensen, Head of Section, Department for Northern Europe, Ministry of Foreign Affairs of Denmark, Exhibit NOR-106.
[499] EU's response to Panel question No. 98, para. 281.
[500] EU's FWS, fn 618 to para. 482.

documentary evidence, thereby failing to support its argument that the delay in recognizing APNN is "reasonable" under the circumstances.

390. Moreover, if the European Union had published its conformity assessment procedures sufficiently far in advance of the entry into force of the EU Seal Regime to allow interested third parties to become recognized bodies *before* the Regime entered into force on 20 August 2010, the prohibition on trade need never have arisen.

391. In these circumstances of extensive delay, the institutional lacuna affecting the European Union's conformity assessment procedures results in an unnecessary obstacle to international trade, contrary to Article 5.1.2, since it would be perfectly feasible for the European Union to designate a body to ensure lawful trade may proceed.

392. At the same time, the particular manner in which the European Union's conformity assessment procedure creates an unnecessary obstacle to trade in seal products also violates Article 5.2.1. Article 5.2.1 suggests that a violation of this provision is established only if the more rapid conduct of conformity assessment procedures is "possible". Again, it would be perfectly "possible" for the European Union to conduct its procedures more rapidly than by imposing infinite delay, namely, by designating a body that could act in timely fashion, without making its procedures depend on the desire of third party entity to seek, and secure, approval as a recognized body.

393. Instead, the above-mentioned institutional lacuna results in a situation where procedures can *never be commenced* with respect to seal products originating in countries other than Sweden, and therefore do not meet the basic requirement that they be undertaken and completed, as "*expeditiously as possible*". In short, infinite delay does not meet a requirement of timeliness. The European Union has therefore violated its obligation, under Article 5.2.1 of the *TBT Agreement*, to ensure that conformity assessment procedures are undertaken and completed as expeditiously as possible.

VIII. NON-VIOLATION NULLIFICATION OR IMPAIRMENT

A. Norway's claim under Article XXIII:1(b)

394. Article XXIII:1(b) of the GATT 1994 provides a remedy where three elements are made out namely that there is: (i) application of a measure; (ii) a benefit accruing under the

relevant agreement; and (iii) nullification or impairment of that benefit resulting from the application of the measure.[501]

395. Because Article XXIII:1(b) applies "whether or not the measure conflicts" with other GATT provisions, Norway's claim under Article XXIII:1(b) stands irrespective of whether or not the Panel finds the EU Seal Regime to be inconsistent with the GATT 1994. Norway believes the Panel must address this claim, regardless of its disposition of other issues under the GATT 1994, in order to facilitate the "prompt settlement" of the dispute and the "maintenance of a proper balance between the rights and obligations of Members" in the sense of Article 3.3 of the DSU.

396. A panel may exercise judicial economy so long as this does not result in a "partial resolution of the matter".[502] However, a failure to rule on Norway's claim under Article XXIII:1(b) may frustrate the resolution of this dispute, constituting a false exercise of judicial economy. Notably, even if the Panel upholds one or more of Norway's claims, the Panel's findings could be reversed with Appellate Body failing to complete the analysis. In that case, Norway could be left without a remedy in the event the Panel has failed to address Norway's claim under Article XXIII:1(b) of the GATT 1994, thereby resulting in only a "partial resolution" of this dispute.

397. Norway's claim under Article XXIII:1(b) can be understood in straightforward terms.

398. The European Union and Norway agreed, at the conclusion of both the Tokyo and Uruguay Rounds of multilateral trade negotiations, on packages of market access commitments that involved concessions from all sides. As part of these deals, the European Union made commitments in relation to market access for seal products. Norway, like any other Member engaging in tariff negotiations on products of trade interest, legitimately expected a benefit from the European Union's commitments enshrined in the results of those Rounds. For its part, Norway also made commitments benefiting the European Union (or its predecessor entities) as part of the Tokyo and Uruguay Round deals.

399. The EU Seal Regime nullifies the benefit to Norway of the EU commitments relating to seal products. It does so by effectively barring Norway's seal products from accessing the

[501] Panel Report, *Japan – Film*, para. 10.41.
[502] Appellate Body Report, *Australia – Salmon*, para. 223; see also Appellate Body Report, *US – Upland Cotton*, para. 732.

EU market. In this way, the European Union has upset the negotiated balance reflected in the Tokyo Round and Uruguay Round outcomes. Article XXIII:1(b) allows for the balance to be put right. With its Article XXIII:1(b) claim, Norway asks the Panel to recommend that the European Union do just that.

B. The EU Seal Regime nullifies or impairs benefits legitimately expected by Norway

400. There is no contest between the parties regarding the first and second elements of requirements to be established under Article XXIII:1(b), that is, (i) that EU Seal Regime constitutes a "measure" in the sense of Article XXIII:1(b), and (ii) that the tariff concessions described in Exhibit JE-42 constitute "benefits" protected under this provision. Rather, the issue between the parties revolves around whether Norway has established element (iii), namely that the measure "nullifies and impairs" benefits accruing to Norway.

401. In particular, the European Union says that Norway has failed to show: that the EU Seal Regime could not have been *reasonably anticipated* by Norway[503]; and the EU Seal Regime *upsets the competitive relationship* between Norwegian seal products and other products. Norway contests both these points and, as set forth below, argues that: (1) Norway could *not* reasonably have anticipated the EU measure and was, therefore, entitled legitimately to expect benefits from the EU tariff concessions; and (2) the EU Seal Regime *does* upset the competitive relationship between Norwegian seal products and other products, nullifying benefits reasonably anticipated by Norway.

1. Norway could *not* reasonably have anticipated the EU measure and it legitimately expected benefits from the EU tariff concessions on seal products

402. In order to establish a claim under Article XXIII:1(b), a complainant must establish that, at the time a tariff concession was made,[504] the imposition of a measure of the same type as the measure at issue[505] was not *reasonably anticipated* by the complainant.[506] There is,

[503] EU's FWS, para. 606.
[504] Panel Report, *Japan – Film*, para. 10.81.
[505] Any expectation of a measure must be of the same time as that actually adopted: Panel Report, *Japan – Film*, paras. 10.79, 10.124 and 10.125; Panel Report, *EC – Asbestos*, para. 8.291(a).
[506] Panel Report, *Japan – Film*, para 10.77.

however, a rebuttable presumption that a measure could *not* reasonably have been anticipated in cases where it was adopted *subsequent* to the making of the relevant tariff concessions.[507]

403. Norway has shown that relevant tariff concessions were made by the European Union as a result of the Tokyo and Uruguay Rounds.[508] The EU Seal Regime came into effect in August 2010, 16 years after the conclusion of the Uruguay Round and 30 after the conclusion of the Tokyo Round. These facts raise a presumption that Norway did not reasonably anticipate the adoption of the EU Seal Regime.

404. In the light of these facts, the European Union argues that: (a) a special, "stricter burden of proof"[509] applies to a measure that would merely "pursue one of the objectives"[510] under Article XX of the GATT 1994, meaning there is no presumption that the EU Seal Regime, adopted 16 and 30 years after the relevant tariff concessions, was not reasonably anticipated by Norway;[511] and (b) Norway could have reasonably anticipated the EU Seal Regime.[512]

405. Both these arguments are wrong, for the reasons that follow.

a. The European Union postulates an incorrect burden of proof for non-violation claims

406. The European Union's argument on the burden of proof relies exclusively on reasoning from the panel in *EC – Asbestos*. The European Union does not identify any basis in the text of the GATT 1994 to support the view of that panel. Nor could it, since, as Norway has pointed out at length in reply to Question 51 from the Panel,[513] the erroneous conclusion reached by that panel is bereft of support in the treaty text. Moreover, the apparent assumption behind the reasoning of the panel in *EC – Asbestos* that Article XXIII:1(b) might be used to prevent a Member from taking justified action under Article XX reflects a misunderstanding of the non-violation remedy.

[507] Panel Report, *Japan – Film*, para 10.71. By contrast, if the measure existed *prior* to the making of the relevant tariff concessions, there is a rebuttable presumption that it could reasonably have been anticipated by the Member concerned.
[508] See Exhibit JE-42.
[509] EU's FWS, para. 601, quoting Panel Report, *EC – Asbestos*, para. 8.282.
[510] EU's FWS, para. 607.
[511] EU's FWS, paras. 600-605.
[512] EU's FWS, paras. 608-618.
[513] See Norway's response to Panel question No. 51, paras. 269-272.

407. Article XXIII:1(b) does *not* prevent the adoption of measures "justified" under Article XX of the GATT 1994. Rather it serves to give exporting Members an *assurance* that, where a GATT-*consistent* measure is adopted (whether or not recourse to Article XX is required to justify it), the balance of the deal struck with the importing Members regarding mutual tariff concessions will be maintained. Since a Member is not prevented by Article XXIII:1(b) from pursuing a GATT-consistent measure, the drafters saw no need to include treaty language that varies the burden of proof under Article XXIII:1(b) to ensure Members are able to adopt such measures.[514]

408. The Appellate Body has consistently held that panels must make an objective assessment of the law and the facts under Article 11 of the DSU and that, to discharge the burden of proof, a *prima facie* case must be made by adducing "evidence sufficient to raise a presumption that what is claimed is true", in which case "the burden then shifts to the other party".[515] The degree of objectivity applied by a panel, and its scrutiny of the evidence, does not vary according to the treaty provision, the type of measure, or the particular policies at stake.

409. The Panel should therefore decline to apply the special burden of proof proposed by the European Union.

b. Norway could not reasonably have anticipated the EU Seal Regime in 1979 or 1993

410. The European Union asserts that, in 1979 and 1993, Norway could reasonably have anticipated the EU Seal Regime. It provides a short history of what it labels "public morals concerns with regard to the killing of seals",[516] and then points to a series of measures, not all of which are measures of European countries, of which four precede the conclusion of the Tokyo Round and five precede the conclusion of the Uruguay Round.[517] On the basis of this review, the European Union says that Norway "cannot pretend now that they could not have reasonably anticipated the measure at issue",[518] since Norway "could not have ignored" either

[514] Norway's response to Panel question No. 51, paras. 273-275.
[515] Appellate Body Report, *US – Wool Shirts and Blouses*, DSR 1997:I, 323 at 335.
[516] EU's FWS, paras. 608-613.
[517] EU's FWS, paras. 614-615.
[518] EU's FWS, para. 617.

the "public moral concerns", or "that the most obvious way to address such public moral concerns was by restricting or prohibiting the marketing of seal products".[519]

411. The European Union's arguments are flawed. In 1979 and 1993, Norway could not reasonably have anticipated the adoption of the EU Seal Regime, with all of its nuances and contours.

i. Reasonable anticipation is an objective standard

412. Norway begins by noting that the consistent approach of GATT and WTO panels examining claims under Article XXIII:1(b) has been to examine whether the measure could have been "reasonably anticipated" by the complaining Member.[520] Reasonable anticipation has rightly been approached as an *objective*, not *subjective*, standard. The question is not whether Norway is "pretending" – which it is not – but rather whether, in the light of the circumstances prevailing *at the conclusion of the respective tariff negotiations*,[521] a *measure of the type* ultimately adopted,[522] could *reasonably* have been anticipated by Norway.

ii. The European Union does not submit evidence rebutting the presumption of reasonable anticipation

413. The Tokyo Round tariff negotiations were concluded in April 1979. The Uruguay Round tariff negotiations were concluded in December 1993. The circumstances prevailing at both those times included that the European Union, in good faith, offered, and Norway, in good faith, accepted tariff concessions in relation to a range of seal products.

414. For that reason, the assessment of what is *reasonable* begins with a presumption that Norway, *in accepting the concessions at the time and giving concessions in return*, did not reasonably foresee a future measure that would empty the concessions of value. Members accepting concessions must, in principle, be entitled to presume that concessions will bring benefits and they should not be expected to presume that they will be nullified or impaired in the future. This presumption that concessions confer value is a fundamental element of the negotiating process.

[519] EU's FWS, para. 617.
[520] See, e.g. Panel Report, *Japan – Film*, para. 10.79.
[521] Panel Report, *Japan – Film*, para. 10.81.
[522] Panel Report, *Japan – Film*, paras. 10.79, 10.124 and 10.125; Panel Report, *EC – Asbestos*, para. 8.291(a).

415. In order to rebut such a presumption, and show that the *particular* measure ultimately adopted *could* reasonably have been anticipated at the relevant time, a respondent needs to show more than the European Union has shown in this case. Indeed, the evidence shows, to the contrary, that, in 1979 and 1993, Norway could not have reasonably foreseen the adoption of the EU Seal Regime.

(1) The European Union mischaracterizes its measure

416. The European Union's view that "the most obvious way" to deal with concerns about the animal welfare of seals was to "prohibit marketing of seal products", seeks to imply that the EU Seal Regime prohibits seal products. To recall, that is *not* how the EU Seal Regime is structured, designed or expected to operate.

417. Rather, the "placing on the market is allowed" for product falling within the IC requirements[523], which are expected to operate to allow all or virtually all product of Greenland to be sold. The EU Seal Regime similarly does not restrict importation and marketing of seal products meeting either the SRM or PU requirements and, in fact, all, or virtually all EU products are eligible to be sold.

418. Accordingly, even if a ban were "the most obvious way" to deal with particular public concerns, that point in itself does not prove that Norway could have anticipated a measure such as the EU Seal Regime, which is effectively a ban on product from Norway, but *not* a ban on the marketing of competitive seal products.

(2) The evidence suggests Norway could <u>not</u> have anticipated the EU Seal Regime

419. The view that Norway could have predicted a measure with the specific characteristics of the EU Seal Regime is not supported by the facts and, indeed, is *contradicted* by much of the material put forward by the European Union.

420. *First*, it bears mentioning that there was no disclosure by the European Union before the conclusion of either the Tokyo Round or the Uruguay Round that the value of concessions offered by the European Union on seal products would be nullified by a regulatory measure denying market access to products from Norway.

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

421. *Second*, the evidence pointed to by the European Union of historical measures indicates that the policy objective of such measures was generally to protect seals from unsustainable exploitation.[524] Given the conservation basis of the concerns reflected in the European Union's evidence, as well as the fact that previous EU measures were directed, expressly, towards conservation ends, Norway could, at most, have anticipated a measure of a type that pursued conservation ends. Since Norway carefully manages its TACs for seals based on scientific evidence, Norway could not reasonably have envisaged that the "market access guarantees"[525] secured from the European Union would be nullified by a measure that bears no relation whatsoever to conservation ends.

422. The European Union notes that it had adopted a measure regulating trade in certain seal products in 1983. The EU concedes that its 1983 ban states that the measure served a conservation purpose.[526] In negotiating market access concessions, other WTO Members should be able to take, at face value, the purpose of legislation as stated in the legislation.

423. *Third*, the evidence referred to by the European Union indicates that, prior to the conclusion of the Tokyo Round, *voluntary* measures undertaken at an *industry* level were preferred to government regulation.[527] This fact does not suggest that Norway should reasonably have anticipated severe government intervention of a type like the EU Seal Regime.

424. *Fourth*, even if the European Union is right to say that some of its current Member States[528] adopted measures regulating trade in seal products for reasons of "public morals concerns" (a point Norway contests), there was no reason for Norway to expect that the *same* moral values exhibited by a small number of Member States would become shared by the community of the EU-27 as a whole. For example, Norway could not reasonably predict whether Dutch moral attitudes towards consumption of seal products in the 1970s and 1980s would be adopted in 27 EU Member States in 2009, just as it could not reasonably predict

[524] See, e.g.: Report of the Royal Commission on Seals and Sealing (1986), Volume I, Chapter 10, Exhibit EU-62, p. 123, regarding the Netherlands' ban on seal products: "The Netherlands justified the ban on conservation grounds, arguing that seals were endangered species". See also ibid., p. 123, regarding the Italian measure subjecting imports of seal skins to prior administrative authorization: "The Italian government maintained that the decree was based on conservation grounds". The only aspect of the Italian measure that was "based on grounds of public morality" was "the policy of not licensing the import of the skins of seal pups".
[525] Panel Report, *EC – IT Products*, para. 7.757.
[526] See EU's FWS, para. 615, bullet point 6.
[527] Of the three measures identified by the European Union taken prior to April 1979, two were voluntary industry measures: see EU's FWS, para. 615.
[528] Namely, the Netherlands, France, Italy, the UK and West Germany. See EU's FWS, para. 615.

whether Dutch moral attitudes in the 1970s and 1980s regarding the consumption of cannabis would be subsequently adopted in other EU Member States.

425. In that regard, in order to predict the evolution of morals within the European Union, it would be crucial for other WTO Members to be able to predict the "community" where the morals are expected to take root. In the case of the EU, in both 1979 and 1993, Norway could not predict the future extent of the EU "community".

426. As Norway discusses in its response to Panel question No. 51, when the Tokyo Round was concluded in April 1979, the European Communities comprised just 9 member states, and when the Uruguay Round was concluded in December 1993 it comprised just 12 member states. When the EU Seal Regime was adopted in 2009, the number of Member States in the European Union had swollen to 27 separate Member States. In 1979 and 1993, the likely membership of the European Union in 2009 was all but impossible for other GATT Contracting Parties/WTO Members to foresee, as was the direction in which the EU-wide moral compass would turn in a community of unforeseeable size and complexion.[529] Moreover, in 1979 and 1993, to the contrary, Norway would have reasonably expected the EU to try to build international consensus on welfare standards, rather than take a unilateral act that regulates seal products on a basis that allows market access to products from favoured sources.

427. *Fifth*, and perhaps most importantly, to the extent the concerns underlying measures relating to seal products in the 1970s and 1980s were indeed about the *animal welfare* of seals (and not other concerns, such as the conservation of seals), "the most obvious" response to such concerns would be to *regulate to ensure the welfare of seals*. The "obvious response" would not be to adopt a measure with the characteristics of the EU Seal Regime. To recall, the EU Seal Regime: has *no provisions whatsoever* addressing animal welfare; and adopts *selective* trade restrictions that *bar* trade from a country that maintains high animal welfare standards (Norway), while simultaneously *permitting* trade from a country that the evidence shows does not maintain such standards (Denmark (Greenland), as well as the EU (Sweden and Finland)).

[529] See Norway's response to Panel question No. 51, para. 282.

(3) During the legislative process, not even EU institutions could anticipate the EU Seal Regime

428. All this is underscored by the fact that, many years *after* the dates on which relevant concessions were made (and Norway's expectations were formed), during the legislative process that led to the EU Seal Regime, *not even EU institutions* were able to predict the specific dimensions of the EU Seal Regime as it was finally adopted. For instance, the Commission, having sought input, *inter alia*, from EFSA responded to a resolution of the EU Parliament by proposing a regulation that, *unlike* the EU Seal Regime ultimately adopted, would have conditioned market access on compliance with animal welfare requirements. Evidence also shows that the Council Legal Service doubted that there was a legal basis, in EU law for a measure with the dimensions of the EU Seal Regime.[530]

c. The measures of Members other than the EU are not relevant

429. With the exception of the handful of measures adopted in the Netherlands, France, Italy, Germany, the United Kingdom and Canada prior to relevant tariff concessions, the European Union does not argue that measures adopted other than by the EU itself (or its predecessor) are relevant to the assessment of Norway's Article XXIII:1(b) claim. It does, however, identify in its submission a series of third country measures, and a measure adopted in Slovenia, that regulate trade in seal products.

430. For the sake of completeness, Norway notes that such measures are irrelevant to the assessment of a claim under Article XXIII:1(b) relating to the EU Seal Regime, just as they are irrelevant to addressing the other matters before the Panel.

431. One reason they are not relevant under Article XXIII:1(b) is the dates on which they were enacted. With the exception of one measure,[531] *all* were enacted subsequent to the Uruguay Round result. Another reason is that all of the measures, *including* the only measure adopted prior to the conclusion of the Uruguay Round, are significantly different from the EU Seal Regime.[532] In addition, even if third country measures did closely reflect relevant characteristics of the EU Seal Regime, a measure by one Member is not foreseeable merely

[530] Humane Society International, *Why a Prohibition on Seal Products Would Improve the Functioning of the Internal Market for a Category of Other Products Wider than Those Concerned by the Ban* (10 March 2009), available at http://bansealtrade.files.wordpress.com/2009/10/2009-03-10-article-95-legal-basis-for-seal-products-trade-ban-3.pdf (last checked 13 December 2012) ("HSI Document"), Exhibit NOR-115, p. 1 (footnote omitted). See also ITK/ICCC Press Release, Exhibit NOR-113, annex.
[531] The Marine Mammal Protection Act ("MMPA") of the United States was enacted in 1972.
[532] See Norway's response to Panel question No. 51.

because it was adopted by another Member.[533] This point applies particularly where a measure reflects policy based on cultural values, since cultural values vary amongst different WTO Members.

2. The EU Seal Regime revokes "market access guarantees" and otherwise "upsets the competitive relationship" between Norwegian seal products and other products

432. Benefits typically accrue through tariff concessions protected under Article II of the GATT 1994, and Norway asserts the nullification or impairment of such benefits in this dispute. As Norway argued in its first written submission,[534] the benefits under Article II take the form of "market access guarantees"[535] and through offering improved competitive opportunities vis-à-vis competitive goods.[536]

433. The EU Seal Regime nullifies benefits accruing to Norway in two ways.

434. *First*, the EU Seal Regime nullifies the "market access guarantees"[537] expected in relation to seal products by Norway. As outlined by Norway in its first written submission[538], a measure that takes the form of a ban on trade "[b]y its very nature … constitutes a denial of any opportunity for competition".[539] Although the EU Seal Regime is not a "ban" as such (since it permits marketing of seal products under the three sets of requirements), its effect is to ban imports of seal products *from Norway*, which is the intended beneficiary of the concessions at issue. Thus, there is no need to consider if there are competitive *products* because the competitive opportunities expected for Norwegian products have been revoked.

435. *Second*, the EU Seal Regime nullifies the benefits accruing to Norway under the European Union's concessions on seal products, since it upsets the competitive position[540] of Norwegian seal products vis-à-vis both (i) "like" seal products that are permitted to be marketed under the IC or SRM requirements, and also (ii) non-seal products that compete

[533] Panel Report, *Japan - Film*, para. 10.79.
[534] Norway's FWS, paras. 983, 1009.
[535] Panel Report, *EC – IT Products*, para. 7.757
[536] See Panel Report, *Japan – Film*, para. 10.82, citing with approval GATT Panel Report, *EEC – Oilseeds*; GATT Working Party Report, *Australian Subsidy on Ammonium Sulphate*; and GATT Panel Report, *Germany – Sardines.*
[537] Panel Report, *EC – IT Products*, para. 7.759.
[538] See Norway's FWS, paras. 1001 and 1034.
[539] Panel Report, *EC – Asbestos*, para. 8.289.
[540] See Panel Report, *Japan – Film*, para. 10.82, citing with approval GATT Panel Report, *EEC – Oilseeds*; GATT Working Party Report, *Australian Subsidy on Ammonium Sulphate*; and GATT Panel Report, *Germany – Sardines.*

with seal products such as alternative products made with fur, alternative sources of omega-3 oils; or footwear derived from products other than seal skin.

436. With respect to "like" products, the European Union says that the EU Seal Regime does not discriminate, since, according to its arguments, it is consistent with Articles I:1 and III:4 of the GATT 1994.[541] Norway, of course, takes a fundamentally different view.[542] However, even assuming, for the sake of argument, that the measure were *not* inconsistent with those provisions,[543] the evidence still shows that the expected operation of the EU Seal Regime is to effectively *bar* all Norwegian seal products from the EU market, while simultaneously *allowing* placing on the market of like products from Denmark (Greenland), or from certain EU Member States. Accordingly, *irrespective* of whether or not the measure conflicts with Articles I:1 or III:4, it still upsets the competitive relationship between Norwegian seal products and like products permitted under the IC or SRM requirements.

437. Similarly, the EU argument on this point completely overlooks the opportunity, *denied* to Norwegian seal products as a result of the EU Seal Regime, to compete with other products on the EU market that do not contain seal inputs. Seal products are in competitive relationships with other products. For instance, seal fur products compete with other fur products on the EU market; omega-3 capsules containing seal oil compete with omega-3 capsules containing oil from other sources; and seal skin boots and slippers compete with shoes and slippers made with other inputs. The EU Seal Regime denies to Norwegian seal products any opportunity to compete at all with these non-seal products.

438. Accordingly the European Union is plainly wrong to say that the measure "does not upset the competitive relationship[s]"[544] of Norwegian seal products.

IX. CONCLUSION

439. For the reasons set forth above and in Norway's other submissions to the Panel, Norway respectfully requests the Panel to find that the EU Seal Regime:

- violates Articles 1:1, III:4 and XI:1 of the GATT 1994;

[541] EU's FWS, para. 6073
[542] See paras. 54 to 69 and 79 to 92 above.
[543] Presumably – following the logic of the European Union's flawed argumentation – since the disproportionate detrimental impacts on imports from Norway could be justified by some factor, such as a legitimate regulatory distinction.
[544] EU's FWS, para. 607.

- is not justified by Article XX(a) or (b) of the GATT 1994;
- violates Article 4.2 of the *Agreement on Agriculture*;
- is a technical regulation in the sense of Annex 1.1 of the *TBT Agreement*;
- violates Articles 2.2, 5.1.2 and 5.2.1 of the *TBT Agreement*; and
- nullifies or impairs benefits accruing to Norway in the sense of Article XXIII:1(b) of the GATT 1994, whether or not it conflicts with relevant provisions.

440. Accordingly, Norway reiterates its request that, pursuant to Article 19.1 of the DSU, the Panel recommend that the Dispute Settlement Body request that the European Union bring the EU Seal Regime into conformity with its obligations under the GATT 1994, the *TBT Agreement*, and the *Agreement on Agriculture*.

441. If, and to the extent, that the Panel finds that the EU Seal Regime does not conflict with relevant WTO provisions, but nonetheless finds that the measure nullifies or impairs benefits accruing to Norway in the sense of Article XXIII:1(b) of the GATT 1994, Norway respectfully requests the Panel to recommend that the Dispute Settlement Body request the European Union to make a mutually satisfactory adjustment as required by Article 26.1 of the DSU.