

**In the World Trade Organization**

**EUROPEAN COMMUNITIES – MEASURES PROHIBITING  
THE IMPORTATION AND MARKETING OF SEAL PRODUCTS  
(DS400, DS401)**

**European Union's Responses to the  
First Set of Questions from the Panel**

**Geneva, 13 March 2013**

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Short Title	Full Case Title and Citation
<i>China – Publications and Audiovisual Products</i>	Panel Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , WT/DS363/R and Corr.1, adopted 19 January 2010, as modified by Appellate Body Report WT/DS363/AB/R, DSR 2010:II, 261
<i>EC – Asbestos</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, 3243
<i>EC – Bananas III</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591
<i>EC – Hormones</i>	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
<i>EC – Sardines</i>	Panel Report, <i>European Communities – Trade Description of Sardines</i> , WT/DS231/R and Corr.1, adopted 23 October 2002, as modified by Appellate Body Report WT/DS231/AB/R, DSR 2002:VIII, 3451
<i>Thailand – Cigarettes (Philippines)</i>	Appellate Body Report, <i>Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines</i> , WT/DS371/AB/R, adopted 15 July 2011
<i>US – Clove Cigarettes</i>	Appellate Body Report, <i>United States – Measures Affecting the Production and Sale of Clove Cigarettes</i> , WT/DS406/AB/R, adopted 24 April 2012
<i>US – COOL</i>	Appellate Body Reports, <i>United States – Certain Country of Origin Labelling (COOL) Requirements</i> , WT/DS384/AB/R / WT/DS386/AB/R, adopted 23 July 2012
<i>US – Gambling</i>	Panel Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/R, adopted 20 April 2005, as modified by Appellate Body Report WT/DS285/AB/R, DSR 2005:XII, 5797
<i>US – Shrimp</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755
<i>US – Tuna II (Mexico)</i>	Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , WT/DS381/AB/R, adopted 13 June 2012

**TABLE OF ABBREVIATIONS**

<b>Abbreviation</b>	<b>Description</b>
AIDCP	Agreement on International Dolphin Conservation Programme
AVMA	American Veterinary Medical Association
AWWG	Animal Welfare Working Group of the OIE
DFO	Canadian Department of Fisheries and Oceans
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EU	European Union
EU Commission	Commission of the European Union
EU Court of Justice	Court of Justice of the European Union
GATT 1994	General Agreement on Tariffs and Trade 1994
IC exception	Indigenous Communities exception
MRM exception	Marine Resources Management exception
NAMMCO	North Atlantic Marine Mammal Commission
OIE	World Organisation for Animal Health
TBT Agreement	Agreement on Technical Barriers to Trade

**EXHIBITS**

<b>Number</b>	<b>Title</b>
EU - 84	Council directive 92/43/EEC, of 21 May 1992, on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 22.7.1992, p. 7
EU - 85	OIE, Terrestrial Animal Code, Chapter 7.5
EU - 86	Applicable duty rates on imports of seal products into the European Union
EU - 87	Eurostat, exports of seal products from the European Union (2001-2011)
EU - 88	Eurostat, imports of seal products into the European Union (2009-2011)
EU - 89	Public statements by local authorities and market participants on the trade impacts of the EU Seal Regime
EU - 90	Report of Sixth meeting of the AWWG (5-7 September 2007)
EU - 91	Report of the Seventh meeting of the AWWG (17-19 June 2008)
EU - 92	Report of the Ninth meeting of the AWWG (23-25 June 2010)
EU - 93	OIE, Commercial killing of wildlife, 2 <sup>nd</sup> report to the AWWG
EU - 94	Email exchange between the EU Delegation to Canada and Agriculture and Agri-Food Canada
EU - 95	List of competent authorities established pursuant to Article 9(3) of Commission regulation (EU) no 737/2010
EU - 96	ISO/IEC 17000: <i>Conformity assessment- vocabulary and general principles</i>

## I. PRELIMINARY MATTERS

### Question 1

*(All parties) How should the EU Seal Regime be characterized? Please respond by referencing to specific parts of the Basic Regulation and/or the Implementing Regulation. For example, is it:*

- a. a total ban on placing on the market, import, export, and transit of seal products;*
- b. a ban on the sale of seal products on the market;*
- c. a ban on the importation of seal products;*
- d. requirements concerning the sale of seal products on the market;*
- e. requirements concerning the importation of seal products;*
- f. all of the above; or*
- g. something else*

1. The EU Seal Regime provides for a General Ban on the placing on the market of seal products. In the case of imported products, the General Ban is applied at the point of importation. The General Ban is subject to three exceptions: the IC exception, the MRM exception and the Travellers exception.
2. Article 3.1 of the Basic Regulation sets forth the General Ban together with the main exception (the IC exception). In turn, the Travellers exception and the MRM exception are stipulated in Article 3.2 a) and 3.2 b), respectively.
3. The Complainants contend that the EU Seal Regime does not impose a General Ban, but instead provides for three self-standing "requirements".<sup>1</sup> The Complainants rely exclusively on the fact that the terms of Article 3.1 of the Basic Regulation provide for a conditional authorization: "the placing on the market of seal products shall be allowed only where ...". From a logical point of view, however, that proposition has the same meaning as other propositions such as "the placing on the market of seal products shall not be allowed unless ..." or "the placing on the market of seal products shall be prohibited except where ...".

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<sup>1</sup> See e.g. Norway's Oral Statement, paras. 7-16.

It would be manifestly absurd to characterize the measure at issue differently from a measure including one those two alternative propositions merely because of a minor syntactic difference.

4. The legislative history and the recitals of the Basic Regulation provide ample confirmation that the EU legislators aimed at enacting a general ban subject to certain exceptions. In particular, Recital 10 states in relevant part that:

In order to counter barriers to the free movement of products concerned in an effective and proportionate fashion, **the placing on the market of seal products should, as a general rule, not be allowed** in order to restore consumer confidence while, at the same time, ensuring that animal welfare concerns are fully met.

5. In turn, recital 14 states that "the placing on the market of seal products which result from hunts traditionally conducted by Inuit and other indigenous communities ... **should be allowed**". This confirms that the IC exception was not conceived as a self-standing "requirement" but instead as an exception from a general prohibition.
6. The Complainants' characterization of the EU Seal Regime is overtly formalistic. The only reason why the Complainants insist on such a contrived characterization is because they believe that it allows them to claim that the EU Seal Regime makes no contribution whatsoever to the overarching policy objective pursued by the European Union (addressing public moral concerns related to animal welfare). Indeed, after positing that the measure consists of three "requirements", the Complainants go on to conclude that since none of those three "requirements" (in reality, exceptions) contributes to that objective, the EU Seal Regime as whole makes no contribution to its stated objective. But this is a manifest *non sequitur*. It is unquestionable that the EU Seal Regime has the effect of prohibiting the placing on the market of seal products where none of the three so-called "requirements" (exceptions) is met. The Complainants, however, totally fail to acknowledge the contribution of that effect to the policy objective of the EU Seal Regime.
7. The position of the Complainants is inconsistent with the arguments which they have submitted in support of their claim that the EU Seal Regime is a technical regulation. In that context, the Complainants have emphasized that, in substance,



the EU Seal Regime provides a "ban" subject to exceptions, just like the measure considered by the Appellate Body in *EC - Asbestos*.<sup>2</sup>

8. Furthermore, the Complainants' position is at odds with the characterization of the measure included in their panel requests. Norway's panel request describes as follows the measure in dispute:

The EU Seal Regime imposes a **general prohibition** on the importation and sale of processed and unprocessed products in the EU, thereby depriving Norway of access to a significant market for its exports of these products. The EU Seal Regime contains certain **exceptions** that set forth conditions under which seal products may be placed on the EU market. However, these **exceptions** appear to discriminate in favour of seals products originating in the EU regime.<sup>3</sup>

9. Norway goes on to claim *inter alia* that:

(i) Through the **general prohibition** and the **exceptions** set out therein, the EU seal regime appears to discriminate among like products originating in different countries in violation of Article I:1 of the GATT 1994 and Article 2.1 of the TBT Agreement.

(ii) Through the **general prohibition** and the **exceptions** set out therein, the EU Seal Regime appears to discriminate between imported products and like products originating in the EU, in violation of Article III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement.<sup>4</sup>

10. For its part, Canada's panel request states that:

The European Union **trade ban prohibits** the importation and the placing on the market for sale in the European union customs territory **except** (a) those derived from hunts traditionally conducted by Inuit and other indigenous communities, which contribute to their subsistence; and (b) those that are by-products of a hunt regulated by national law and with the sole purpose of sustainable management of marine resources. In addition, seal products for personal use may be imported but may not be placed on the market. The effect of the **trade ban**, in combination with the implementing measure, is to restrict virtually all trade in seal products within the European Union, and in particular with respect to seal products of Canadian origin.<sup>5</sup>

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<sup>2</sup> See e.g. Canada's first written submission, paras. 354-359.

<sup>3</sup> Emphasis added.

<sup>4</sup> Emphasis added.

<sup>5</sup> Emphasis added.

11. If, as the Complainants contend now, the EU Seal Regime did not provide for a ban subject to exceptions, but for three self-standing "requirements", it would have to be concluded that both Norway's and Canada's panel requests were manifestly incorrect and seriously deficient in that they failed to "present the problem clearly". In view of this, and in the event that the Panel were to decide that, as alleged by the Complainants, the EU Seal Regime cannot be characterized as a General Ban subject to three exceptions, the European Union hereby requests the Panel to find that Norway's and Canada's panels request do not meet the requirements of Article 6.2 of the DSU and reject all the claims submitted by them.

### **Question 2**

*(All parties) Please confirm the parties' clarification at the first substantive meeting that the EU Seal Regime should be treated as one single measure for the purposes of this dispute.*

12. The European Union confirms that the measure at issue before the Panel is the EU Seal Regime, which is composed of the Basic Regulation as well as the Implementing Regulation.<sup>6</sup> In this respect, the EU Seal Regime comprises a General Ban and three exceptions.
13. The European Union understands, however, that Canada and Norway challenge precise aspects of the EU Seal Regime and raise specific claims against those aspects. Should the Panel find any of the elements of the EU Seal Regime to be inconsistent with the covered agreements (e.g., either the General Ban, any of its exceptions or any combination thereof), the Panel's findings and recommendations should be addressed to that specific aspect of the measure at issue. In other words, the Panel should refrain from recommending the European Union to bring the EU Seal Regime as a whole into conformity with the covered agreements if its findings are limited only to certain identifiable aspects of the EU Seal Regime, as claimed by Canada and Norway.

### **Question 4**

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<sup>6</sup> See European Union's first written submission, para. 8.

*(All parties) Please clarify whether there is a mandatory sequence of analysis in this dispute which, if not followed, would amount to an error of law and/or affect the substance of the analysis itself. If not, what factors should be considered in determining the order of the Panel's analysis.*

14. In the European Union's view, there is no mandatory sequence of analysis in this dispute that the Panel is required to follow. The Panel may start its analysis by either the TBT Agreement or the GATT 1994 and that would not affect the interpretation of the provisions at issue.<sup>7</sup> The European Union, in any event, suggests that the Panel follows the same sequence as the European Union in its first written submission. That is, the Panel should start its analysis with the complainants' claims under the TBT Agreement,<sup>8</sup> followed by the analysis of the GATT 1994, leaving the analysis under the Agreement on Agriculture for the last.

#### **Question 6**

*(All parties) Should the Panel take into account the difference in the scope of claims between the complainants in deciding the overall order of its analysis?*

15. No. Although for practical reasons the Panel will draft one single report, strictly speaking it will contain two separate panel reports (in DS400 and DS401). Consequently, the Panel is free to organise its analysis regardless of the commonalities of the claims raised by the complainants.

#### **Question 7**

*(All parties) Please explain your views on the relationship between the TBT Agreement and the GATT 1994 in terms of the non-discrimination obligations and policy justifications addressed in both agreements. For example, can a measure found inconsistent with Article 2.1 and/or Article 2.2 of the TBT Agreement be justified under Article XX of the GATT 1994? Or, vice versa (i.e. can a measure found unjustifiable under Article XX of the GATT 1994 be found consistent with Article 2.1 and/or Article 2.2 of the TBT Agreement)?*

16. The European Union considers that the TBT Agreement and the GATT 1994 must be read together in a consistent manner. The TBT Agreement "further[s] the objectives of GATT 1994".<sup>9</sup> In this sense, the non-discrimination obligations and policy justifications addressed in both agreements should be interpreted

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<sup>7</sup> Panel Report, *EC – Sardines*, paras 7.14-7.19; and Appellate Body Report, *US – Shrimp*, para. 120.

<sup>8</sup> According to the Appellate Body, the provision from the agreement that "deals specifically, and in detail" with the measures at issue should be analysed first (Appellate Body Report, *EC – Bananas III*, para. 204).

harmoniously. In the European Union's view, an interpretation of Articles 2.1 and 2.2 of the TBT Agreement that would provide for a different outcome in terms of the consistency of the measure at issue with the GATT 1994 would be illogical.

17. With respect to the non-discrimination obligations, both Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994 have been read together by the Appellate Body when interpreting the terms "less favourable treatment".<sup>10</sup> The same should be concluded with respect to Article 2.1 of the TBT Agreement and Article I:1 of the GATT 1994.<sup>11</sup> The same legitimate regulatory distinctions should be capable of showing that there is no discrimination regardless of whether the measures are examined under Article 2.1 of the TBT Agreement or under Articles I:1 or III:4 of the GATT 1994; otherwise, a public policy deemed legitimate pursuant to Article 2.1 of the TBT Agreement would fail to save a measure under GATT 1994 unless such public policy falls within Article XX's limited list of exceptions. Indeed, if both the GATT 1994 and the TBT Agreement are intended to strike a balance between trade liberalisation and regulatory autonomy, then it makes little (if any) sense for technical regulations to enjoy a much broader scope of policy space than all other types of internal regulations. Further, it would make no sense whatsoever to conclude that Articles I:1 and III:4 of the GATT 1994 prohibit what is consistent under Article 2.1 of the TBT Agreement, as this would make Article 2.1 of the TBT Agreement and the balanced interpretation of that provision carefully developed by the Appellate Body utterly useless. Given that the GATT 1994 also applies to all technical regulations, complainants would have an incentive to bring claims only under the GATT 1994, thereby limiting the possibilities of justifying regulatory distinctions to those grounds contained in the closed list in Article XX. Indeed, this is precisely the situation in this dispute. Norway has carefully avoided to argue its claim under Article 2.1 of the TBT Agreement (even though it is in its Panel Request) because, apparently, it believes that it cannot show that the measure is inconsistent with that

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<sup>9</sup> TBT Agreement, second recital.

<sup>10</sup> Appellate Body Report, *US – Clove Cigarettes*, paras. 176 – 182. See also Appellate Body Report, *US – Tuna II (Mexico)*, paras. 214, 215, and 236-239; and Appellate Body Report, *US – COOL*, paras. 260 and 270.

<sup>11</sup> See European Union's first written submission, paras. 538 – 540.

provision, while claiming that it is inconsistent with Articles I:1 and III:4 of the GATT 1994.

18. Thus, the European Union considers that the contours of the basic non-discrimination obligations in the TBT Agreement and the GATT 1994 should be understood as similarly crafted: both recognise a regulatory space in case of alleged *de facto* discrimination claims, in the sense that both permit a regulation that may result in detrimental impact in so far as the regulatory distinction causing such an impact is legitimate and does not reflect discrimination.

In terms of the justifications provided by Article XX of the GATT 1994 and Article 2.2 of the TBT Agreement, the European Union also considers that they should be read harmoniously, thereby providing for the same consistent results.

## II. LEGAL CLAIMS

### **Question 8**

*(European Union) Setting aside the interests pursued under the exceptions of the measure, please explain whether the current measure addresses the "welfare" of seals hunted by the Inuit and indigenous communities and for the purpose of marine resource management as defined under the measure? If so, how.*

19. Access to the IC exception and the MRM exception is not subject to compliance with any explicit animal welfare requirement. Those two exceptions, nevertheless, take into account, among other considerations, that the conditions under which the hunts within their scope take place are very different from those prevailing in the commercial seal hunts and, in principle, less conducive to inhumane animal welfare outcomes.
20. Commercial seal hunting in Norway and Canada is a large-scale, highly organized, systematic, intensive and very competitive activity, which is concentrated within a very short period of time and is conducted at a frenetic pace, often under adverse weather conditions.<sup>12</sup>
21. In contrast, the hunts within the scope of the IC exception can be characterized as a dispersed, opportunistic and non-competitive activity.<sup>13</sup> Thus, the traditional

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<sup>12</sup> See EU's first written submission, paras. 122-151 and 178-180.

<sup>13</sup> COWI (2008) p. 44 (Exhibit JE 20).

Inuit seal hunt is a daily activity in every coastal settlement<sup>14</sup> which occurs all-year round.<sup>15</sup> It is generally a one-man activity conducted from small boats or by using sledge dogs.<sup>16</sup> These characteristics make it less likely that hunting is undertaken under adverse environmental conditions.<sup>17</sup> As a result, some of the factors which contribute to make Canada's and Norway's commercial hunts inherently inhumane are not present in this type of hunts.<sup>18</sup>

22. The hunting methods used by the Inuit are different from those used in Canada's and Norway's commercial hunts.<sup>19</sup> One of them, the so-called "trapping and netting" method, is problematic from a strict animal welfare perspective.<sup>20</sup> It is generally recognised, nevertheless, that the use of that method may be indispensable for the subsistence of the Inuit. Thus, the NAMMCO expert group has noted that:

[netting and trapping of seals] is an important and widely used method of subsistence hunting in areas where there are no other alternatives during certain periods of the year.<sup>21</sup>

23. Similarly, the Government of Greenland has observed that "from October to the end of March, netting is the prevailing method since it is impossible to use any other technique during the dark winter months."<sup>22</sup>
24. For the above reasons, making access to the IC exception conditional upon compliance with strict animal welfare requirements could have eviscerated that exception and undermined its purpose. The Complainants have not offered any indication of how animal welfare could be improved in the hunts within the scope

<sup>14</sup> See Government of Greenland, *Management and utilization of seals in Greenland*, at p. 11 and pp. 18-20 (Exhibit JE - 26).

<sup>15</sup> See Government of Greenland, *Management and utilization of seals in Greenland*, at p. 11 and pp. 18-20 (Exhibit JE - 26).

<sup>16</sup> Nunavut Department of Environment, Fisheries and Sealing Division, *Report on the Impacts of the European Union seal ban*, p.1 (Exhibit JE – 30); Government of Greenland, *Management and utilization of seals in Greenland*, p. 11 and pp. 18-20 (Exhibit JE - 26).

<sup>17</sup> COWI (2008), p. 51 (Exhibit JE - 20).

<sup>18</sup> See EU's first written submission, paras. 122-151 and 178-80.

<sup>19</sup> A description of those methods can be found in Government of Greenland, *Management and utilization of Seals in Greenland*, pp.18-20 (Exhibit JE - 26).

<sup>20</sup> EFSA Opinion, pp. 46-48 (Exhibit EU - 30).

<sup>21</sup> NAMMCO report, p. 17 (Exhibit JE - 24).

<sup>22</sup> Government of Greenland, *Management and utilization of Seals in Greenland*, p. 19 (Exhibit JE - 26).

- of the IC exception without at the same time endangering the subsistence of the Inuit and the preservation of their cultural identity.
25. Other countries which have banned trade in seal products on public moral grounds, such as Russia or Chinese Taipei, also exempt products resulting from traditional hunts by indigenous communities. Indeed, Canada itself exempts the Inuit from the animal welfare requirements provided in Canada's hunting regulations.<sup>23</sup> For example, Canada allows the Inuit to hunt seals by "netting" them.
26. As regards the MRM exception, it should be recalled that the products covered by that exception result from small scale hunts conducted exclusively for management purposes. Those hunts are often dispersed, occasional and non-competitive.<sup>24</sup> Thus, again, some of the factors which contribute to make Canada's and Norway's commercial hunts inherently inhumane are not present in this type of hunts.<sup>25</sup>
27. Moreover, for the reasons explained in the EU's first written submission, applying the General Ban to hunts falling within the MRM exception would have been counterproductive from the perspective of animal welfare.<sup>26</sup> The possibility to recover costs, but not to make a profit, provides a motivation for the hunter to recover the carcass and hence avoid "struck and loss". It further provides a motivation for clean headshots, rather than just shooting seals without regard to which part of the body is hit, or ensuring that the seal is dead.
28. It is also worth stressing that prohibiting the marketing of products from the hunts covered by the MRM exception would not have contributed to reduce the suffering of seals, because those hunts would take place in any event, as they are conducted exclusively for management purposes and not for commercial reasons.

### **Question 9**

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<sup>23</sup> Canada's first written submission, para. 88. See also MMR, sections 6.1(a), 6.2, 27 and 28(1) of Canada's MMR (Exhibit CDA – 21).

<sup>24</sup> See e.g. with regard to the Swedish hunt COWI (2008), pp. 78-86.

<sup>25</sup> See EU's first written submission, paras. 146-151.

<sup>26</sup> See EU's first written submission, paras. 42 and 315-316 and the legislative history cited in paras. 58 and 309-311.

(All parties) Explain whether "seal welfare" and "public moral concerns on seal welfare" can and/or should be differentiated as a policy objective within the meaning of Article 2.2 of the TBT Agreement and/or Article XX of the GATT 1994. If so, how. Would the achievement of the objective of protecting "animal welfare" address the "public moral concerns on animal welfare"? If not, why not.

29. The two objectives mentioned in the question are closely connected, but nonetheless different.
30. The 'seal welfare' objective focuses on the well-being of seals, including ways in which it may be affected by human actions or environmental factors. On the other hand, the public moral concern over seal welfare focuses on the rightness or wrongness of human actions which affect seal welfare.
31. A measure addressing exclusively seal welfare would only look at how the sealing methods used in a particular hunt affect the well-being of the seals, i.e. how humane or inhumane the methods are in practice
32. On the other hand, a measure addressing the moral concerns over seal welfare (like the EU Seal Regime) would also look at the rightness or wrongness of the various human actions affecting seals, including not only the act of killing seals as such, but also other forms of participation in the killing of seals. Furthermore, in considering the rightness or wrongness of those actions, the author of such measure would balance the harm inflicted upon the seals and other pertinent moral considerations, including in particular the benefits to humans resulting from each type of hunt.
33. More specifically, the public moral concerns on seal welfare fall within two related, but distinguishable categories. First, EU citizens are morally concerned, as an absolute measure of right and wrong, about the incidence of inhumane killing of seals as such. They *care* deeply about what is happening to the seals irrespective of their own responsibility in and connection to the event. This is akin to the exposure of someone witnessing the commission of a crime. Second, they are morally concerned about their own, and the wider EU public's, agency in the context of violations of their standards of right and wrong, *i.e.*, their individual and collective participation as consumers in, and exposure to, the economic activity which sustains the market for commercially-hunted seal products. This is akin to



- the moral exposure of someone who “aids and abets” in the perpetration of a crime.
34. A measure which addressed satisfactorily all the seal welfare concerns would, at the same time, address all the public moral concerns relating to seal welfare. However, the inverse is not true. A measure which failed to address the seal welfare concerns would fail to address the first type of moral concerns described above. But it could still address successfully the second type of public moral concerns if, as a result, the community which holds those concerns is shielded from (1) participating in any way—direct, economic, or otherwise—in the type of seal hunt offending the public morality and (2) being confronted with the by-products of such morally offensive seal hunt.
35. The General Ban makes a material, but necessarily partial, contribution to addressing the animal welfare concerns by reducing global demand for seal products resulting from commercial hunts, with the consequence that less seals are killed in an inhumane way. In order to address in full the animal welfare concerns it would be necessary to put an end to the commercial seal hunts, given that humane killing methods cannot be applied on a consistent basis. This solution, however, is beyond the powers of the European Union.
36. In addition to making a material, albeit partial, contribution to the welfare of seals and to assuaging the moral concerns relating to the inhumane killing of seals as such (the concerns of the first type described above), the General Ban addresses successfully the moral concerns of the second type, by ensuring that the EU population does not render itself accomplice to the inhumane killing of seals in the commercial hunts and is not confronted with the products resulting from such immoral killing.

### **Question 10**

*(European Union) Please describe the precise objective that the European Union claims the Regime aims to achieve. For example, the European Union uses the following expressions in the section on "the identification of the policy objective of the measure" of its first written submission, which range from a more general description to a very specific level of concern:*

- *"the moral concerns of the EU public with regard to the presence on the EU*

market of seal products. Those concerns arise from the fact that seal products may have been obtained from animals killed in a way that causes them excessive pain, distress, fear or other forms of suffering. Those concerns, nevertheless, vary according to the purpose of each type of hunt." (para. 33)

- "the EU public regards seal products from commercial hunts as morally objectionable and is repelled by their availability in the EU market" (para. 36)
- "the EU public does not wish to be accomplice to the killing of seals in a manner which causes them excessive suffering" (para. 36)
- "the degree of suffering resulting from the risks inherent in the unique conditions in which seal hunting takes place, and the ensuing difficulties of enforcement, is excessive and morally unacceptable" (para. 37)
- "In assessing the moral implications of seal hunting it is essential to take into account, together with the welfare of the seals, the purpose of each type of hunt" (para. 38)
- "If the EC Seals Regime allows the placing on the market of seal products under those two exceptions it is because products qualifying for those exceptions do not raise the same moral concerns as products from commercial seal hunts" (para. 43)
- "based on public moral concerns relating to animal welfare" (para. 46)
- "public moral concerns relating to the welfare of seals" (para. 53)

*In defining the precise objective of the EU Seal Regime, please briefly refer to specific relevant parts of the regulation, legislative history, and other relevant evidence.*

37. Previous panels have interpreted the notion of public morals as "standards of right and wrong conduct maintained by or on behalf of a community or a nation".<sup>27</sup> The EU Seal Regime seeks to uphold a standard of conduct according to which it is morally wrong for humans to inflict suffering upon animals without sufficient justification. This basic rule reflects a long-established tradition of moral thought, which in its modern form is usually designated as "animal welfarism".<sup>28</sup> This moral doctrine on the relationship between humans and animals is the most widely held in modern societies.<sup>29</sup> It has led to the adoption of comprehensive legislation on animal welfare by the European Union and its Member States, as well as by

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<sup>27</sup> Panel report, *US – Gambling*, para. 6.465; Panel report, *China – Publications and Audiovisual Products*, para. 7.759

<sup>28</sup> In contrast with animal welfarism, the more recent "animal rights" school of thought holds that any killing and use of animal by humans is unacceptable. This moral doctrine remains a minority view. See the *amicus brief* submitted by Prof. R. Howse *et al.*, paras. 139-143.

<sup>29</sup> See the poll evidence discussed in the Report of the Royal Commission on Seals and Sealing (1986), Volume I, Chapter 11, "Public Opinion on Sealing", pp. 158-159 (Exhibit EU - 48).

- many other countries, and guides the work of international organizations such as the Council of Europe and the OIE.<sup>30</sup>
38. The moral disapproval for the breach of the above described rule of morality falls primarily upon the person who inflicts the suffering upon an animal. But the moral reproach also extends to those who render themselves accomplices to such behaviour by promoting, profiting from or tolerating the behaviour that inflicts the suffering. Ultimately, the moral degradation extends to the entire community where the suffering is inflicted or where the acts of complicity are committed.<sup>31</sup>
39. The definition of precise legal requirements for giving effect in each specific situation to the above described basic rule of morality requires balancing the welfare of animals and other pertinent interests. The “level of protection” which results from this balancing exercise for each species may vary according to the moral assessment made by the legislator in view of the various interests present in each situation.
40. The EU Seal Regime addresses the concerns of the EU population with regard to the way in which seals are killed in commercial hunts.<sup>32</sup> Those concerns stem from the basic rule of morality described above.<sup>33</sup> In response to those concerns, the EU authorities examined carefully the scientific evidence available and concluded that in commercial hunts seals cannot be killed humanely on a consistent basis.<sup>34</sup> On this premise, the EU Seal Regime provides for a General Ban on the placing on the

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<sup>30</sup> See Section 2.3 of the EU's first written submission.

<sup>31</sup> The website of Norway's Ministry of Agriculture and Food emphasises the notion of societal responsibility by paraphrasing a well-known Ghandian maxim: "the way we treat our animals reflects the ethical standard of the society". See EU's first written submission, para. 68.

<sup>32</sup> These concerns are cited expressly in recitals 4 and 5 of the Basic Regulation. They are confirmed by the opinion polls cited by the European Union in Section 2.6 of the EU's first written submission.

<sup>33</sup> The legislative history shows that the EU authorities regarded the concerns of the public as being moral in nature. For example, the explanatory memorandum accompanying the EU Commission proposal notes that those concerns had been expressed by the public "out of ethical concerns". Similarly, according to the EU Commission, the bans implemented by some Member States "were intended, according to their authors, to stop trade in seal products mainly on the basis of ethical reasons related to animal welfare". The EU Commission went on to note that "having regard to the public's growing awareness and sensitivity to ethical questions in how seal products are obtained", it was likely that other bans could be introduced. The EU Commission then discussed the possibility to address those "ethical concerns" by enacting legislation at the EU level. The EU Commission proposal also discusses the compatibility of the proposal with Article XX(a) of the GATT. See EU Commission Proposal, Explanatory memorandum, pp. 2-5 and 8 (Exhibit EU - 9).

market of seal products. The General Ban addresses the concerns of the EU population in two different ways.<sup>35</sup>

41. *First*, by prohibiting the marketing of seal products on the EU market, the General Ban seeks to reduce global demand for seal products and, consequently, the number of seals which are not killed in a humane way. This improves the welfare of seals and, at the same time, addresses partially the first type of moral concerns described in the reply to Question 9.<sup>36</sup>
42. *Second*, by prohibiting the marketing of seals within the EU market, the EU Seal Regime seeks to address the second type of moral concerns described in the reply to Question 9, i.e. the concerns with regard to certain acts performed within the EU territory which are morally reprehensible in themselves: selling seal products, because it involves an act of commercial exploitation of an immoral act (the killing of seals in an inhumane way); and purchasing seal products, because it promotes such immoral killings. Furthermore, by prohibiting the marketing of seal products in the EU market, the EU Seal Regime also addresses the broader concern of the EU population not to render itself accomplice collectively to an immoral act by tolerating the marketing of seal products within the European Union, while shielding the EU public from being confronted with the products resulting from such immoral act.
43. In addressing the moral concerns of the EU population, the EU legislators balanced the welfare of seals and other interests in the manner described above. This balancing is reflected in the IC exception and the MRM exception.
44. The IC exception reflects the EU legislators' assessment that the subsistence of the Inuit and other indigenous communities and the preservation of their cultural identity provide benefits to humans that, from a moral point of view, outweigh the

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<sup>34</sup> This conclusion is mentioned e.g. in recital 11 of the Basic Regulation and in the legislative history documents mentioned at paras. 54-56 of the EU's first written submission.

<sup>35</sup> That the objective of the General Ban is to address public concerns with regard to the welfare of seals is made clear by recitals 4, 5, 9 and 10 of the Basic Regulation. *See* also the legislative history documents cited in paras. 54-56 of the EU's first written submission.

<sup>36</sup> This specific objective is mentioned expressly in recital 10 of the Basic Regulation.

- risk of suffering inflicted upon seals as a result of the hunts conducted by those communities.<sup>37</sup>
45. Similarly, the MRM exception reflects the EU legislators' assessment that small-scale hunts conducted exclusively for management purposes do not raise the same moral concerns as commercial hunts because the benefits to humans and other animals which are part of the same ecosystem outweigh the risk of suffering being inflicted upon the relatively small number of seals concerned. Moreover, the prohibition of the marketing of products from the hunts covered by the MRM exception would not contribute to reduce the suffering of seals, because those hunts would take place in any event, as they are conducted exclusively for management purposes and not for commercial reasons. On the contrary, prohibiting the marketing of the products from those hunts could be counterproductive from the point of view of animal welfare.<sup>38</sup>
46. Having regard to the above explanations, the precise objectives pursued by the EU Seal Regime may be summed up by saying that 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.
47. The second objective can be regarded as being simultaneously a legitimate objective on its own and one of the instruments to achieve the first, broader and overarching, objective.
48. The European Union does not regard the IC exception and the MRM exception as pursuing independent objectives from those sought by the General Ban. Rather,

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<sup>37</sup> The justification for the IC exception is set out in recital 14 of Basic Regulation.

<sup>38</sup> See EU's first written submission, para. 42. The grounds for the MRM exception are not specified in the recitals of the Basic Regulation, presumably because the legislators perceived that exceptions as being of relatively minor importance. Nevertheless, they may be gleaned from the legislative history. See EU's first written submission, paras. 58 and 309-311.

those exceptions must be seen as the outcome of the balancing of the welfare of seals and other interests which is part of the basic standard of morality that the EU Seal Regime as a whole seeks to uphold. In other words, the two exceptions exist because the products falling within the scope of those exceptions do not raise the same moral concerns as the products that are subject to the General Ban.

### **Question 11**

*(All parties) In assessing the question of whether the morals or interests protected through the exceptions under the measure (i.e. indigenous communities and marine resource management) should be considered as separate objectives of the EU Seal Regime, is it relevant that the exceptions are built into and thus form part of the measure itself (e.g. Article 3 of the Basic Regulation and the Implementing Regulation), as opposed to something that emerged in the process of applying the measure?*

49. The relationship between the objective pursued by the EU Seal Regime and the grounds for the IC exception and the MRM exception has been described in detail in the reply to Question 10. Given that relationship, the European Union believes that it would be incorrect to describe the IC exception and the MRM exception as pursuing each an objective which is "separate" from the overarching objective of the EU Seal Regime.
50. At any rate, the measures applied by Members often have "separate" or even competing objectives.<sup>39</sup> This can be relevant in measuring the extent of the contribution of the measure to each of those objectives. But it does not render any of those objectives illegitimate *a priori*. Nor does it make the measure incapable of justification under Article XX of the GATT 1994 or inconsistent with Articles 2.1 or 2.2 of the TBT Agreement.

### **Question 12**

*The last sentence of paragraph 2 of Article 3 of the Basic Regulation reads:*

*The application of this paragraph shall not undermine the achievement of the objective of this Regulation.*

*a. (European Union) Explain the meaning of this sentence, including its reference to the exceptions listed in paragraph 2 (i.e. MRM and Travellers exceptions), but not to the Inuit community exception addressed in paragraph 1*

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<sup>39</sup> Cfr. Appellate Body Report, *EC – Hormones*, para. 245.

*b. (Canada and Norway) This sentence refers to the "achievement of the objective of this Regulation" and uses the term "objective" in singular. Should it be given any meaning in determining the objective(s) of the EU Seal Regime?*

51. The last sentence of Article 3.2 of the Basic Regulation reflects the concern of the EU legislators to avoid that the Travellers exception and, especially, the MRM exception could become, through an expansive interpretation, a loophole allowing the circumvention of the General Ban.

52. The same concern is reflected in the last sentence of both Article 3.2 a) and 3.2 b), which provide, respectively, that

The nature and quantity of such goods shall not be such as to indicate that they are being imported for commercial reasons.

The nature and quantity of the seal products shall not be such as to indicate that they are being placed on the market for commercial reasons.

53. The last sentence of Article 3.2 does not refer to the IC exception because, given the conditions for the application of that exception, the EU legislators had no reason to fear that it could be abused in order to circumvent the General Ban on products from commercial hunts. It should be noted that, by the same token, the IC exception is not subject to a provision similar to those provided in the last sentence of both Article 3.2 a) and Article 3.2 b).

54. At the first meeting with the Panel, Norway argued, on the basis of recital 21 of the Basic Regulation, that the "objective" referred to in the last sentence of Article 3.2 should be understood as the "elimination of obstacles to the functioning of the internal market by harmonising national bans concerning the trade in seal products at Community level". However, as made clear by recital 10, the objective of the Basic Regulation is not harmonisation as such, but instead "to provide for harmonised rules while taking into account animal welfare considerations". Moreover, it is difficult to see how the application of the Travellers exception and the MRM exception could undermine the objective of harmonisation cited by Norway. In addition, if the objective mentioned in the last sentence of Article 3.2 was the mere harmonisation of national bans, there would have been no reason for not making that provision applicable also with regard to the IC exception.

### **Question 13**

*(All parties) The European Union submits in paragraphs 32 and 47 of its first written submission:*

*The immediate objective of the EU Seal Regime is to harmonise the requirements applied by the EU Member States with regard to the marketing of seal products, so as to prevent obstacles to intra-EU trade in those or other products. ...*

*The immediate objective of the Basic Regulation is to facilitate the functioning of the EU internal market by preventing the emergence of unnecessary trade barriers resulting from the disparity of rules among the EU Member States. ...*

*In arguing that the objective of harmonizing the European Union internal market is not legitimate under Article 2.2 of the TBT Agreement, Norway submits in paragraph 660 of its first written submission,*

*There is nothing in the covered agreements that indicate that the objective of harmonizing an internal market, in itself, warrants the imposition of a trade restriction that is not necessary for the formation of a customs union. Trade restrictions cannot be imposed simply because of regulatory or legislative convenience in deciding what common rules to adopt in a country or a customs union such as the European Union. A trade restriction imposed for such purposes does not pursue a legitimate objective in the sense of Article 2.2 of the TBT Agreement. Rather, there must be some broader policy goal that justifies the adoption of a restriction, such as animal welfare. ...*

*Can the Panel consider that both the European Union's and Norway's statements, cited here, support the view that the so-called "immediate" objective of harmonizing the internal regulations should be distinguished from the policy objectives of the type covered by Article 2.2 of the TBT Agreement? In other words, should the Panel not consider the "harmonization of the EU internal market" as a policy objective within the meaning of Article 2.2 of the TBT Agreement?*

55. The harmonization of regulatory approaches within the European Union or within a federal state could conceivably be a legitimate objective for the purposes of Article 2.2 of the TBT Agreement.<sup>40</sup> However, in the case at hand, 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. Rather, those elements seek to achieve the objectives described in the reply to Question 10.

### **Question 14**

*(All parties) Is scientific evidence relevant to the Panel's assessment of the objective(s) that the European Union aims to achieve through the EU Seal Regime? If not, is it*

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<sup>40</sup> Cfr. Appellate Body Report, *EC – Hormones*, para. 245.



*relevant to determining the legitimacy of such an objective; the degree of the measure's contribution to the objective; and/or the legitimacy of a regulatory distinction?*

56. The European Union considers that scientific evidence is not relevant in order to identify the objective sought by the EU Seal Regime. Instead, the objective of the EU Seal Regime should be ascertained by considering the text of the Basic Regulation, its design and structure, its preamble and the legislative history, as the European Union has done in Section 2.2 of its first written submission.
57. Nor is scientific evidence relevant in order to determine whether the policy objective of the EU Seal Regime is "legitimate". According to the Appellate Body, the terms "legitimate objective" refer to "an aim that is lawful, justifiable or proper."<sup>41</sup> This is a normative issue, rather than a scientific matter. The determination of whether the objective of the EU Seal Regime is "legitimate" should rather be made on the basis of the type of evidence examined by the European Union in Section 2.3 of its first written submission.
58. Whereas in selecting a specific level of protection of the policy objective it may be relevant, depending on the type of objective, to take into account relevant scientific evidence, as the EU legislators did in this case, the choice of a certain level of protection of public morals is not a scientific judgement. It is a policy choice.
59. On the other hand, the examination of scientific evidence may be relevant, together with other factual considerations, in order to establish whether the trade restrictions resulting from the EU Seal Regime are "necessary" in order to achieve its policy objective at the selected level of protection and, more particularly, in order to determine whether less restrictive alternative measures could be equally effective.
60. The EU Seal Regime rests on the premise, based on scientific evidence, that in the context of commercial hunts seals cannot be killed humanely on a consistent basis. Hence the choice of the EU legislators to impose a ban on the marketing of seal products rather than making the marketing of seal products conditional upon

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<sup>41</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 313; Appellate Body Report, *US – COOL*, para. 370.

compliance with certain animal welfare requirements. Whether or not that factual premise is correct is a matter to be ascertained on the basis of scientific evidence. Indeed, as the European Union noted in its Oral Statement, the crucial question before the Panel in this dispute is a relatively narrow one, namely whether the EU's view that a genuinely humane killing method cannot be applied effectively and consistently in the circumstances of Canada's and Norway's commercial seal hunts finds adequate support from qualified scientific evidence. It bears emphasizing, once again, that when addressing this question, the Panel should not choose one among the various expert opinions available or substitute its own scientific judgement. Rather, the Panel's task is limited to examine whether, in so far as the policy choices reflected in the EU Seal Regime purport to be based on science, such choices find adequate support from qualified scientific opinions, irrespective of whether they represent the majority view.<sup>42</sup>

#### **Question 16**

*(All parties) Should "the protection of animal life or health" included in the non-exhaustive list of legitimate objectives in Article 2.2 be understood as encompassing the "public moral concerns on the welfare of seals"?*

61. No. The European Union agrees that "the protection of animal life or health" encompasses the protection of animal welfare. However, for the reasons explained in its replies to Questions 9 and 10, the European Union believes that animal welfare and public moral concerns with regard to animal welfare are closely connected, but different objectives.

#### **Question 18**

*(All parties) Are moral concerns on seal welfare different from concerns on seal welfare? If so, what kind of evidence is necessary to establish moral concerns on seal welfare?*

62. Yes, as explained in the reply to Question 9, moral concerns are concerns about the extent to which an action or behaviour is right or wrong. Specifically, the moral concerns at issue in this case are about the extent to which certain actions affecting the well-being of seals are right or wrong.

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<sup>42</sup> Appellate Body Report, *EC – Asbestos*, para. 178.

63. Mere concerns about seal welfare do not include a value judgment regarding the rightness or wrongness of any actions taken affecting the well-being of seals. Instead, they focus on the extent to which the actions affect the seals' well-being.
64. For example, conducting an experiment on a live seal for medical research purposes in which the seal was subjected to intense suffering would raise very serious concerns about seal welfare because the suffering negatively affected the seal's well-being, but may not raise any moral concerns because it is morally acceptable to the community to cause suffering to seals in order to achieve medical breakthroughs through experimentation given the potential benefits to society of the results.
65. As regards the second part of the question, see below the reply to Question 48.

### **Question 19**

*(European Union) The Appellate Body states in paragraph 72 of EC – Asbestos:*

*There is, however, more to the measure than this prohibition on asbestos fibres. It is not contested that asbestos fibres have no known use in their raw mineral form. Thus, the regulation of asbestos can only be achieved through the regulation of products that contain asbestos fibres. This, too, is addressed by the Decree before us. An integral and essential aspect of the measure is the regulation of "products containing asbestos fibres", which are also prohibited by ... the Decree. ...*

*In light of the Appellate Body's analysis in this regard, please explain whether the EU Seal Regime as a whole (including the exceptions) can be distinguished from that in EC – Asbestos.*

66. To respond this question, it is useful to look at how the Appellate Body analysed the measure in *EC-Asbestos*. The Appellate Body firstly noted<sup>43</sup> that the proper legal character of the measure at issue cannot be determined unless the measure is examined as a whole. It then went on to examine the prohibition on asbestos fibres<sup>44</sup>, followed by the prohibition on products containing asbestos fibres<sup>45</sup> and finally the exceptions to the prohibition<sup>46</sup>. It concluded that the measure at issue was a technical regulation within the meaning of the TBT Agreement not based on

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<sup>43</sup> Appellate Body report, para. 64.

<sup>44</sup> Ibid., para. 71.

<sup>45</sup> Ibid., para. 72.

<sup>46</sup> Ibid., para. 73.

- one of its elements, but based on all prohibitive and permissive elements of the measure and the manner in which they interrelate.
67. It is indeed in the exceptions - which in turn define the scope of the prohibitions - that the EU Seals regime differs fundamentally from the measure at issue in *EC-Asbestos*. In *EC – Asbestos* the exceptions permitted certain products which were identified according to their intrinsic characteristics. Thus, Article 2(1) of the Decree exempted, under certain additional conditions, from the ban "certain existing materials, products or devices containing *chrysotile* fibre" whereas the ban in Article 1 concerned "*all* varieties of asbestos fibres". The exceptions, thus, only concern products with a particular composition, i.e. those containing one of several types of asbestos fibres. Furthermore, Article 2(2) of the Decree provided that the scope of this exception "shall cover only the material, products or devices falling within the categories shown in an exhaustive list" decreed by the relevant French authorities.<sup>47</sup> The Appellate Body, therefore, rightly found in *EC – Asbestos* that "[t]he exceptions apply to a *narrowly defined group of products with particular 'characteristics'*".<sup>48</sup> Since the exceptions of the Decree themselves referred to particular product characteristics, the Appellate Body in *EC – Asbestos* had no reason to question that the measure as an integrated whole, i.e. the prohibition and its narrowly defined exceptions taken together, lay down "product characteristics" within the meaning of Annex 1.1 of the TBT Agreement.
68. What is decisive for the characterization of the EU seals regime is that – unlike the measure at issue in *EC-Asbestos* – none of the three exceptions it contains lays down product characteristics within the meaning of Annex 1.1 of the TBT Agreement:
69. First, the IC exception allows the placing on the market of seal products "where the seal products result from hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence"<sup>49</sup>. This exception

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<sup>47</sup> Articles 1 and 2 of the Decree are reproduced in Appellate Body Report, *EC – Asbestos*, para. 2.

<sup>48</sup> Appellate Body Report, *EC – Asbestos*, para. 74 (emphasis added).

<sup>49</sup> Article 3(1) of the Basic Regulation. Article 3(1) of the Implementing Regulation further sets out that the hunts must be conducted by "communities which have a tradition of seal hunting in the community and in the geographical region", that the products of the hunt must be "at least partly used,

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- concerns the identity of the hunters, the traditions of their communities and the purpose of the hunt, none of which can be considered as an intrinsic or related features of the products, such as their composition or presentation.
70. Second, the MRM exception allows the placing on the market of seal products "where the seal products result from by-products of hunting that is regulated by national law and conducted for the sole purpose of the sustainable management of marine resources" under the condition that it is "on a non-profit basis" and "[t]he nature and quantity of the seal products shall not be such as to indicate that they are being placed on the market for commercial reasons".<sup>50</sup> This exception concerns the size, intensity and purpose of the hunt and the marketing conditions (i.e. non-profit and non-systematic) of the products. Similarly to the IC exception, these conditions do not set out any intrinsic or related features of the products.
71. Finally, the travellers exception allows the importation of seal products "where it is of an occasional nature and consists exclusively of goods for the personal use of travellers or their families" provided that "[t]he nature and quantity of such goods shall not be such as to indicate that they are being imported for commercial reasons".<sup>51</sup> Here, the exception concerns the use of the products and the circumstances of their importation, but none of their intrinsic or related features.
72. Thus, if the prohibition contained in the EU seals regime is examined in the light of these three exceptions, the EU seals regime cannot be reduced to the simple negative intrinsic product characteristic that products may not contain seal. Whether products may contain seal rather depends on a set of conditions *none* of which relate to intrinsic or related product characteristics. The EU seals regime as

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consumed or processed within the communities according to their traditions" and that the hunts must "contribute to the subsistence of the community".

<sup>50</sup> Article 3(2)(b) of the Basic Regulation. Article 5(1) of the Implementing Regulation further provides that the seal products must result from hunts "conducted under a national or regional natural resources management plan which uses scientific population models of marine resources and applies the ecosystem-based approach", and which "do not exceed the total allowable catch quota established in accordance with [such] plan" and "the by-products of which are placed on the market in a non-systematic way on a non-profit basis".

<sup>51</sup> Article 3(2)(a) of the Basic Regulation. Article 4 of the Implementing Regulation further specifies that the seals products must be "either worn by the travellers, or carried in their personal luggage", "contained in the personal property of a natural person transferring his normal place of residence from a third country to the Union" or "acquired on site in a third country by travellers and imported by those travellers at a later date, provided that, upon arrival in the Union territory, those travellers present to the customs authorities of the Member State concerned [certain] documents".

an integrated whole, therefore, does not lay down "product characteristics" within the meaning of Annex 1.1 of the TBT Agreement.

### **Question 20**

*(All parties) Please explain how the nature of certain exceptions to a general rule is relevant to the Panel's analysis of whether the measure as a whole (i.e. both ban and exceptions) is a technical regulation within the meaning of Article 1.1 of the TBT Agreement.*

73. As explained in response to Panel's Question 19, when the general rule is a ban, the exceptions are part of what defines the scope of the ban. Their exact content, nature and purpose therefore critically inform the proper legal character of the measure as a whole<sup>52</sup>.
74. This is particularly important in the context of this dispute since most claims of the complainants under the TBT Agreement, i.e. those under Articles 2.1, 5.1.2 and 5.2.1, actually focus on the exceptions.
75. In practical terms, in the context of the EU seals regime, whether or not a seal product can be placed on the EU market will depend on compliance with a series of conditions that cannot be considered as product characteristics within the meaning of Annex 1.1 of the TBT Agreement, as explained in greater detail in response to Question 19. These conditions - which are set out in the exceptions - and not the issue of whether or not a product contains seal are dispositive for whether or not the product will be permitted to be put on the EU market under the EU seal regime.

### **Question 21**

*(All parties) Does the (i) identity of a producer and/or (ii) purpose of production fall within "process and production methods" within the meaning of Annex 1.1 of the TBT Agreement?*

76. There may be circumstances where *who* produces a product may be a surrogate for characteristics or related process and production methods (for instance a producer who has a particular certification, or competences, to achieve particular characteristics). In the view of the European Union, to include the *purpose of*

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<sup>52</sup> Appellate Body report, *EC-Asbestos*, para. 64.

*production* and hence regulations that are premised on permissible or impermissible purposes of a given productive activity would, however, improperly stretch the ordinary limit of the concept of product characteristics and related process and production methods.

**Table 1**

EU Seal Regime	Domestic Seal Products	Norway's & Canada's Seal Products	Other Foreign Seal Products (MFN)
Not conforming	A	B	C
Conforming	D	E	F

**Question 22**

*(All parties) Do the parties agree that in the present case, the 'universe' of products covered by the EU Seal Regime can be illustrated by the six possibilities represented in the table above? If not, explain why and what product possibilities are covered by the EU Seal Regime.*

77. For the purpose of the likeness analysis, the European Union considers that the universe of products covered by the EU Seal Regime can be illustrated by reference to the two possibilities mentioned above (conforming and non-conforming products).
78. It would also appear that the further split on the basis of origin accurately represents the various possibilities of groups of products covered by the EU Seal Regime in the particular context of the claims raised by Canada and Norway. In other words, the EU Seal Regime does not distinguish between domestic and/or other origins as it is drafted in an origin-neutral manner. Thus, the EU Seal Regime does not distinguish between domestic seal products, Canada's and Norway's seal products and other foreign seal products, in determining which products conform or do not conform in the sense that they are permitted or not permitted to be placed on the territory of the European Union. Such distinctions are drawn by reference to the purpose of the hunts from which seal products are derived from.
79. The European Union considers that the following table represents the universe of products more accurately in the present dispute.

EU Seal Regime	Domestic Seal Products	Norway's & Canada's Seal Products	Other Foreign Seal Products (MFN)
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Not conforming because commercial purpose of hunt	A	B	C
Conforming because subsistence hunt conducted by indigenous communities	D	E	F
Conforming because marine resources management hunt	G	H	I
Conforming because traveller exemption	J	K	L

### **Question 23**

*(All parties) Based on Table 1 and specific cells comprising the table, please identify the groups of products to be compared for the purpose of the Panel's analysis of the complainants' claims under Articles I:1 and III:4 the GATT 1994. Should different groups of products be compared for each element of relevant provisions, such as 'like product' and 'less favourable treatment'?*

80. With respect to the complaints' claim under Article I:1 of the GATT 1994, the European Union considers that the relevant groups of products to be examined are Norway's and Canada's seal products (B+E) and Other Foreign seal products (C+F). In order to determine whether the EU Seal Regime provides for "less favourable treatment" the treatment granted to products in B should be compared with the treatment of products in C (as the group of non-conforming products and the group of non-conforming like imported products). Likewise, the treatment granted to products in E (or more precisely E, H and K) should be compared with the treatment of products in F (or more precisely F, I and L) (as the group of conforming products and the group of conforming like imported products).<sup>53</sup>
81. With respect to the complainants' claims under Article III:4 of the GATT 1994, the European Union considers that the relevant groups of products to be examined are Norway's and Canada's seal products (B+E) and Domestic seal products (A+D). In order to determine whether the EU Seal Regime provides for "less favourable treatment", B should be compared with A (as the group of non-conforming imported products and the group of non-conforming like domestic products) and

<sup>53</sup> See Appellate Body Report, *EC – Asbestos*, para. 100 ("[A] Member may draw distinctions between products which have been found to be "like", without, for this reason alone, according to the group of



the treatment granted to E (or more precisely E, H and K) should be compared with D (D, G and H in the table provided by the European Union) (as the group of conforming imported products and the group of conforming like domestic products).<sup>54</sup>

82. That being said, the European Union observes that in order to determine whether there is a violation of Articles I:1 or III:4 of the GATT 1994, the Panel has to examine whether there is discrimination in the treatment granted to the group of imported products when compared to the group of like domestic/other origin products. This entails comparing the aggregate competitive opportunities afforded, on the one hand, to imported seal products that are derived from hunts conducted for commercial, subsistence and marine resource management purposes and, on the other hand, to domestic/other origin like seal products that are the result of these three kinds of hunts. This further requires an analysis of the various *categories* of the products at issue, i.e. by comparing imported seal products and domestic/other origin like seal products derived from seal hunts for commercial purposes, imported seal products and domestic/other origin like seal products derived from seal hunts for subsistence purposes, and imported seal products and domestic/other origin like seal products derived from seal hunts for managing marine resources purposes. When making a category-to-category comparison within the group of products, it should be concluded that there is no alteration of the aggregate competitive opportunities in favour of domestic/other origins group of products. Put in simple terms, such approach shows that there is no discrimination contrary to Articles I:1 and III:4 of the GATT 1994 since each category in the same situation (by reference to the purpose of the hunt) is treated equally and have identical access to (or prohibition to access) the EU market.

#### **Question 24**

*(Canada and European Union) Does your response to Question 23 also apply to Canada's claim under Article 2.1 of the TBT Agreement?*

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<sup>54</sup> "like" imported products "less favourable treatment" than that accorded to the group of "like" domestic products").  
See Appellate Body Report, *EC – Asbestos*, para. 100 ("[A] Member may draw distinctions between products which have been found to be "like", without, for this reason alone, according to the group of "like" imported products "less favourable treatment" than that accorded to the group of "like" domestic products").

83. Yes. The European Union considers that the analysis under Article 2.1 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994 in cases concerning measures indistinctly applicable (i.e., origin-neutral on their face) should be the same and should lead to the same WTO consistent or WTO inconsistent result.

**Table 2**

EU Seal Regime	Domestic Seal Products	Norway's & Canada's Seal Products	Other Foreign Seal Products
<b>Not conforming</b>	A	B	C
<b>Conforming (IC exception)</b>	D	E	F (e.g. Greenland)
<b>Conforming (MRM exception)</b>	G	H	I

**Question 25**

*(European Union) Please clarify whether the products falling within categories G, B and F in Table 2 are "like" each other.*

84. The European Union considers that seal products falling under G, B and F are "like" each other.
85. However, for the purpose of determining whether there is discrimination in the context of Article 2.1 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994, comparing those categories would imply drawing a diagonal line that would ignore the regulatory distinction among those categories and would skew the analysis towards finding discrimination.<sup>55</sup> Indeed, the non-discrimination obligations under the GATT 1994 and the TBT Agreement do not require that each and every imported product be treated identically to each and every domestic/other origin like product.<sup>56</sup>

**Question 26**

*(European Union) Please explain your statement in paragraph 552 of your first written submission that the products falling within these categories are "not in comparable situations" and may thus be treated differently. How is the EU's reference to "not in a*

<sup>55</sup> See European Union's first written submission, paras. 251 and 292.

<sup>56</sup> See Appellate Body Report, *EC – Asbestos*, para. 100 ("[A] Member may draw distinctions between products which have been found to be "like", without, for this reason alone, according to the group of "like" imported products "less favourable treatment" than that accorded to the group of "like" domestic products"); and Appellate Body Report, *US – Clove Cigarettes*, para. 193 ("...the national treatment obligation of Article 2.1 does not require Members to accord no less favourable treatment to each and every imported product as compared to each and every domestic like product. Article 2.1 does not preclude any regulatory distinctions between products that are found to be like, as long as treatment accorded to the group of imported products is no less favourable than that accorded to the group of like domestic products").

*comparable situation" relevant to assessing whether the measure is creating a detrimental impact on imported products?*

86. Paragraph 552 of the European Union's first written submission states, in rebutting Canada's arguments under Article I:1 of the GATT 1994, that seal products derived from non-Inuit commercial hunts and seal products derived from Inuit hunts are not in a comparable situation and, thus, the different situation granted by the EU Seal Regime to those products cannot be found to be discriminatory. In other words, seal products derived from hunts for commercial purposes are in a different situation (and thus are not comparable) to seal products derived from hunts for subsistence purposes. Comparing them (in the diagonal manner as explained in Question 25 above) would skew the analysis towards finding discrimination while disregarding the regulatory distinction that makes them non-comparable.
87. As mentioned in paragraph 296 of the European Union's first written submission, by definition, discrimination arises when two situations that are similar are treated differently. In contrast, when two situations are different, there is no discrimination if they are treated in a different manner. The statement in paragraph 552 reflects this understanding in the sense that seal products derived from commercial hunts are in a different situation than seal products derived from hunts under the IC exception. The EU Seal Regime regulates and treats them differently by prohibiting the placing on the market of the former whilst permitting the placing on the market of the latter.
88. The European Union considers that a logical approach to determine whether the treatment of the group of imported products is less favourable than that of the group of domestic/other origin like products would be to compare apples and apples and oranges and oranges within the entire group of imported products and the entire group of domestic/other origin like products. Thus, if the treatment of imported seal products derived from commercial hunts is the same as the treatment of domestic/other origin like seal products from commercial hunts (banned), and the treatment of imported seal products obtained from hunts for subsistence or marine resource management purposes is the same as the treatment of domestic/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 domestic/other origin seal products in aggregate. In other words, such a comparison ensures even-handedness within the entire group.

**Question 28**

*(All parties) The Appellate Body stated in paragraph 215 of its report in US – Clove Cigarettes:*

*A panel must analyse whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products.*

*In assessing the EU Seal Regime in light of the Appellate Body's statement above, what is the "regulatory distinction" made by the EU Seal Regime?*

89. The EU Seal Regime imposes a General Ban on all seal products, which cannot be placed on the EU market. The EU Seal Regime distinguishes between seal products that cannot be placed on the EU market and those that can be placed if they fall under the IC and MRM exceptions. The "regulatory distinction" is primarily based on the purpose of the hunt in each case, when compared to the purpose of the hunt behind the group of non-conforming products (i.e., hunts for commercial purpose). Thus, the EU Seal regime distinguishes between seal products that are permitted access to the EU market in view of the purpose of the hunt they are derived from.
90. The European Union considers that the statement of the Appellate Body equally applies in the context of Article 2.1 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994. Under both covered agreements, the analysis as to whether a measure indistinctly applicable (i.e. origin-neutral on its face) *de facto* discriminates against the group of imported products in comparison to the group of domestic/other origin group of like products must be assessed in view of the totality of the facts and evidence.
91. In this respect, the two-step approach indicated by the Appellate Body in *US – Tuna II (Mexico)*<sup>57</sup> should be understood in that light. In principle, the regulatory

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<sup>57</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 231 ("Our analysis of this issue proceeds in two parts. First, we will assess whether the measure at issue modifies the conditions of competition in the

distinction will be relevant in order to determine whether any detrimental impact on imports can be fully explained by legitimate policy considerations unrelated to the origin of the products and thus does not constitute unfair protectionism. Either in the context of the TBT Agreement or of the GATT 1994, WTO Members are not required to eliminate detrimental impacts on imports which are based on legitimate, non-protectionist and non-discriminatory considerations.

92. The European Union considers that a proper examination of treatment granted by the EU Seal Regime to imported vs domestic/other origin like products in the present dispute shows that there is no detrimental impact on Canada's and Norway's imports, within the meaning given to that concept in *Dominican Republic-Cigarettes* and *US-Clove Cigarettes*. Indeed, in *Dominican Republic – Cigarettes*, the Appellate Body rightly held that there was no disparate impact because the competitive opportunities of imported products not affected by a bond requirement. The per unit cost of the bond varied due not to origin but instead to the volume that operators might be selling into the market at a given time, a consideration unrelated to whether the products were imported or domestic. In the present case, the EU Seal Regime equally affects all seal products derived from hunts for commercial purposes, as well as seal products derived from hunts for subsistence and marine resource management purposes. The fact that Canada and Norway have decided to structure their industries around hunts for commercial purposes does not necessarily show a detrimental impact in the sense of affording fewer competitive opportunities to the Canadian and Norwegian seal products. The volume of products in a given year resulting from hunts falling under the IC exception in Canada and Norway could end up becoming bigger than qualifying domestic/other origin like products.<sup>58</sup> The EU Seal Regime thus accords the same competitive opportunities to all seal products falling under the same category, on the basis of the purpose behind the hunt (the regulatory distinction).
93. The situation created by the EU Seal Regime is also remarkably different from the factual pattern in *US – Clove Cigarettes*. In that case the product universe

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US market to the detriment of Mexican tuna products as compared to US tuna products or tuna products originating in any other Member. Second, we will review whether any detrimental impact reflects discrimination against the Mexican tuna products").

<sup>58</sup> See Canada's first written submission, para. 45.

- identified by the Appellate Body was flavoured cigarettes. Within that universe, clove cigarettes and menthol cigarettes were considered as like products. The former product was entirely produced outside the United States whereas there was a large domestic production of the latter. There was thus no question, based upon the determination of the product universe and of "likeness", that there was a detrimental impact on the like imported product. That product was excluded entirely from the marketplace while the like domestic product's (i.e. menthol) market access was left unaffected by the measure.
94. The facts of the present dispute are fundamentally different. The General Ban on seal products has left neither imported seal products derived from commercial hunts nor domestic/other origin ones access to the EU market (prior to the EU Seals Regime both EU-origin and non-EU origin seal products were sold on the EU market). At the same time, the exceptions under which non-commercial seal products are allowed market access in the European Union apply equally to imported and domestic/other origin seal products.
95. Moreover, unlike in *US – Clove Cigarettes*, where the regulatory distinction between menthols and cloves was nonsensical and illegitimate because it hid protectionism intending to appease US commercial interest (menthol cigarettes producers), the EU Seal Regime's distinction between seal products derived from hunts for commercial purposes and seal products obtained from hunts for subsistence or marine resource management purposes is legitimate and hides no protectionist motive (there is no domestic production qualifying for the IC exception and the production qualifying for the MRM exception is extremely small. Moreover, it cannot be sold commercially).
96. Should the Panel consider that the EU Seal Regime indeed modifies the conditions of competition to the detriment of Canada's and Norway's imports, contrary to the views expressed before, then the Panel would need to examine whether under Articles I:1 and III:4 of the GATT 1994 or under Article 2.1 of the TBT Agreement this detrimental impact reflects discrimination; in other words, whether such an impact is caused or explained by a protectionist objective, related to the foreign origin of the products, or rather whether such an impact can be accounted

- for by legitimate, unrelated to origin and non-discriminatory objective in the EU Seal Regime. In *US-Clove Cigarettes* the Appellate Body expressed this step of the analysis as determining whether the detrimental impact can be attributed to or explained by "a legitimate regulatory distinction" in the measure.
97. On the above hypothesis of detrimental impact, the "regulatory distinction" at issue is based on the purpose behind the hunt. Such a distinction is neutral as to the origin of the products. Such a distinction reflects the moral concerns of the EU citizens about the killing of seals in inherently inhumane seal hunts for purely commercial purposes.
98. Thus, the distinctions drawn by the EU Seal Regime are not aimed at protecting the EU industry or benefiting imports from Greenland as opposed to Canada or Norway. Rather, such distinctions reflect in an origin-neutral manner the moral concerns of the EU citizens about the inherently inhumane killing of seals in seal hunts for purely commercial purposes.

### **Question 29**

*(European Union) The European Union refers to the "type and purpose" of a seal hunt in its first written submission. Please explain the meaning of the "type" and "purpose" of a hunt. For example, do the "type" of the hunt and "purpose" of the hunt refer to (i) the identity of the hunter; (ii) the method of killing; (iii) the physical environment in which the hunt occurs; (iv) the commercial or non-commercial nature of the hunt; and/or (v) the end use of resulting products?*

99. The regulatory distinction made by the EU Seal Regime between conforming and non-conforming seal products is primarily based on the "purpose" of the hunt. In this sense, the EFSA Opinion distinguishes among three reasons or "purposes" as to why seals are hunted:
- 1) for commercial gain (i.e. for the sale of products such as skins);
  - 2) for subsistence and cultural purposes, particularly by aboriginal peoples;

3) because fishermen perceive that individual seals are causing damage to fishing gear as well as to fisheries (as threats to other species of concern). These seals are identified in some licensing regimes (such as Canada, Finland and Sweden) as “nuisance seals”.<sup>59</sup>

100. The European Union uses the term "purpose" to refer to the principal aim of the hunting, i.e., the primary reason why the seal in question is killed. In this sense, the EU Seal Regime distinguishes among seal hunts:

- for commercial purposes, where seals are killed primarily or exclusively in order to make a profit out of the skins, oil and other products from the hunted seals;
- for subsistence purposes, where seals are killed primarily in order to contribute to the subsistence of Inuit and other indigenous communities;
- for the purpose of the sustainable management of marine resources.

101. The purpose of the hunt is reflected in other characteristics of the hunt, such as its size, intensity or end-use of products, which together conform a "type". Both the IC and MRM exceptions are framed by reference to those related characteristics, so as to ensure that products from commercial hunts are excluded.

**Table 3**

EU Seal Regime	Type of Hunt	Purpose of Hunt
<b>Not conforming</b>	A	B
<b>Conforming (IC exception)</b>	C	D
<b>Conforming (MRM exception)</b>	E	F

**Question 30**

*(European Union) Based on the European Union's explanation of the type and purpose, please clarify the type and purpose of hunt applicable for each category of seal products under the EU Seal Regime as described in Table 3.*

102. See the EU's response to Question 29. The European Union considers that Table 3 is not representative since the "purpose" of the hunt is not different from the "type" of the hunt, in the sense that there are three "types" of hunts in view of their different "purpose". In any event, to be clear, the European Union would like to further clarify this matter as follows.

<sup>59</sup> EFSA's Opinion, p. 12 (Exhibit EU - 30).



103. First, the "purpose" of the hunt from which non-conforming products are derived is primarily or exclusively commercial. In other words, seals are killed with a view to making profit out of the sale on commercial markets of products such as skins or oil. Commercial hunts are usually large-scale (tens or hundreds of thousands of seals), intensive (the seals are killed in a very short time-frame, of days or weeks), systematic, highly organized and very competitive.<sup>60</sup>
104. Second, the "purpose" of the hunt from which conforming products under the IC exception are derived is contributing to the subsistence of the Inuit and other indigenous communities. This type of hunts is usually a dispersed, opportunistic and non-competitive activity. The conditions attached to the IC exception relate to the origin of the hunt (hunts traditionally conducted by Inuit and other indigenous communities – this does not relate to the methods of hunting but rather means that the community in question must have a tradition of seal hunting in the geographical region), the community to which the hunters belong (seal hunts conducted by Inuit or other indigenous communities), the use of the results of the hunt (the products of which are at least partly used, consumed or processed within the communities according to their traditions) and the contribution of the hunt to the subsistence of the community. All these conditions ensure that only products from genuinely subsistence hunts qualify for the exception and avoid potential circumvention of the General Ban (e.g. by introducing seal hunting in regions where there was no hunting in the past; or by engaging in intensive and systematic hunting, in order to kill more seals for the market).
105. Third, the "purpose" of the hunt from which conforming products under the MRM exception are derived is for managing marine resources. The conditions attached to the MRM exception speak to the hunt's size (small-scale), and its intensity (occasionally and/or opportunistic). Further, in order to ensure that the purpose of the hunt is for managing marine resources (as opposed to commercial purposes), additional conditions are imposed to avoid circumvention of the General Ban, in

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<sup>60</sup> Although the EU Seal Regime does not contain any definition of "commercial seal hunting", it is illustrative in this respect to refer to the definition of "commercial hunting" contained in the European Parliament's debates proposing amendments to the proposal (Exhibit JE-4), p. 64 ("Commercial hunting' means organised hunting, on a wide scale with reference to the hunting area and/or the number of animals killed, by people paid to do this in order to supply seal product processing enterprises on a regular and continuous basis for commercial purposes").

particular, that seal hunts are conducted under a national or regional natural resources management plan which uses scientific population models of marine resources and applies the ecosystem-based approach; that those seal hunts do not exceed the total allowable catch quota established in accordance with the plan in question; and that the by-products of those hunts are placed on the market in a non-systematic way on a non-profit basis.

**Question 31**

*The European Union submits that the European Union public moral concerns vary according to the type and purpose of the seal hunts.*

*a. (European Union) Please explain whether you have elaborated on this statement based on supporting evidence other than public opinion surveys provided in Exhibits EU-48 through EU-57. Please refer to specific exhibits, as appropriate.*

*b. (Canada and Norway) What kind of evidence is necessary to establish such a claim?*

106. The moral relevance of the purpose, and its related characteristics, of each type of hunt is inherent in the basic rule of morality which the EU Seal Regime seeks to uphold. As explained in the Reply to Question 10, that rule of morality requires balancing the welfare of seals and other interests. More specifically, in order to determine whether it is morally acceptable to inflict suffering upon seals the legislator must assess whether such suffering is outweighed by the benefits to humans (or to other animals). As a factual matter, it is unquestionable that those benefits do vary according to the purpose and related characteristics of each type of hunt. For that reason, the EU legislator could legitimately decide, having regard to the overarching objective of the EU Seal Regime, that it was appropriate to exempt from the General Ban certain types of hunts where those benefits outweighed the animal welfare concerns.

107. The European Union considers that, once it is established that the basic standard of conduct which the EU Seal Regime seeks to uphold is part of the European Union's "public morals", it is not necessary to prove that each of the individual outcomes from the application of that rule in specific situations is regarded by the EU public as a separate rule of public morality on its own. Instead, the mere fact that the EU legislator has made a proper application of the basic rule of morality

- would be sufficient to confer upon each of those outcomes the status of "public morals".
108. In this regard, it must be recalled that, according to the definition of public morals made by the panel in *U.S – Gambling*, that notion includes "standards of right and wrong conduct maintained by or *on behalf of* a community or a nation".<sup>61</sup> Therefore, governments are not required to test the populace's support for each and every element of an envisaged piece of legislation based on public morals before enacting it. Indeed, as illustrated by the measures at issue in both *U.S. - Gambling* or *China – Publications and Audiovisual Products*, regulations on public morals can be very complex and do not lend themselves easily to that kind of testing. Instead, all that may be necessary is to show that the subject matter of the measure at issue (e.g. gambling, drugs, pornography or the protection of animals) is regarded as an issue of public morals in the responding Member.
109. At any rate, some of the opinion polls mentioned in the Panel's question confirm that the public do value very differently the various types of seal hunt. More precisely, the surveys reviewed by Canada's Royal Commission on sealing in the document provided as Exhibit EU – 48 show that a very large majority of the public agrees that the killing of animals may be justified for both subsistence purposes and management purposes.<sup>62</sup> They also show that, in the words of the Royal Commission, "the purpose behind the hunt may have a great effect on public reaction to it"<sup>63</sup>. More specifically, while a very large majority found acceptable subsistence hunting by indigenous populations, an even a larger majority objected to hunting for commercial reasons.<sup>64</sup>
110. In addition, reference can be made to the public consultation conducted by the EU Commission as part of the process of preparation of the proposal, the results of

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<sup>61</sup> Panel report, *US – Gambling*, para. 6.465. Emphasis added.

<sup>62</sup> Report of the Royal Commission on Seals and Sealing (1986), Volume I, Chapter 11, "Public Opinion on Sealing", pp. 160 and 185 (Exhibit EU - 48).

<sup>63</sup> Report of the Royal Commission on Seals and Sealing (1986), Volume I, Chapter 11, "Public Opinion on Sealing", p.185 (Exhibit EU - 48).

<sup>64</sup> Report of the Royal Commission on Seals and Sealing (1986), Volume I, Chapter 11, "Public Opinion on Sealing", table 11.6 at p. 169 and p.185 (Exhibit EU - 48).

which have been summarised in the Impact Assessment (Exhibit JE 18, at pp. 18-19).

**Question 32**

*Canada states in paragraph 485 of its first written submission:*

*There is no definition provided for a 'hunt traditionally conducted by Inuit'. During review of the Proposed Regulation, the European Parliament's draft amendments defined a 'hunt traditionally conducted by Inuit or other indigenous community' as 'the commercial hunting for seals undertaken by Inuit communities'. There is nothing in that definition that indicates any specific requirements relating to the manner in which the seal is harvested relating to protection of seals from avoidable pain and suffering in their harvesting.*

*a. (Canada) In light of this statement, clarify whether Canada is challenging the specific requirements for the IC exception under the EU Seal Regime.*

*b. (European Union) Explain the Parliament's description of a traditional Inuit hunt as "the commercial hunting for seals".*

111. The European Union observes that Canada does not provide any specific citation about the source of the statement in question. The European Union understands that Canada was citing from the document contained in Exhibit JE-4 (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)). Canada appears to have cited to Amendment 24 in that document, which states that:

7a.'hunts traditionally conducted' means the commercial hunting for seals traditionally undertaken by Inuit communities;

Justification

The definitions 7a and 7b are added to clearly specify the meaning of the exemption which should only apply to products coming from commercial subsistence hunting by Inuit communities for personal or family consumption.<sup>65</sup>

112. In this dispute the European Union uses the term "commercial hunt" as referring to hunts conducted exclusively or primarily for commercial purposes. The authors of the proposed amendment reproduced above did not use the terms "commercial hunting" in the same sense. This is made clear by the justification of the proposed

amendment (also reproduced above) which alludes to "commercial subsistence hunting." Traditional hunts by the Inuit and other indigenous communities qualifying for the IC exception have a commercial dimension in the sense that part of the products resulting from the hunt is sold commercially. Indeed, otherwise the IC exception would have been useless. The hunts qualifying for the IC exception, nevertheless, differ from the hunts addressed by the General Ban in that they must contribute to the subsistence of the Inuit or other indigenous communities, with the implication that they should not be conducted primarily or exclusively for commercial purposes.

113. In any event, the proposed amendment cited by Canada was not accepted by the EU legislator and, thus, it is irrelevant.

### **Question 33**

*(European Union) The European Union submits in footnote 399 of its first written submission, "[c]urrently there are no Greenlandic seal products placed on the EU market". Please confirm this statement and explain where the process currently stands in any request from Greenland for inclusion in a list of recognized bodies pursuant to Article 6 of the Implementing Regulation.*

114. The Danish authorities have informed the EU Commission that, following the date of application of the Basic Regulation (20 August 2010), the Danish customs authorities have allowed the importation of seal products under the IC exception on the basis of certificates issued by the Groenlandic authorities in accordance with the criteria laid down in the EU Seal Regime, despite the fact that the EU Commission has not taken yet a decision on the application filed by the Groenlandic authorities to be approved as a "recognized body".
115. The application submitted by Greenland on 23 February 2011 did not contain sufficient documentary evidence to establish that the requirements set out in Article 6(1) of the Implementing Regulation have been met (in this regard c.f. response to Question 88). A deficiency letter was sent to the Greenland's authorities on 7 July 2011. Greenland subsequently provided additional documentation in three instalments: by letter on 5 January 2012 via the Danish Ministry of Foreign Affairs, by email on 1 November 2012 and finally by letter

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<sup>65</sup> Exhibit JE-4, p. 24.

dated 29 January 2013, which was received by the Commission Services on 5 February 2013. The documentation received on 5 February is currently in translation.<sup>66</sup> Once translated the Commission Services will be able to verify if the applicant, based on all documentary evidence submitted, fulfils the requirements of Article 6(1) of the Implementing Regulation and can be added to the list of recognised bodies.

### **Question 34**

*(European Union) Explain how data on trade after the imposition of a measure, if proven to be accurate, is relevant to the complainants' claim that the EU Seal Regime has a detrimental impact on the competitive conditions for their seal products through its design and structure.*

116. The European Union understand that the Panel's question addresses two separate issues. One is the impact of the EU Seal Regime on imports in view of its design and structure. Another issue is the impact of the EU Seal Regime on imports as applied. The European Union understands that Canada and Norway have made "as such" claims against the EU Seal Regime, not "as applied".
117. In any event, as explained before, the EU Seal Regime is designed and structured in an origin-neutral manner. It bans seal products resulting from hunts for commercial purposes, and permits the placing on the EU market of seal products derived from hunts for the subsistence of indigenous communities and for marine resource management purposes, provided that they are accompanied by the relevant certificate. Consequently, the EU Seal Regime is designed and structured to have the same impact on similarly situated categories of seal products.
118. The relevant trade data is inconclusive as to whether the EU Seal Regime has modified the conditions of competition in the EU market to the detriment of Canada's and Norway's imports. Indeed, the fact that there have not been imports from Canada (and Norway) falling under the IC exception is the result of the inaction by the relevant entities in Canada which have failed to request the certification envisaged in Article 6 of the Implementing Regulation. In other words, it is the action (or more concretely the omission) of the countries in question, and not the EU Seal Regime, that explains the relevant trade data.

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<sup>66</sup> The submission in question which comprises approximately 40 pages was made in Danish.

### **Question 35**

(All parties) In *US-COOL*, the Appellate Body stated:

*[S]ome technical regulations that have a de facto detrimental impact on imports may not be inconsistent with Article 2.1 when such impact stems exclusively from a legitimate regulatory distinction. In contrast, where a regulatory distinction is not designed and applied in an even handed manner — because, for example, it is designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination — that distinction cannot be considered "legitimate", and thus the detrimental impact will reflect discrimination prohibited under Article 2.1. In assessing even handedness, a panel must carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue." (para. 271)*

*a. Based on the AB's statement above, does an assessment of whether a detrimental impact caused by a regulatory distinction is "legitimate" necessarily require an examination of whether such a distinction is designed and applied in an even handed manner?*

119. The European Union understands the Appellate Body's statement as meaning that a regulatory distinction causing detrimental impact on imports cannot be considered "legitimate" (and thus the detrimental impact would reflect *de facto* discrimination prohibited under Article 2.1 of the TBT Agreement) if the regulatory distinction is not designed and/or applied in an even-handed manner. In this respect, a panel "must" carefully scrutinise all the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue, and, in particular, whether that technical regulation is even-handed, in order to determine whether the detrimental impact is caused by a legitimate regulatory distinction or by unjustifiable discrimination against the group of imported products.<sup>67</sup>

*b. What does an assessment of a measure's "even-handedness" entail? For instance, to examine whether a regulatory distinction is "designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination", should the Panel examine factors similar to those examined under the chapeau of Article XX of the GATT 1994 in previous disputes? If so, what specific factors should be taken into account? If not, what other factors should be examined?*

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<sup>67</sup> See Appellate Body Report, *US – Clove Cigarettes*, para. 182; and Appellate Body Report, *US – COOL*, para. 271.

120. The assessment of a measure's "even-handedness" entails examining whether the measure is "fair", "non-discriminatory" and "calibrated" to the purpose it pursues. In this respect, the European Union observes that the dictionary meaning of "even-handed" refers to "fair, evenly-balanced; free of bias or preference".<sup>68</sup> The concept of "even-handedness", like discrimination, refers to whether two similar factual situations are treated differently<sup>69</sup> and whether the specific measure is "calibrated" (and does not go beyond what is necessary) to achieve its purpose.<sup>70</sup>
121. That being said, the straightforward application of the chapeau of Article XX of the GATT 1994 may not be entirely appropriate since the chapeau deals with issues concerning the application of the measure, whereas the language employed by the Appellate Body refers to the "design" as well.<sup>71</sup>

### **Question 36**

*(European Union) The European Union argues in paragraph 261 of its first written submission that if the legitimacy of an objective is established, then a fortiori, the regulatory distinction at issue is also legitimate. Please elaborate on this argument, including whether the legitimacy of an objective under Article 2.2 of the TBT Agreement is sufficient enough to establish legitimate regulatory distinction under Article 2.1.*

122. The European Union considers that, if an objective is considered to be legitimate under Article 2.2 of the TBT Agreement, the regulatory distinction made pursuant to the measure based on that objective would also be legitimate (provided that such a regulatory distinction is designed and applied in a non-discriminatory, even-handed manner).
123. Indeed, the Appellate Body has relied on Article 2.2 of the TBT Agreement, and in particular on the terms "legitimate objective" contained therein, to provide meaning to Article 2.1 of the TBT Agreement.<sup>72</sup> The Appellate Body has also relied on the objectives contained in the sixth recital of the TBT Agreement (also

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<sup>68</sup> OED On-Line, Entry 1  
(<http://www.oed.com/view/Entry/242829?rskey=yg9GDD&result=2&isAdvanced=false#eid>).

<sup>69</sup> See Appellate Body Report, *US – Softwood Lumber V*, paras. 166 – 176.

<sup>70</sup> See Appellate Body Report, *US – Tuna II (Mexico)*, para. 297.

<sup>71</sup> See Appellate Body Report, *US – COOL*, para. 271.

<sup>72</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 171 ("The context provided by Article 2.2 suggests that "obstacles to international trade" may be permitted insofar as they are not found to be "unnecessary", that is, "more trade-restrictive than necessary to fulfil a legitimate objective". To us, this supports a reading that Article 2.1 does not operate to prohibit *a priori* any obstacle to



reproduced in Article 2.2 of the TBT Agreement) in the context of Article 2.1 of the TBT Agreement, "making clear that technical regulations may pursue the objectives listed therein".<sup>73</sup>

124. As mentioned before, Articles 2.1 and 2.2 of the TBT Agreement (like Articles I:1, III:4 and XX of the GATT 1994) are intended to strike a balance between trade liberalisation and regulatory autonomy. Thus, if the legitimacy of an objective is established, then any even-handed regulatory distinction based on such objective would also represent the exercise of legitimate (as opposed to protectionist) regulatory autonomy and thus should be taken into account when examining allegations of *de facto* discrimination.

### **Question 37**

*(European Union) If protecting the welfare of seals (i.e. protecting seals from "avoidable pain and suffering" in seal hunting), as defined by the complainants, were accepted as the "overarching" objective of the EU Seal Regime, what would be a rational connection between (i) the protection of the welfare of seals and (ii) the interests protected under the exceptions of the measure?*

125. The European Union takes issue with the suggestion, which appears to be made in the question, that the objective of "protecting the welfare of seals" means necessarily "protecting seals from *avoidable* pain and suffering' in seal hunting". The term *avoidable* implicates the choice of a certain level of protection. The European Union was entitled to select a higher level of protection of seal welfare and it chose to do so. As explained in the EU's first written submission, the EU Commission's proposal sought to address exclusively the *avoidable* risks to seal welfare.<sup>74</sup> The EU legislators, however, considered that, in the context of the commercial seal hunts, the *unavoidable* risks to animal welfare were *excessive*. For this reason, the EU Commission proposal was amended in order to provide for the General Ban.<sup>75</sup>
126. The European Union has addressed the animal welfare implications of the IC exception and the MRM exception in its reply to Question 8.

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international trade. Indeed, if any obstacle to international trade would be sufficient to establish a violation of Article 2.1, Article 2.2 would be deprived of its *effet utile*").

<sup>73</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 173.

<sup>74</sup> EU's first written submission, para. 52.

<sup>75</sup> EU's first written submission, paras. 54-56.

127. In turn, the fact that the IC exception and the MRM exception provided for independent, rather than connected objectives, would have the consequences set out in the Reply to Question 11.

**Question 39**

*(All parties) Please explain what extent, if any, the United Nations Declaration on the Rights of Indigenous Peoples and the ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries are relevant to the analysis of the parties' claims under Article XX of the GATT 1994 and Article 2.1 and/or Article 2.2 of the TBT Agreement.*

128. The European Union considers that the *United Nations Declaration on the Rights of Indigenous Peoples* and the *ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries* confirm the legitimacy of protecting the Inuit and indigenous communities' interest.<sup>76</sup> Measures taken to protect the economic and social interests of those communities pursue a legitimate objective in the sense of Article 2.2 of the TBT Agreement. In the same vein, regulatory distinctions based on the protection of those interests are also legitimate for the purpose of Article 2.1 of the TBT Agreement.
129. The UN Declaration and the ILO Convention are relevant to the analysis in that they demonstrate:
- A widespread international consensus that protecting the livelihoods, social integrity and cultural identity (including a traditional way of life) of Inuit and indigenous peoples is a legitimate policy objective;
  - A widespread international consensus that indigenous peoples are unlike other ethnic groups in that in their quality as indigenous peoples, as closely circumscribed by the definitions in the two instruments (and as reflected in the EU regulations), they require and deserve the special protection of the world community.
  - That traditional practices undertaken by Inuit and indigenous peoples (e.g. seal hunting for subsistence purposes) can and should be viewed through a unique moral perspective vis-à-vis the same practices undertaken by others (e.g. seal hunting for purely commercial purposes).

130. The two instruments thereby provide important context and background to the EU's identification and implementation of the moral imperative to exempt the products resulting from traditional seal hunts conducted by indigenous communities for purposes of subsistence from the structures of the General Ban.
131. The two instruments inform and support both the EU's moral value judgement and the design of the measure. They are, however, not a constitutive condition of that judgement and design, both of which are anchored in the EU's sovereign right and duty to act to reflect important moral concerns, in this case in the difficult context of conflicting moral concerns over the welfare of seals.
132. The international instruments further provide conclusive evidence that the EU's judgement (and choice of action) in the case of the IC exception is not the expression of a unique national perspective which may or may not warrant further scrutiny as to its actual rootedness in the EU's moral and legal framework to exclude abuse ("arbitrary or unjustifiable discrimination" or "disguised restriction on trade"), but an expression of and response to concerns shared by the international community as a whole.
133. The two instruments thus play the following roles in the context of the mentioned TBT and GATT provisions.
134. In the context of TBT Article 2.1, should the Panel hold this provision to be applicable in the present context, they underscore the legitimacy of the regulatory distinction made by the EU through the IC exception between products from commercial seal hunts and products resulting from indigenous communities' traditional subsistence hunting.
135. They inform, first, the legitimacy of the objective of the exception, namely to satisfy the EU's moral responsibility to safeguard – in view of the threat otherwise posed by the General Ban – the economic and social interests of Inuit communities engaged in the hunting of seals as both a means to ensure their subsistence and a manifestation of their cultural tradition and identity specifically as indigenous

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<sup>76</sup> See European Union's first written submission, paras. 270 – 273.

peoples communities which are singled out and protected by the said international instruments.

136. Second, they underscore the even-handedness of the design and application of the exception as they confirm that the distinction made – reflecting a distinction between the social, cultural and economic subsistence interests of certain ethnic communities which are specifically protected by international instruments and the interests of all other persons – is neither arbitrary nor unjustifiable, nor represents a disguised restriction on trade (elements of the sixth recital of the TBT preamble identified by the Appellate Body in *US-Cove Cigarettes*, *US-Tuna II (Mexico)* and *US-COOL* as affecting even-handedness). The instruments serve to confirm that the distinction is neither “capricious” nor “random” (concepts invoked by the Panel in *Brazil-Tyres* in its interpretation of “arbitrary and unjustifiable discrimination” in the context of the chapeau of GATT Article XX) and bears a “relationship to the objective of the measure at issue” (standard established by the Appellate Body in the same case and legal context, namely the chapeau of GATT Article XX). The protection of the social, cultural and economic interests invoked by the two international instruments clearly responds to an overriding moral imperative accepted by the world community, which is the same imperative the European Union acts on here; both rule and exception thus respond to the same objective: the protection of moral concerns. In addition, it underscores the fact that the said moral imperative includes specifically the protection of social and economic interests (subsistence) of the relevant indigenous communities as well as their traditions, culture, identity and related practices. Allowing indigenous communities, as the IC exception does, to continue to support their subsistence through traditional seal hunting (which for many of them is still largely without alternative as a means of physical and basic economic survival), in other words, is precisely what the said moral imperative requires.
137. In the context of TBT Article 2.2, again in case the Panel were to follow the complainants, the two instruments would underscore the fact that the measure (the “IC condition”) serves the objective of public morality, as well as the legitimacy of that objective.

138. The European Union likewise considers that the legitimacy of protecting the Inuit and indigenous communities' interest is also relevant, *mutatis mutandi*, when assessing whether any regulatory distinction is discriminatory in the sense of Articles I:1 and III:4 of the GATT 1994. In other words, before moving to Article XX of the GATT 1994, the fact that the IC exception pursues a legitimate objective, as supported by those international conventions, implies that treating seal products falling under the IC exception differently from seal products resulting from hunts for commercial purposes is not discriminatory, as they are in different factual situations. Indeed, otherwise, the TBT Agreement and the GATT 1994 could provide for different results, contrary to the object and purpose of the TBT Agreement, which is i.a. "further the objectives of GATT 1994".<sup>77</sup> Article XX of the GATT 1994 contains a limited list of exceptions, whereas there is no such limitation in the concept of "legitimate regulatory exception" under Article 2.1 of the TBT Agreement or in Article 2.2 of the TBT Agreement, which lists "legitimate objectives" in a non-exhaustive manner. Thus, if a disparate impact were due to a legitimate regulatory distinction not founded in one of the objectives explicitly listed in Article XX of the GATT 1994, there would be no means of justifying the measure indistinctly applicable (i.e. origin-neutral on its face) as WTO-consistent (and thus *de facto* non-discriminatory), while the TBT Agreement would be permissive of legitimate public policies in such a context.
139. Furthermore, as explained before, should Articles I:1 and III:4 of the GATT 1994 be interpreted as prohibiting technical regulations that are consistent with Article 2.1 of the TBT Agreement, the later provision would become useless in practice.
140. In the context of GATT Article XX, provided that such provision is applicable under Article XX(a), the aforesaid applies largely *mutatis mutandis*.
141. Thus, the UN Declaration and the ILO Convention fundamentally underpin the EU's justification for protecting indigenous communities by exempting products resulting from their traditional subsistence hunting of seals from the General Ban. A look at the flipside may provide further illumination. Canada, by claiming a violation of TBT Article 2.1, and both complainants, by claiming a violation of

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<sup>77</sup> TBT Agreement, second recital.

GATT Article I and the absence of justification through GATT Article XX, appear to suggest that the EU would have to make a choice. Either protect public morals related to seals, and ignore the moral imperative to protect indigenous communities (by applying the General Ban without the IC exception); or protect indigenous communities and ignore the welfare of seals (by eliminating the General Ban). This would obviously be strange if not absurd. In the first scenario the European Union would thus see itself forced to severely affect the internationally recognized welfare of indigenous communities in order to be allowed to protect its public's moral concerns over the inhumane killing of seals, even though a partial carve-out would have been sufficient. In the second scenario the EU would see itself forced to ignore its moral concerns over the inhumane killing of hundreds of thousands of seals in order not to interfere with the protected interests of indigenous communities even though it would have been perfectly possible to provide the indigenous communities with the freedom to continue their traditional social and economic subsistence ways while still addressing the moral concerns over the inhumane killing of seals for the large remaining share of seals not hunted by indigenous communities under traditional and subsistence circumstances.

142. Consequently, the European Union considers that those international conventions speak to the legitimacy of the objective pursued by the IC exception, which in turn is relevant to the question of determining *de facto* discrimination in the context of Articles I:1 and III:4 of the GATT 1994 and in Article 2.1 of the TBT Agreement. The same conventions are also relevant to determine the legitimacy of the objective in the context of Article 2.2 of the TBT Agreement and, in the present case, in Article XX(a) of the GATT 1994. They demonstrate that there is worldwide concern for the economic, social and cultural development and sustainment of indigenous peoples, which can inform a community's moral judgments (in particular with respect to how a community views suffering-causing actions taken by indigenous peoples for subsistence purposes and for the continuation of cultural heritages and how a community can hold differing moral views on these actions and suffering-causing actions taken purely to maximise commercial gain on non-essential products).

### **Question 42**

*(European Union) Is the EU Seal Regime capable of ensuring that only humane killing methods are applied in hunting seals that are used for products falling within the scope of the exceptions under the Regime?*

143. See above the reply to Question 8.

### **Question 43**

*(All parties) What aspects of the EU Seal Regime should be examined for the necessity test under Article XX(a) and XX(b) of the GATT 1994? Explain your position in light of the Appellate Body's statement in paragraph 177 of its report in Thailand – Cigarettes, "[w]hen Article XX(d) is invoked to justify an inconsistency with Article III:4, what must be shown to be "necessary" is the treatment giving rise to the finding of less favourable treatment."*

144. In *Thailand - Cigarettes*, the Appellate Body noted that:

Furthermore, when Article XX(d) is invoked to justify an inconsistency with Article III:4, what must be shown to be "necessary" is the treatment giving rise to the finding of less favourable treatment. Thus, when less favourable treatment is found based on differences in the regulation of imports and of like domestic products, the analysis of an Article XX(d) defence should focus on whether those regulatory differences are "necessary" to secure compliance with "laws or regulations" that are not GATT-inconsistent.<sup>78</sup>

145. The above quoted passage indicates that, according to the Appellate Body, when less favourable treatment results from differences between the regulation of imports and of domestic products, or by analogy from differences between the regulation of different categories of imports, the analysis under Article XX(a) or Article XX (b) should focus on whether such "regulatory differences" are "necessary" in order to achieve the objectives set out in either of those two provisions at the level of protection chosen by the responding Member.

146. In the present case, the less favourable treatment alleged by the Complainants results from the interplay between the General Ban and the IC and MRM exceptions. Specifically, the alleged less favourable treatment results from the fact that the placing on the market of some products imported from Greenland and of some domestic products is allowed, respectively, by the IC exception and the

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<sup>78</sup> Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 177. Footnote omitted. Underlining added.

- MRM exception, whereas the placing on the market of some products imported from Canada and Norway is prohibited pursuant to the General Ban.
147. Therefore, if the Panel found that the alleged difference in treatment is inconsistent with Articles I:1 and/or Article III:4 of the GATT 1994, it should examine whether the "regulatory differences" between the General Ban and the two exceptions are "necessary" in order to achieve the objectives invoked by the European Union.
148. More specifically, in order to establish that the less favourable treatment alleged by the Complainants is justified under Article XX(a) or Article XX(d), 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 not "necessary", in order to achieve those objectives at the same level of protection, to extend the same treatment provided under the General Ban to seal products falling under the MRM exception or the IC exception.
149. The Complainants appear to consider that the European Union is required to show that the more favourable treatment provided under the IC exception and the MRM exception is, in and by itself, "necessary" in order to achieve the policy objectives pursued by the EU Seal Regime.<sup>79</sup> As just explained, however, according to the Appellate Body, what must be shown is that the "regulatory differences" between the General Ban and the two exceptions are "necessary".

#### **Question 44**

*(European Union) Please clarify the exact risks that the non-fulfilment of the European Union's stated objective of protecting public moral concerns on the welfare of seals would create. Can it be distinguished from the risks that may arguably be created by not being able to protect the welfare of seals as such, as opposed to the public moral concerns on the welfare of seals?*

150. Yes, the risks of non-fulfilment are different because the objectives are different, as explained above in the reply to Question 9.
151. The risk of non-fulfilment of the animal welfare objective is that more seals would be killed in an inhumane way.

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<sup>79</sup> See e.g. Norway's oral statement, paras. 49-52.



152. The risk of non-fulfilment of the objective of protecting public morals is that the EU public would experience the same moral feelings that prompted the adoption of the EU Seal Regime. Unlike in the case of many other technical regulations, whose effect may be a matter of likelihood of certain events (e.g. for a safety feature which lowers certain risks), the effect in the present case would be rather immediate and predictable. A withdrawal or non-implementation of the General Ban would without further mediation cause precisely the moral impact it is meant to prevent.
153. As regards the Panel's second question, it should be recalled that, as explained in the reply to Question 9, the EU Seal Regime addresses two related, but distinguishable, types of moral concerns: 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, and more broadly about their exposure to the presence of morally tainted products in the EU market.
154. As explained also in the reply to Question 9, a measure which failed to address the seal welfare concerns would, at the same time, fail to address the first type of moral concerns. But such measure could still address successfully the second type of public moral concerns if, as a result, the community at issue is shielded from (1) participating in any way —direct, economic, or otherwise— in the type of seal hunt offending the public morality and (2) being confronted with the by-products of such morally offensive seal hunt.

#### **Question 45**

*(All parties) If the EU Seal Regime did not have the current exceptions (i.e. a ban only), would it be considered more trade-restrictive than the current form? If not, why not.*

155. Yes. The exceptions do not restrict trade. On the contrary, they allow trade that would otherwise be prohibited by the General Ban.

#### **Question 46**

*(All parties) Has there been a discussion on the welfare of seals and/or sustainable marine resource management at the international level, including through the development of international standards for animal welfare in sealing? If so, describe the context in which these discussions took place and provide details on its participation, including whether there were any consultations by the European Union.*

156. Following a request from the Canadian authorities, the Animal Welfare Working Group (AWWG) of the OIE discussed the possibility to develop guidance with regard to the commercial killing of wild life, including in particular seals and whales, at various meetings held between 2007 and 2009.<sup>80</sup> In the course of those meetings the AWWG considered the EFSA opinion<sup>81</sup>, which was presented by an official of the EU Commission.<sup>82</sup>

157. At the request of the AWWG, one of its members (Dr David Wilkins) prepared a report on "Issues, Options and Recommendations", which concluded, drawing on the findings of the EFSA report, as follows:

It might be possible for OIE to attempt to formulate standards for the killing of seals but if they were closely linked to existing OIE standards for killing animals for food then they are likely to be considered to be impractical for those having to kill seals on the ice in extreme weather conditions. If they deviate from those standards it is possible that they will be criticised for allowing inhumane practices.

The alternative would be for the OIE to accept that the environment under which most of the seal killing takes place is such that national regulations and national implementation and enforcement measures are the only way forward although some essential improvements would have to be suggested.<sup>83</sup>

158. The above conclusions recognise that the humane killing standards developed by OIE for the commercial slaughtering of animals for food cannot be transposed to the commercial seal hunts due to the environmental conditions in which the latter take place. A practicable standard for the commercial seal hunts would have to include compromises deviating from those standards and allow the continuation of inhumane practices.

159. Following this report, the AWWG decided to abandon the discussion of this item.<sup>84</sup>

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<sup>80</sup> See Report of Sixth meeting of the AWWG (5-7 September 2007), point 6.5 (Exhibit EU - 90); Report of the Seventh meeting of the AWWG (17-19 June 2008), point 8.4 (Exhibit EU - 91) and Report of the Ninth meeting of the AWWG (23-25 June 2010), point 8.2 (Exhibit EU -92). A list of participants is attached to each of the reports.

<sup>81</sup> EFSA Opinion (Exhibit EU-30).

<sup>82</sup> Report of the Seventh meeting of the AWWG (17-19 June 2008), point 8.4 (Exhibit EU - 91)

<sup>83</sup> OIE, Commercial killing of wildlife, 2<sup>nd</sup> report to the AWWG (Exhibit EU -93).

<sup>84</sup> Report of the Ninth meeting of the AWWG (23-25 June 2010), point 8.2 (Exhibit EU - 92).

**Question 47**

*(European Union) Please describe any actions or measures taken by the European Union to improve the welfare of seals in third countries, including technical or financial assistance.*

160. Under the existing financial instruments for co-operation with third countries, the EU authorities can provide technical or financial assistance only upon request from the third country concerned. No such request has been received from any third country with respect to assistance to improve the welfare of seals.

**Question 48**

*(All parties) What kind of evidence is necessary to establish the existence of "public morals" under Article XX(a) of the GATT 1994? Does it differ depending on the type of public moral in question? What differentiates a public moral from public opinion?*

161. Previous panels have noted that the content of the concept of public morals "can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values"<sup>85</sup> and that, for this reason,

Members should be given some scope to define and apply for themselves the concepts of 'public morals' in their respective territories, according to their own systems and scales of values.<sup>86</sup>

162. The European Union agrees with the above views. Panels are not bound by the responding Member's own characterization of the measure in dispute as being based on "public morals". Nevertheless, panels should accord appropriate deference to such characterization and be very careful not to substitute its own definition of public morals.

163. Having regard to the above, the European Union considers that the starting point of the enquiry should be the measure itself, including its preamble, and the legislative history. Where, as in the present case, the measure at issue has been adopted in accordance with a democratic and open process by representative political institutions, those institutions are best placed, and uniquely legitimised, to recognise and interpret the moral concerns of the population that they represent. The adoption in good faith of a measure by such institutions with the objective of

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<sup>85</sup> Panel report, *US- Gambling*, para. 6.461. See also Panel report, *China – Publications and Audiovisual Products*, para. 7.759

<sup>86</sup> Panel report, *US – Gambling*, para. 6.465.

- addressing the moral concerns of the population should, in principle, be regarded as evidence of such moral concerns.
164. Where the examination of the measure is inconclusive or if there are elements that cast doubt on the responding Member's own characterization of the measure, it may be relevant to look, *inter alia*, at the following other types of evidence in order to confirm whether the measure pursues a genuine public morals objective:
165. *First*, it may be relevant to examine whether the measure reflects prescriptions of religious origin or the doctrines of a moral school of thought.<sup>87</sup>
166. *Second*, it may be relevant to examine whether the measure is part of a broader regulatory policy or similar to other measures which are themselves regarded as pursuing a public moral objective in the responding Member.<sup>88</sup>
167. *Third*, it may be relevant to examine whether other Members<sup>89</sup> or international organizations<sup>90</sup> have taken similar measures on public moral grounds or otherwise expressed views indicating that they regard the subject matter addressed by the measure at issue as a matter of public morals.<sup>91</sup>
168. *Last*, opinion polls may be useful, but are not indispensable. In previous disputes have been able to conclude that the measures at issue pursued a public morals objective despite the absence of any opinion polls. Indeed, the definition of “public morals” from *US-Gambling* above quoted clearly shows that the standards of right and wrong do not necessarily have to originate with the citizens themselves. They can be set by the government “on behalf of” a community. Authoritarian and paternalistic governments often impose from above measures based on public morals which do not enjoy public support. Even in democratic

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<sup>87</sup> See above reply to Question 10. See the *amicus brief* submitted by Prof. R. Howse *et al.*, paras. 139-143.

<sup>88</sup> See EU's first written submission, paras. 61-65. See also *amicus curiae* brief by Anima *et al.*, paras. 154-160 and 164-165 (Exhibit EU -81)

<sup>89</sup> See EU's first written submission, paras. 67-70 and 75-76. See also *amicus curiae* brief by Anima *et al.*, paras. 34-44, 161-162 and 166-167 (Exhibit EU - 91)

<sup>90</sup> See EU's first written submission, paras. 66 and 71. See also the *amicus brief* submitted by Prof. R. Howse *et al.*, para. 109-110.

<sup>91</sup> See the evidence taken into account by the Panel in *US – Gambling*, paras. 6471-6473.

- states with representative institutions, governments do not have to poll first the views of the population in order to enact measures based on public morals.
169. Opinion polls showing support for the measure at issue may be relevant in order to confirm that the public moral concerns invoked by a government for adopting such measure are genuine, rather than a mere pretext for pursuing protectionist policies. Thus, in the case at hand the opinion polls provided as Exhibits EU – 49 through EU-59 confirm that the public concerns with regard to commercial sealing cited in the Preamble to the Basic Regulation and in its preparatory documents are both genuine and strong. The Complainants have argued that the respondents were “ill-informed”. The European Union disagrees. But, at any rate, the Complainants' criticism misses the point. The European Union does not rely on the opinion polls in order to prove that commercial sealing is inherently inhumane. That is a factual determination made by the EU authorities on the basis of scientific evidence. Nonetheless, the opinion polls confirm that the EU population does care strongly about the welfare of seals and would regard a trade ban as an adequate response to serious seal welfare concerns, should such concerns be justified on the basis of scientific evidence.
170. Unlike the opinion polls provided as Exhibits EU – 49 through EU-59, the various opinion polls analysed by Canada’s Royal Commission on sealing in the document provided as Exhibit EU - 48 do not test the public support for a certain measure. Instead, they evaluate the attitudes of the public with regard to both animals in general and various aspects of seal hunting. Predictably, they confirm that a very large majority of the public agrees that the killing of animals may be justified for both subsistence purposes and management purposes.<sup>92</sup> They also show that, in the words of the Royal Commission, "the purpose behind the hunt may have a great effect on public reaction to it"<sup>93</sup>. More specifically, while a very large majority

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<sup>92</sup> Report of the Royal Commission on Seals and Sealing (1986), Volume I, Chapter 11, "Public Opinion on Sealing", pp. 160 and 185 (Exhibit EU - 48).

<sup>93</sup> Report of the Royal Commission on Seals and Sealing (1986), Volume I, Chapter 11, "Public Opinion on Sealing", p. 185 (Exhibit EU - 48).

found acceptable subsistence hunting by indigenous populations, and even a larger majority objected to hunting for commercial reasons.<sup>94</sup>

171. A public moral differs from a public opinion in that (1) a public moral necessarily involves a value judgment on the rightness or wrongness of a thing (gambling is wrong) while a public opinion merely involves questions of taste or preferences (Coke tastes better than Fanta), and (2) a public moral is deeply woven into the fabric of society, while public opinion is a more surface-level phenomenon.
172. The opinion polls cited by the European Union show a strong public demand for a ban on the marketing of seal products. This demand indicates the *unacceptability* of seal hunting, rather than mere dislike of seal hunting or preference for some alternative. This expression of unacceptability is evidence of a *moral* concern. In turn, the support for the proposed consequence of a marketing ban demonstrates that the public links individual and collective conduct (e.g. through the purchasing power of the EU market) to the cruelty being inflicted through the commercial seal hunt.
173. Furthermore, the opinion polls relied upon by the European Union span over various decades, which shows that public concerns with seal hunting are not a transitory and superficial opinion, but instead a well-rooted and permanent moral concern.

#### **Question 49**

*(All parties) Can the legal analytical framework for Article 2.2 of the TBT Agreement also be adopted for an assessment of a claim under Article 5.1.2, given, inter alia, their textual similarity?*

174. As noted in our first written submission<sup>95</sup>, there are textual similarities between Article 2.2 and Article 5.1.2. While due account must be taken of the differences, these textual similarities in the view of the European Union make it possible to draw useful guidance from the WTO jurisprudence concerning Article 2.2 when interpreting the obligation pursuant to Article 5.1.2.

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<sup>94</sup> Report of the Royal Commission on Seals and Sealing (1986), Volume I, Chapter 11, "Public Opinion on Sealing", table 11.6 at p. 169 and p.185 (Exhibit EU - 48).

<sup>95</sup> European Union's first written submission, para. 424.

### III. FACTUAL QUESTIONS AND DATA

#### **Question 53**

*(European Union) Does the European Union have animal welfare regulations on the hunt of wild animals?*

175. Under the EU Treaties, the competence for regulating hunting, including the animal welfare aspects of hunting, lies in principle with the EU Member States.
176. The European Union is competent to regulate animal welfare where differences between the regulations of the Member States may create obstacles to the functioning of the EU's internal market.<sup>96</sup> In the European Union wild animals are generally hunted for management, recreational and/or health purposes. The products resulting from those hunts are usually traded locally, if at all. As a result, there is generally no need to adopt regulations on animal welfare with regard to wild animals at the EU level.
177. The main instances of EU measures addressing the animal welfare of wild animals are, in addition to the measure at issue in this dispute, Directive 83/129/EEC prohibiting the importation of skins of seal pups;<sup>97</sup> and Regulation (EEC) 3254/91, prohibiting the use of leghold traps<sup>98</sup>. All these measures have in common that they concern species of wild animals which, exceptionally, are hunted primarily for commercial purposes, with the products resulting from the hunt being traded internationally in large quantities.
178. In addition, the European Union has enacted some minimal welfare requirements as part of Directive 92/43/EEC on the conservation of natural habitats and of wild fauna or flora (the "Habitats Directive")<sup>99</sup>. The Habitats Directive requires the Member States to take certain measures in order to maintain or restore the

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<sup>96</sup> Cfr. Article 114 of the TFEU.

<sup>97</sup> Council Directive 83/129/EEC of 28 March 1983 concerning the importation into Member States of skins of certain seal pups and products derived therefrom, OJ L 91, 9.4.1983 (Exhibit CDA – 12).

<sup>98</sup> Council Regulation (EEC) No 3254/91 of 4 November 1991 prohibiting the use of leghold traps in the Community and the introduction into the Community of pelts and manufactured goods of certain wild animals species originating in countries which catch them by means of leghold traps or trapping methods which do not meet international humane trapping standards, OJ L 308, 9.11.1991 (Exhibit EU – 5).

<sup>99</sup> Council Directive 92/43/EEC, of 21 May 1992, on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 22.7.1992, p. 7 (Exhibit EU – 84).

conservation status of certain species (including all species of seals occurring in the European Union). Species listed in Annex IV are strictly protected and cannot be hunted in principle.<sup>100</sup> Species listed in Annex V (including most species of seals) may be hunted, provided that their conservation status is not endangered.<sup>101</sup> In those cases where the killing is permitted, Article 15 of the Habitats Directive prohibits the use of certain killing methods.<sup>102</sup>

### **Question 57**

*(All parties) Is there a way to tell the difference between post-mortem or unconscious reflex movements (e.g. "swimming reflex"), and "coordinated movements" or conscious motions? Can this be done reliably and consistently in the context of the seal hunt?*

179. “Swimming reflex” is a term used by some veterinarians and sealing industry representatives to describe post-mortem or unconscious movements in seals. The reflex is described by Daoust (2002) as “strong lateral movements of the caudal portion of the body.”<sup>103</sup>
180. It is important to note that fully conscious seals use strong lateral movements of the caudal (hind) portion both to swim and to propel themselves across the ice. In other words, the movements associated with “swimming reflex” are observed in both fully conscious and unconscious/dead seals.
181. According to the EFSA Opinion:
- ...conscious responses may resemble swimming reflexes, and it is not always easy to distinguish between conscious and unconscious reactions from a distance and, particularly, when it is not possible to examine the animal clinically.<sup>104</sup>
182. Burdon (2001) notes that:

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<sup>100</sup> Article 11 and 16 of the Habitats Directive (Exhibit EU - 84).

<sup>101</sup> Article 14 of the Habitats Directive (Exhibit EU - 84).

<sup>102</sup> Article 15 of the Habitats Directive (Exhibit EU - 84).

<sup>103</sup> Daoust (2002), p. 688 (Exhibit EU - 32).

<sup>104</sup> EFSA Opinion, p. 71 (Exhibit EU - 30).



It is very difficult to determine loss of consciousness in any seal by observation. Swimming movements can be voluntary or involuntary. It is difficult to differentiate between involuntary reflex movement and conscious voluntary movement without assessing higher centre activity. It must therefore be assumed that all movement seen could be due to conscious voluntary muscle activity until the corneal reflex has been checked.<sup>105</sup>

183. Daoust (2002) notes that “the frequent occurrence of strong swimming actions in seals killed by trauma complicates the determination of their death from a distance.”<sup>106</sup> The same author also states that:

Complete immobility immediately following a blow to the head should actually alert the sealer to the possibility that the animal is still conscious...other authors have commented on the possibility that such immobile seals might be interpreted as dead by inexperienced sealers and, therefore, might still be conscious when skinning begins.<sup>107</sup>

184. Notably, Daoust (2012) admits that movements identified by veterinary observers as swimming reflex may have in fact been voluntary, noting that:

The skull damage was not severe in at least two of the remaining three seals, and it is therefore possible that some of the early movements interpreted as swimming reflex in these seals were voluntary.<sup>108</sup>

185. If trained veterinary observers of commercial sealing are unable to differentiate swimming reflex from voluntary movements, it seems unreasonable to expect that sealers would be able to do so consistently and effectively. This is especially true given most seals are shot at distance ranging from 30-70 meters in Norway<sup>109</sup> and 40-50 meters in Canada,<sup>110</sup> making close observation of the subtleties of these movements impossible.

### **Question 60**

*(All parties) According to humane killing standards, what would be an "acceptable" lapse of time between the stages of stunning and checking, and between the stunning and bleeding of the seal? How do scientists who review video images of seal hunting assess what period of time is too long?*

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<sup>105</sup> Burdon (2001), p. 4 (Exhibit EU – 31)

<sup>106</sup> Daoust (2002), p. 692. (Exhibit EU – 30)

<sup>107</sup> Daoust (2002), p. 692 (Exhibit EU – 30).

<sup>108</sup> Daoust (2012), p. 450 (Exhibit CDA -34)

<sup>109</sup> EFSA Opinion, p. 26 (Exhibit EU – 30)

<sup>110</sup> Smith (2005), p. 9 (Exhibit EU – 33).

Table 1

	<b>Time between stun and monitoring</b>	<b>Time between stun and bleeding</b>
Abattoir	Immediate	Immediate (maximum delay = 20 seconds)
Commercial sealing	Mean duration = 59-68 seconds <sup>111</sup>	Mean duration = 69-80 seconds <sup>112</sup>

186. Shooting and clubbing of seals in the commercial hunts "should be viewed as stunning methods only, producing a potentially temporary loss of consciousness."<sup>113</sup> Hence the need to monitor for consciousness before bleeding the animals.
187. Responsible veterinary authorities require that animals be monitored for consciousness and bled immediately or without delay following stunning. For example, the AVMA guidelines state that "stunning must be followed *immediately* by a method that ensures death."<sup>114</sup>
188. The OIE's guidelines for the slaughter of domestic animals in abattoirs state that "from the point of view of animal welfare, animals which are stunned with a reversible method should be bled without delay" and note that in the case of a non penetrating captive bolt, the maximum stun to bleed time should be 20 seconds.<sup>115</sup>
189. In contrast, Daoust (2002) recorded a delay of  $\leq 1$  minute for the sealers to get the vessel close enough to even reach the seal after shooting, but did not record the time until bleeding occurred.<sup>116</sup>
190. Butterworth (2007) recorded a mean duration from time of first shot to contact by the sealer of  $48.8 \pm 9.4$  seconds, but because bleeding did not occur in most cases, the panel was unable to record the time until bleeding commenced. The panel noted that this delay indicated "a substantial period of potential suffering" before the sealers could have even ensured that the animals were insensible.<sup>117</sup>

<sup>111</sup> Daoust (2012) (Exhibit CDA – 34).

<sup>112</sup> Daoust (2012) (Exhibit CDA – 34).

<sup>113</sup> Burdon (2001), p. 1 (Exhibit EU – 31).

<sup>114</sup> AVMA, (2007), p. 17. Emphasis supplied. (Exhibit NOR – 91).

<sup>115</sup> OIE, Terrestrial Animal Code, Article 7.5.7, section 5, at p.18 (Exhibit EU - 85).

<sup>116</sup> Daoust (2002), p. 689 (Exhibit EU – 32).

<sup>117</sup> Butterworth (2007), p. 3 (Exhibit EU – 34).

191. Daoust (2012) recorded an even higher interval between stunning and monitoring for consciousness, which precedes bleeding (see Table 2 below) in seals observed killed in 2009 in the Front. For example, when seals were shot on ice, a mean duration of  $61 \pm 33.9$  seconds (a range of 16-307 seconds) between the seal being shot and monitored for consciousness was recorded. When seals were shot in the water, the delay increased to  $91.95 \pm 54.1$  seconds (a range of 43-244 seconds).
192. Daoust (2012) did not record the time between monitoring and cutting open the seal, but did record the time between the first cut into the seal until the time of the first artery cut (the beginning of the bleeding process). This time was measured at  $10.9 \pm 4.2$  seconds.<sup>118</sup> However, the authors do not clarify if these data were sourced from the same group of seals measured for times between stunning and monitoring.
193. Given that Daoust (2012) provides no data for the time between monitoring and the first cut into the seal, when seals were shot on ice the *minimum* mean time between the shot and beginning the bleeding process would have been  $71.9 \pm 38.1$  seconds, assuming that the same seals were implicated (in the measure of time from stun to monitoring and time from first cut to severing of arteries). In a similar fashion, when seals were shot in the water, the *minimum* mean time between the shot and bleeding would have been  $102.85 \pm 58.3$  seconds.
194. Notably, Daoust (2012) states that “retrieving seals with a gaff significantly increased the interval between step one (stunning) and step two (checking) by, on average, 26.5 seconds.”<sup>119</sup> Daoust (2012) also noted that the interval between stunning and monitoring increased by 30.9 seconds when seals were shot in the water.<sup>120</sup>

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<sup>118</sup> Daoust (2012), p. 451 (Exhibit CDA – 34).

<sup>119</sup> Daoust (2012), p. 450 (Exhibit CDA -34).

<sup>120</sup> Daoust (2012), p. 451 (Exhibit CDA -34).

Table 2 (Excerpted from Daoust (2012))

Table 2 Parameters recorded during the harp seal hunt at the Front, east of the province of Newfoundland and Labrador, in 2009.

Parameters	Mean ( $\pm$ SD)	95% CI	Range	N
<i>Interval between steps one and two</i>				
All measures	63.5 ( $\pm$ 36.7)	58.9–68.0	16–307	254
Shot in the water	91.95 ( $\pm$ 54.1) <sup>a</sup>	66.6–117.3	43–244	20
Shot on the ice	61.0 ( $\pm$ 33.9) <sup>a</sup>	56.7–65.4	16–307	234
Poor welfare outcome	114.4 ( $\pm$ 54.8) <sup>b</sup>	79.6–149.2	58–244	12
Acceptable welfare outcome	60.9 ( $\pm$ 33.8) <sup>b</sup>	56.7–65.2	16–307	242
Retrieved using gaff	76.5 ( $\pm$ 43.9) <sup>c</sup>	69.2–83.8	28–307	90
Retrieved manually by sealer	50.0 ( $\pm$ 26.3) <sup>c</sup>	40.3–59.7	16–163	116
<i>First part of step three</i> (time from first soft tissue cut to first axillary artery cut)	10.9 ( $\pm$ 4.2)	10.1–11.8	5–26	90
<i>Second part of step three</i> (time from first axillary artery cut to end of steady bloodflow, ie bleeding time)	11.0 ( $\pm$ 4.1)	10.4–11.7	5–32	141
Steps one, two and three refer, respectively, to stunning (with regulation tools, in this case a rifle), palpation of the skull (in order to ensure that the brain is destroyed), and bleeding (done by sectioning both axillary arteries, following a skin incision along the ventral midline from the mandibular symphysis to the pelvis). All times are in seconds. Superscripts differ significantly from each other at $P < 0.05$				

195. When reviewing video evidence of commercial sealing, some scientists note the delays between stunning (clubbing or shooting), monitoring and bleeding and compare those delays to what would be accepted in a slaughterhouse.
196. The difference, however, is that in a slaughterhouse the maximum times suggested between stunning and bleeding assume that the animals have been correctly stunned. In an abattoir, the animals are observed closely and, should the animal have been stunned incorrectly, the operator can take immediate action to rectify the situation. In contrast, at the commercial seal hunt, there is (in the case of shooting) an inevitable delay between the shot and the ability for the sealer to even properly monitor the seal for unconsciousness.
197. In other words, the maximum delay of 20 seconds between stunning and bleeding required in abattoirs assumes an unconscious animal, and exists simply to ensure that the animal does not regain consciousness in the case of a reversible stunning method. It would not be acceptable in a slaughterhouse to allow an improperly stunned animal to suffer for 20 seconds. Yet far longer delays for conscious, wounded seals are inevitable and well documented in commercial sealing.

### **Question 61**

*(All parties) Please explain the situation regarding access of independent observers to seal hunts in Norway, Canada and European Union Member states where seal killing takes place. Please provide any available information parties may have regarding the situation in Greenland.*

198. In the relevant EU Member States, third party observation is neither prohibited nor expressly regulated. Given that the hunts are small-scale, dispersed and opportunistic, third-party observation may be impractical.

**Question 63**

*(European Union) Does the European Union accept that the three-step killing method, if carried out effectively and consistently, would satisfy:*

*-animal welfare requirements? and/or*

*-European Union public moral concerns relating to animal welfare?*

199. As explained in the EU's first written submission, there are different versions of the three-step method.<sup>121</sup> While Canada's and Norway's hunting regulations purport to comply with that method, they fail to do so.<sup>122</sup>
200. The European Union agrees that in theory it might be possible to design a genuinely humane method for killing seals based on the three-step method, which, if applied effectively and consistently, would satisfy animal welfare requirements at the level of protection selected by the European Union. As explained above in the reply to Question 9, a measure that addressed entirely the EU's animal welfare concerns would also address the EU's public moral concerns.
201. However, for the reasons explained in detail in the EU's first written submission, in practice, there are inherent obstacles in the commercial seal hunts which would render impossible the effective application of such a genuinely humane killing method on a consistent basis. As shown by the European Union, this view finds adequate support on qualified scientific evidence.<sup>123</sup>

**Question 64**

*(European Union) Please elaborate on the meaning of "effective monitoring and enforcement", including whether it requires regulatory supervision of the entire killing process for every seal killed?*

202. Monitoring and enforcement can be regarded as “effective” where they ensure that the prescribed legal requirements are complied with on a consistent basis and the

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<sup>121</sup> EU's first written submission, paras. 98-110.

<sup>122</sup> EU's first written submission, paras. 112-121 and 171-175.

<sup>123</sup> EU's first written submission, paras. 122-156 and 176-182.

- violations of those requirements remain below a certain threshold which is deemed acceptable in view of the specific level of protection chosen by each government.
203. The degree of “effectiveness” achieved by any system of monitoring and enforcement of animal welfare requirement is a function of various factors. It depends not only on the quantity and quality of the monitoring and enforcement means (both material and human) deployed by the responsible authorities, but also on other factors, including, in particular, the degree of difficulty in complying with the applicable regulations, the incentives to breach those regulations and the nature and importance of the obstacles to monitoring and enforcement.
204. The animal welfare requirements imposed by Canada's and Norway's current hunting regulations, inadequate as they are, are very difficult to comply with in the uniquely challenging environment in which commercial seal hunting takes place. Furthermore, in the context of Canada's and Norway's commercial hunt there is a strong incentive to breach those regulations, not just for economic gain, but also in order to safeguard the sealers' own safety.
205. In addition, the monitoring and enforcement of Canada's hunting regulations faces formidable natural obstacles. As explained in the EU's first written submission Canada's commercial hunt may involve thousands of vessels spread over a vast area.<sup>124</sup> Norway's commercial hunt is a smaller operation and, *a priori*, easier to monitor. Yet, as discussed in the EU's first written submission, not even the presence of an inspector on board can be considered as a sufficient guarantee.<sup>125</sup>
206. As a result of the above, and as shown in the EU's first written submission, there is strong evidence that, in practice, Canada's and Norway's current hunting regulations, inadequate as they are, are often breached in practice.<sup>126</sup>
207. If Canada's and Norway's regulations were amended in order to prescribe a genuinely humane killing method, they would be even more difficult to comply with than the current regulations. In that hypothetical scenario, improving the means of monitoring and enforcement would lead to more violations being

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<sup>124</sup> EU's first written submission, paras.152-156 and 397-400

<sup>125</sup> EU's first written submission, paras. 181-182.

<sup>126</sup> EU's first written submission, paras. 157-169 and 181-187.

detected, but it would still fail to prevent many of such violations. Not even the most conscientious and law-abiding sealer could avoid breaching the regulations providing for a genuinely humane killing method, whether involuntarily (e.g. inaccurate shooting or clubbing) or, out of necessity, in order to preserve his own safety. This point is clearly illustrated by Norway's recent and ill-fated attempt to make more humane its hunting regulations by prohibiting the hooking of seals prior to their bleeding on the ice. Ship owners and sealers rightly complained that such prohibition would seriously compromise the safety of sealers and render economically unviable the hunt and, as a result, succeeded in preventing the amendment of the regulations.<sup>127</sup>

208. Given that, in practice, a genuinely humane killing method cannot be applied on a consistent basis, in order to be able to certify with a reasonable degree of certainty that any given individual seal has been killed in accordance with such a method, an inspector would have to observe the entire killing process of that seal. However, in practice such a 'seal-by-seal' certification system would be unviable. Not only because it would require an army of inspectors, but also because, in practice, inspectors would find it difficult in many cases to monitor properly all the steps of the killing process.
209. In an abattoir, animals are restrained and stunned at close range. The trained operator is able to observe the animal closely to ensure appropriate stunning and take immediate action to re-stun in cases of stun failure. Supervisors and veterinary inspectors can inspect the entire process of humane killing (stunning, monitoring and bleeding) at close range. If higher rates of mis-stuns are found in audits, training, equipment improvements, changes in stunning methods, and increased inspections can all be implemented to rectify the situation. This is not the case in commercial sealing. For example:
- Shooting from long distances (40-50 metres in Canada<sup>128</sup> and 30-70 metres in Norway<sup>129</sup>) has become the preferred method of stunning in both the Canadian and Norwegian seal hunts. In these cases, observing the seal at close range *during* the stunning process is a practical impossibility. Thus, stunning in these cases can only be observed at a distance from a moving vessel.

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<sup>127</sup> EU's first written submission, paras. 173-175.

<sup>128</sup> Smith (2005), p. 9 (Exhibit EU – 33)

<sup>129</sup> EFSA Opinion, p. 26 (Exhibit EU – 30).

- In many cases, the sea ice will not support the weight of a sealer, or the seal has been shot in the water. In these situations, the only option is to gaff the seal and drag the animal across the ice and onto the vessel. There, the veterinary inspector is able to closely inspect the remainder of the killing process. However, by this time, an unacceptable amount of time may have passed (see above reply to Question 60) between stunning and confirmation of unconsciousness, and should the animal still be conscious after being shot, wounded, and gaffed, this would be exceptionally poor welfare for the seal.
  - When seals are shot near the edge of the ice or in the water, a significant number will escape into the water and cannot be retrieved (struck and lost). In Canada, rates of struck and lost have been measured at 5% of seal pups shot ice, and some studies suggest the rates are even higher when seals are shot on broken sea ice.<sup>130</sup> In these cases, it is impossible for the sealer to complete the killing process and for veterinarians to observe. This situation can never occur in an abattoir.
210. Even more crucially, as explained in the reply to Question 94, such a 'seal-by-seal' certification system would fail to make an equivalent contribution to the objective pursued by the EU Seal Regime.

### **Question 66**

*(All parties) Do the Inuit or indigenous communities in general consume meats derived from seals hunted? And, in Norway and Canada?*

211. Seal meat is an essential part of the diet of the Inuit,<sup>131</sup> including the Inuit communities in Canada.<sup>132</sup> For example, the Nunavut authorities have noted that:

The cash generated from the sale of sealskins helps to finance the hunt, which has become more and more expensive due to higher capital and operating costs, as well as the need to travel greater distances to hunt.

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<sup>130</sup> EU's first written submission, para. 145.

<sup>131</sup> See e.g. COWI Report (2010) (Exhibit JE-21), p. 24 ("Aleut diet" - Alaska), p. 30 (seal meat is consumed locally – Greenland), and Annex 2, p. 6 ("It is unlikely that Inuit trade seal meat (other than perhaps in barter trade in the Northern communities) as it is mostly for own consumption or sharing within the communities"); and Greenland Home Rule Department of Fisheries, Hunting and Agriculture, Management and Utilization of Seals in Greenland (revised in April 2012)(Exhibit JE-26), p. 11 ("[C]onsuming seal meat has huge advantages for the protection of the environment and for the health of Kalaallit / Inuit in Greenland") and p. 16 ("Throughout the Arctic, seal meat is considered a delicacy and is a fundamental component of the human diet in hunting communities").

<sup>132</sup> See e.g. COWI Report (2010) (Exhibit JE-21), pp. 26 and 27 ("seal meat is a traditional staple component in the Inuit diet") and NunatsiaqOnline "Less symbolism, more realism please", 16 March 2010 (available at [http://www.nunatsiaqonline.ca/stories/article/9768\\_less\\_symbolism\\_more\\_realism\\_please/](http://www.nunatsiaqonline.ca/stories/article/9768_less_symbolism_more_realism_please/)) ("This is the biggest economic benefit of the Nunavut seal hunt: thousands of kilograms of protein that Nunavut residents would otherwise be forced to buy in local retail stores").



Nevertheless, the cost and effort expended to hunt seals results in substantial benefits to Nunavut's subsistence economy: the replacement value of domestic seal meat consumption, which is estimated at \$5 million per year, is more than 5 times the economic contribution of all other activities associated with the sealing industry, as well as an excellent source of good, nutritious meat. Seal hunting is central to the cultural fabric of Inuit communities.

Seals have been vital to human survival in the Canadian Arctic for thousands of years. Seal meat is flavourful and very high in nutritional value. It is rich in high-quality protein, vitamins and minerals. All parts of the seal are used although food is the prime reason for hunting seals. According to one researcher, ringed seals contributed up to 67% of the edible weight of all wildlife harvested in what is now the Baffin Region.<sup>133</sup>

212. In contrast, Canada's and Norway's hunts are conducted almost exclusively for the purpose of obtaining skins and oil. Global demand for seal meat is minimal.<sup>134</sup>

**Question 67**

*(All parties) Can specific killing methods used in the seal hunts be considered as part of the tradition and/or culture of the Inuit or indigenous communities?*

213. At the outset, the European Union would like to note that the reference to "hunts traditionally conducted by Inuit and other indigenous communities" in Article 3.1 of the Basic Regulation, as well as the reference to "tradition of seal hunting" in Article 3.1(a) of the Implementing Regulation do not address the killing methods used in seal hunts by those communities. In this respect, the IC exception is meant to cover hunts for subsistence purposes conducted by those communities with a tradition of seal hunting since the application of the General Ban would have an adverse impact on the interest of these communities (as explained in recital (14) of the Basic Regulation).
214. That being said, the Inuit use killing methods which are different in some cases from the methods used in the commercial hunts and which blend tradition and modern technology.<sup>135</sup>

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<sup>133</sup> Government of Nunavut, Nunavut Economic Value of the Seal Hunt, Department of Environment (Exhibit CDA – 17).

<sup>134</sup> *Canadian Commercial Seal Harvest Overview 2011*, p. 5 (Exhibit JE – 27).

<sup>135</sup> See Greenland Home Rule Department of Fisheries, Hunting and Agriculture, Management and Utilization of Seals in Greenland (revised in April 2012)(Exhibit JE-26), pp. 18 – 20.

**Question 68**

*(European Union) Please clarify whether the European Union is arguing that seal hunting as such or commercial seal hunting is inherently inhumane.*

215. The European Union argues in this dispute that commercial sealing is inherently inhumane. The animal welfare implications of other types of hunts have been addressed in the reply to Question 8.

**Question 72**

*(All parties) Are the conditions under which seal hunts take place the same in all sealing countries? In particular, are they the same between Canada and Norway? Are the conditions in one more conducive to humane killing than in another?*

216. The conditions under which the subsistence seal hunts within the scope of the IC exception take place are very different from those prevailing in the commercial seal hunts. As explained in the reply to Question 8, some of the factors that contribute to make commercial seal hunting inherently inhumane are not present in the traditional hunts conducted by Inuit and other indigenous communities.

217. Similarly, as explained in the reply to Question 8, the conditions under which the small-scale management hunts within the scope of the MRM exception take place are also very different from those occurring in commercial seal hunting and less conducive, in principle, to inhumane killing.

218. While the environmental conditions of the Namibian seal hunt differ from those of the Canadian and the Norwegian hunts, all commercial seal hunts have in common essential aspects. For example, all commercial seal hunts involve:

- Moving, free ranging targets, which make consistent accuracy in shooting and clubbing a practical impossibility.
- The ability of the free ranging targets to escape into the ocean.
- The inability to monitor and bleed without delay when shooting in all cases and in clubbing in some cases.

219. The Canadian and Norwegian seal hunts, in particular, are exceptionally similar. For example:

- Both target the same species of seal (harp seals), at the same life stage (young ‘beater’ seal pups).

- Both take place in a very similar physical environment and under similar extreme weather conditions.<sup>136</sup>
  - The hunting regulations and the prescribed killing methods are very similar, despite certain differences, and raise similar concerns.<sup>137</sup>
  - Shooting from long distances (40-50 metres in Canada<sup>138</sup> and 30-70 metres in Norway<sup>139</sup>) has become the preferred method of stunning in both the Canadian and Norwegian seal hunts, while stunning with hakapiks remains common in both hunts.
  - The beater seals hunted in both Canada and Norway are more mobile on the sea ice (which is also in motion) than the whitecoats killed decades ago<sup>140</sup>, presenting moving targets to the sealers. Accuracy in clubbing and shooting is compromised by moving targets.<sup>141</sup>
  - In both Canada and Norway, sealers shoot the seals from moving platforms (sealing vessels) that pitch and roll in the ocean. Boat movement creates significant challenges to sealers delivering accurate head shots.<sup>142</sup>
  - When shooting, the distance of the vessels from the wounded seals, in both Canada and Norway, makes confirmation of unconsciousness and bleeding without delay impossible.<sup>143</sup>
  - In both Canada and Norway, the seals are often shot on broken sea ice, in proximity to open water, where the wounded seals can escape beneath the water's surface<sup>144</sup>
  - Because sealers are unable to operate safely on the sea ice in many cases, gaffing of seals prior to confirmation of unconsciousness and bleeding is a frequent practice.<sup>145</sup>
220. Norway has argued that the Norwegian commercial hunt is fundamentally different from its Canadian counterpart. But it has failed to offer any credible scientific evidence to suggest that Norway's seal hunt is any more humane than Canada's. Instead, Norway has relied on largely unsupported and carefully

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<sup>136</sup> See EU's first written submission, paras 124-126, 133-138, 178-180.

<sup>137</sup> See EU's first written submission, paras. 112-121 and 171-175.

<sup>138</sup> Smith (2005), p. 9 (Exhibit EU – 33)

<sup>139</sup> EFSA Opinion, p. 26 (Exhibit EU – 30).

<sup>140</sup> See below the reply to Question 91.

<sup>141</sup> See EU's first written submission, paras. 127, 129-130, 132, 135-138.

<sup>142</sup> See EU's first written submission, paras. 133 and 135-138.

<sup>143</sup> See EU's first written submission, paras. 139-144.

<sup>144</sup> See EU's first written submission, para. 145.

<sup>145</sup> See EU's first written submission, paras. 140, 172-175.

supervised statements by government employees prepared expressly for the purposes of this dispute<sup>146</sup> and on a staged video showing a handful of “cherry picked” seal kills.

221. There is very little scientific evidence on the Norwegian seal hunt.<sup>147</sup> What little data does exist suggests high wounding rates and other outcomes that are similar to those in Canada, and would never be tolerated in an abattoir or other commercial slaughter operation. For example, in 1995 Dr. Egil Øen (1995) carried out a study in Norway on 349 weaned harp seal pups shot with rifles with calibres .222 and .223 at an average shooting range of 30 meters (the average shooting distance in Norway is 30-70 meters).<sup>148</sup> In 8% of cases, the shots missed the seals entirely. In 13.5% of cases, the seal was shot in areas other than the head or upper neck, and in a further 2% of cases, the seal was shot in the head/upper neck but the bullet reportedly missed the brain.<sup>149</sup> This is a total misfire rate of 8%, and a stun failure rate of 15.5%, when sealers were shooting at the *minimum* shooting distance estimated for the Norwegian seal hunt.

### **Question 73**

*(All parties) Are there differing animal welfare outcomes in different countries, in particular within Canada, Norway, the European Union and Greenland? If so, please explain how the difference(s) in animal welfare outcomes and how this has changed over time.*

222. The European Union has addressed at length the animal welfare outcomes of Canada's commercial seal hunt and Norway's commercial seal hunt in its first written submission.<sup>150</sup> As explained there, while there is hardly any independent evidence concerning Norway's commercial seal hunt, both hunts take place in very similar conditions and there is no reason why the animal welfare outcomes should be significantly different. See also the reply to Question 72.

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<sup>146</sup> See EU's first written submission, para. 402.

<sup>147</sup> EU's first written submission, paras. 176 and 401.

<sup>148</sup> EFSA Opinion, p. 29 (Exhibit EU – 30).

<sup>149</sup> Cited in EFSA Opinion, p. 66 (Exhibit EU – 30). See also EU's first written submission, para. 401.

<sup>150</sup> See, in particular, EU's first written submission, paras. 157-169, 176-177, 183-187, 389-396, 401-403. See also the *amicus curie* brief by *Anima et al.*, pp. 12-36 (Exhibit EU – 81), which are hereby incorporated by reference.

223. As regards Namibia's seal hunt, the Panel is referred to the EU's oral statement at the third party session of the first meeting of the Panel with the parties. As explained on that occasion, Namibia's seal hunt is, if anything, more problematic from an animal welfare point of view than Canada's and Norway's commercial seal hunts.
224. There is very little evidence on the animal welfare outcomes of the subsistence seal hunts conducted by the Inuit and other indigenous communities, including Greenland's Inuit traditional seal hunts. As explained in the reply to Question 8, the seal hunts falling within the scope of the IC exception have characteristics which set them apart from the commercial seal hunts. The animal welfare implications of those characteristics have been addressed in the reply to Question 8. See also Government of Greenland, *Management and utilization of Seals in Greenland*, at pp.18-20.<sup>151</sup>
225. As regards the seal hunts in Finland, Scotland and Sweden, see above the reply to Question 8, EFSA's opinion<sup>152</sup>, at pp. 31-32 122, and COWI (2008)<sup>153</sup> at pp. 35-43, 78-86 and 87-91. As regards Scotland, however, it should be noted that the regulatory framework described by EFSA and COWI has been substantially modified with the enactment of the *Marine Act 2010*.<sup>154</sup>

#### **Question 74**

(All parties) Please describe the collection and processing of seal products in Greenland, as well as the sale/distribution of seal products both within Greenland and from Greenland to other countries.

226. The European Union refers to the document in Exhibit JE-26 where the Government of Greenland addresses these matters.<sup>155</sup>

#### **Question 75**

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<sup>151</sup> A description of those methods can be found in Government of Greenland, *Management and utilization of Seals in Greenland*, pp.18-20 (Exhibit JE - 26).

<sup>152</sup> Exhibit EU – 30.

<sup>153</sup> Exhibit JE -20.

<sup>154</sup> Exhibit JE – 06.

<sup>155</sup> Greenland Home Rule Department of Fisheries, Hunting and Agriculture, *Management and Utilization of Seals in Greenland* (revised in April 2012) (Exhibit JE-26), pp. 25 – 29.

*(European Union) Is the transit of seal products prohibited under the EU Seal Regime? If yes, please refer to the specific parts of the measure where such prohibition is indicated. If not, please elaborate on the activities relating to transit of seal products.*

227. The Basic Regulation contains no provision addressing specifically the transit of seal products originating in third countries through the territory of the European Union. In practice, the Basic Regulation is being interpreted by the customs authorities of the Member States as not applying to goods in transit through the EU territory on the grounds that they cannot be considered to have been placed on the EU market. The EU Commission has not taken any official position on this issue. Nor has this matter been resolved by the EU Court of Justice

**Question 76**

*(European Union) Please clarify whether the "commercial hunting of seals" (e.g. recital 10 of the Basic Regulation) is defined under the EU Seal Regime. If not, explain its scope and meaning.*

228. The EU Seal Regime does not define the terms "commercial hunting of seals". Those terms should be understood as referring to hunts which are conducted exclusively or primarily for the purpose of obtaining products, such as skins or oil, which are subsequently marketed for profit.

**Question 77**

*(European Union) Please clarify whether the last sentence of Article 3(1) of the Basic Regulation also applies to Article 3(2)(a) & 3(2)(b) of the Basic Regulation.*

229. Yes, the derogations from Article 3.1 provided in Articles 3.2 a) and 3.2 b) are also applied at the time or point of import.

**Question 78**

*(European Union) Please confirm whether the conditions for placing on the market of seal products under Article 3(1) and Article 3(2)(b) of the Basic Regulation restrict commercial imports of seal products that do not qualify under these two provisions.*

230. Yes, commercial imports are prohibited unless they qualify for the IC exception or the MRM exception.

**Question 79**

*(European Union) Please clarify the scope and meaning of "import" as defined by Article 2(5) of the Basic Regulation and confirm that commercial imports of seal products are not allowed under Article 3(2)(a) of the Basic Regulation.*

231. The Basic Regulation is being interpreted by the customs authorities of the Member States as applying to goods which have been released for free circulation in the customs territory of the European Union after payment of the duties to which they are liable. The EU Commission has not taken any official position on this issue. Nor has this matter been resolved by the EU Court of Justice.

232. Article 3.2 a) only allows imports of an occasional nature which consist exclusively of goods for personal use.

### **Question 80**

*(European Union) What needs to be demonstrated to qualify as "seal hunts conducted under a national or regional natural resources management plan" as prescribed in Article 5(1)(a) of the Implementing Regulation?*

233. This needs to be read in conjunction with the remaining part of Article 5(1)(a) of the Implementing Regulation, which reads:

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

234. 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. Substantive support to the concept of natural resources management plan has been given in a number of areas by the scientific community (e.g. ICES) and has been integrated in the work of international instances, such as regional fisheries organisations, regional sea conventions, etc.

235. Any implementation of an ecosystem-based approach to the management of human activities has also to be realistic and iterative. The exercise has to be done periodically, allowing to test in reality the consequences of any action adopted. This information, along with any other new available scientific information, should be used in new iterations of the process.

**Question 81**

*(European Union) What needs to be demonstrated to qualify as "seal hunts which contribute to the subsistence of the community" as prescribed in Article 3(1)(c) of the Implementing Regulation?*

236. Article 3.1(c) should be understood as meaning that those seal hunts should make a material contribution to maintaining the community economically or socially. This should also be read in conjunction with recital (14) of the Basic Regulation.

**Question 82**

*(European Union) Is the list in Exhibit EU-77 a complete and up to date list of recognized bodies that have met the necessary requirements pursuant to Article 6 of the Implementing Regulation? If not, please provide a complete and up to date list of such recognized bodies.*

237. Yes, the list contained in Exhibit EU-77 is up-to-date at the time of writing.

**Question 83**

*(European Union) For all currently recognized bodies under Article 6 of the Implementing Regulation, please describe the process and basis for their recognition.*

238. The European Commission is required, in accordance with Article 6(1) of the Implementing Regulation, to include on the list of recognised bodies any entity, which submits an application pursuant to Article 6(2) of the Implementing Regulation accompanied by documentary evidence that it fulfils the requirements set out in Article 6(1).
239. In practice, after an application has been received by the Commission Services it will first be translated into a Commission working language (unless submitted in one of the working languages). Commission Services will then check whether based on the application, including its accompanying evidence, the applying entity satisfies the criteria set out in Article 6(1) of the Implementing Regulation. If the application is incomplete, the applicant is asked to supplement its application. Once Commission Services are satisfied that the applying entity meets the criteria set out in the Implementing Regulation, a proposal for adoption of a decision to include the entity on the list of recognised bodies is submitted to the College of Commissioners. Following its adoption such decision is made public on the website of the European Commission at:



[http://ec.europa.eu/environment/biodiversity/animal\\_welfare/seals/seal\\_hunting.htm](http://ec.europa.eu/environment/biodiversity/animal_welfare/seals/seal_hunting.htm).

240. More specifically, with respect to the process concerning the currently recognised bodies, as noted in our first written submission<sup>156</sup>, the European Commission received a request by the Swedish Ministry of Agriculture on 20 January 2011, on behalf of eleven County Administrative Boards. Namely the County Administrative Boards of Norrbotten, Västerbotten, Västernorrland, Gävleborg, Uppsala, Stockholm, Södermanland, Östergötland, Kalmar, Västra Götaland and Halland. The request was accompanied by documentary evidence.
241. By letter dated 7 July 2011, the European Commission accepted that the eleven applications be treated jointly and requested additional documentary evidence with regard to fulfilment of some of the requirements set out in Article 6(1) of Commission Regulation (EU) No 737/2010. By letter dated 6 October 2011, the Swedish Ministry for Agriculture submitted the requested additional information and documentary evidence. Commission Services then conducted an assessment of the application with respect to the 11 entities. After having established that the conditions set out in the Implementing Regulation are satisfied, the European Commission adopted on 18 December 2012 a decision to recognise the 11 applicant bodies. The decision was sent to the applicant and made public on the European Commission's website on the day of adoption.

#### **Question 84**

*(All parties) Please confirm that no Canadian or Norwegian entity has submitted a request to be included in the list of recognized bodies according to Article 6 of the Implementing Regulation. If not, why not? If yes, explain the process in detail and the results.*

242. The EU only received an informal inquiry concerning the application procedure from an officer of Agriculture and Agri-Food Canada (AAFC).<sup>157</sup> To date no application by any Canadian or Norwegian entity has been received by the European Commission.

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<sup>156</sup> European Union's first written submission, footnote 517.

<sup>157</sup> Email exchange between the EU Delegation to Canada and Agriculture and Agri-Food Canada (Exhibit EU-94).

**Question 86**

*(European Union) What is the nature of "competent authorities" under Article 9 of the Implementing Regulation, which are required to be designated by each Member State and are responsible for verifying as well as controlling the issuing of attesting documents. Explain why such competent authorities designated pursuant to Article 9 cannot be designated as "default" competent authorities.*

243. The Panel's question correctly acknowledges that different actors/entities participate in a conformity assessment procedure and carry out distinct tasks and responsibilities. Under the system established by the Implementing Regulation a number of actors interact with each other: the designating body (European Commission); the recognised bodies (certification and inspection authorities, which can be private or public bodies established and active within or outside the European Union territory); applicants for an attesting document and/or holders of a seal product accompanied by an attesting document; EU enforcement authorities, including customs authorities; and Member State competent authorities.
244. Pursuant to Article 9(1) of the Implementing Regulation each Member State is required to designate one or several "competent authorities". These authorities are responsible for (i) the verification of attesting documents (Article 9(1)(a)); (ii) the control of the issuing of attesting documents by recognised bodies established and active in the Member State of the competent authority (Article 9(1)(b)); (iii) collecting documents issued for seal products originating from hunts in the Member State of the competent authority (Article 9(1)(c)).
245. Verification is not a mandatory step under the Implementing Regulation; it is foreseen only for cases where customs authorities and other enforcement authorities have doubts regarding the authenticity or correctness of an attesting document or where they require additional information. Verification can concern attesting documents issued by recognised bodies in the Member State of the competent authority, other EU Member States or outside the EU. The control and the repository function of competent authorities are even more limited in their scope. Control is limited to recognised bodies established and active in the Member State of the competent authority. Lastly, archiving is *ipso facto* limited to a few competent authorities of those EU Member States where seal hunting takes place and in any event explicitly limited to the EU.

246. Through the three functions which were entrusted to them by the Implementing Regulation, competent authorities exercise control over recognised bodies which are active and established in the EU (in addition to the audit foreseen under Article 6(1)(g) which applies to all recognised bodies regardless of their location), and constitute a safeguard against fraudulent use of "attesting documents" for all recognised bodies. In most Member States ministries for environment or agriculture have been designated as competent authorities, two Member States designated their respective ministries of finance.<sup>158</sup>
247. The role of competent authorities is therefore fundamentally different from the role of recognised bodies under the Implementing Regulation, which perform an inspection and certification function. Even though, a public authority, such as those designated as competent authorities, could theoretically apply for recognised body status, acting both as a recognised body and a competent authority at the same time would give rise to a conflict of interest (c.f. Article 6(1)(d)).

### **Question 87**

*(All parties) Do any other WTO Members have a measure similar to that embodied in Article 6 of the Implementing Regulation (i.e. process for designating a recognized body)?*

248. As noted already in our first written submission<sup>159</sup>, there is considerable diversity between the systems for designation/accreditation of conformity assessment bodies between WTO Members.<sup>160</sup> Nonetheless, a number of features are commonly found in WTO Members' measures.
249. Where Members put in place third party conformity assessment systems<sup>161</sup>, conformity assessment bodies are either designated<sup>162</sup> by a governmental authority or accredited by an accreditation authority.<sup>163</sup> Designation or accreditation is done on the basis of designation/accreditation criteria set out in the relative normative documents. Designation and accreditation authorities typically also have the power

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<sup>158</sup> List of competent authorities established pursuant to Article 9(3) of Commission regulation (EU) no 737/2010; Exhibit EU-95.

<sup>159</sup> European Union's first written submission, para. 460.

<sup>160</sup> For an overview see ISO Central Secretariat: Building Trust: The conformity assessment toolbox, Geneva 2012; available at [http://www.iso.org/iso/casco\\_building-trust.pdf](http://www.iso.org/iso/casco_building-trust.pdf) (Exhibit EU-74).

<sup>161</sup> ISO/IEC 17000: *Conformity assessment- vocabulary and general principles*, p. 6, pt. 2.4 (Exhibit EU-96).

<sup>162</sup> *Ibid.* p. 18, pts 7.2 and 7.3

to suspend or withdraw designation/accreditation or remove their suspension. Where a scheme is based on designation/accreditation, the accreditation body cannot at the same time perform the functions of a conformity assessment body.<sup>164</sup>

250. Also in our first written submission, we already indicated a few examples of systems which have a number of features in common with the process (and substantive criteria)<sup>165</sup> that are in place under Article 6 of the Implementing Regulation, as for instance the "Nationally Recognized Testing Laboratory (NRTL) Accreditation Program"<sup>166</sup> in the United States.

### **Question 88**

*(European Union) Explain how the application from Greenland was "incomplete" (see the European Union's statement in paragraph 482, footnote 618). Were any steps taken to obtain additional needed information?*

251. The application submitted by Denmark on behalf of the Self-Rule Government of Greenland on 23 February 2011 did not contain sufficient documentary evidence to establish that the requirements set out in Article 6(1) of the Implementing Regulation have been met.
252. Once Commission Services established that the application was deficient a letter was sent to the Greenland authorities on 7 July 2011 identifying those deficiencies and inviting Greenland to complete its application. Greenland subsequently provided additional documentation to support its application in three instalments: by letter on 5 January 2012 via the Danish Ministry of Foreign Affairs, by email on 1 November 2012 and finally by letter dated 29 January 2013, which was received by the Commission Services on 5 February 2013.
253. In addition to the formal deficiency letter of 7 July 2011, the Commission Services also engaged with the applicant and provided all the requested clarification concerning the requirements and supporting documentation. The most recent exchange was in the form of a meeting on 7 December 2012 at the Greenland Representation in Brussels.

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<sup>163</sup> Ibid. p.6, pt 2.6 and p. 14, pt. 5.6.

<sup>164</sup> Ibid., p. 6, note to pt. 2.5.

<sup>165</sup> See European Union's first written submission, para 451.

<sup>166</sup> See Exhibit EU-70, Chapter 2, pt. III.

**Question 91**

*(All parties) Please elaborate on the age of seals hunted, including any names and/or classifications of seal age groups and the proportion of such age groups in relation to total seals hunted.*

- a. (European Union) Specifically clarify the seals covered by the 1983 Seal Pups Directive.*
  - b. (Canada) Specifically clarify the seals covered by the 1987 prohibition of hunting seal pups in Canada.*
  - c. (Norway) Please describe any regulations in Norway pertaining to the age of seals.*
  - d. (All parties) Please explain any other relevant considerations of seal age to both the hunting of seals as well as the products derived from seals.*
254. The 1983 EU Seal Pups Directive<sup>167</sup> prohibits trade in products of “whitecoat” harp seals and “blueback” hooded seals. These are harp seal pups from 0-12 days of age, and hooded seal pups from 0 days to about 13 months of age, respectively.
255. Harp seals are born with a neonatal white fur coat and are called “whitecoats” while their neonatal coat is intact. It has been illegal in the European Union (since 1983), in Canada (since 1987) and in Norway (since 1989) to trade in whitecoats. However, whitecoats begin to shed their white fur as young as 12 days of age, and can legally be killed and their products traded as soon as the shedding process begins. During the few days that harp seals are shedding their white coats (from about 12-19 days of age) the seal pups are known as “ragged jackets.” Ragged jackets are commonly killed in Canada’s and Norway’s commercial seal hunt, and their skins could be legally traded in the European Union until the EU Seal Regime became applicable.
256. The primary targets of Canada’s and Norway’s commercial seal hunts are “beater” harp seal pups that have fully shed their white fur, between the ages of 20 days and 12 weeks of age
257. Hooded seals shed a pre-natal coat in the womb, and are born with a silver grey fur coat, for which the pups are named “bluebacks.” It has been illegal in the

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<sup>167</sup> Council Directive 83/129/EEC of 28 March 1983 concerning the importation into Member States of skins of certain seal pups and products derived therefrom, OJ L 91, 9.4.1983 (Exhibit CDA – 12).

European Union (since 1983) and Canada (since 1987) to trade in bluebacks. The blueback hooded seal pups retain this silver-grey coat until 13-14 months of age, at which point they are no longer protected from hunting or trade in Canada. In Norway is has been prohibited to hunt hood seals since 2007 for conservation reasons.

**Protection of harp and hooded seals in Canada, Norway and the European Union**

Species	Age	Nickname	Can be traded in Canada?	Can be traded in Norway?	Can be traded in the EU?
Harp seal (phoca groenlandica)	0-12 days of age (while neonatal white fur coat remains intact)	Whitecoat	No (since 1987)	No (since 1989)	No (since 1983)
Harp seal (phoca groenlandica)	13-19 days of age (while neonatal white coat is shedding)	Ragged jacket	Yes	Yes	No (since 2010)
Harp seal (phoca groenlandica)	20 days of age – 12 weeks of age*	Beater	Yes	Yes	No (since 2010)
Hooded seal (Cystophora cristata)	0 days – 14 months of age	Blueback	No (since 1987)	No	No (since 1983)

\* Harp seal pups who have fully shed their neonatal white coats, between about 20 days and 13 months of age, are known as “beaters.” These seal pups are the primary targets of the commercial seal hunt until about 12 weeks of age, when they have taken to water and begun their migration away from the sealing areas.

258. The fact that slightly older seal pups are now the targets of the seal hunts has a number of impacts on animal welfare:

259. *First*, because the sealers are killing the pups when they are a few weeks older, the hunting occurs three to four weeks later in each region. Thus, the bulk of the killing is happening in the midst of the spring sea ice melt when the ice floes are far more broken up than they were in seal hunts of past decades (when newborn pups were targeted earlier in the season).<sup>168</sup> This means that sealers are targeting seal pups on broken sea ice, near open water, which increases rates of struck and loss.<sup>169</sup> In many situations, the broken sea ice is not safe for sealers to operate on, and the only option in these cases is to gaff the seal onto the vessel prior to

<sup>168</sup> EU's first written submission, para. 125.

<sup>169</sup> See e.g. Burdon, p. 5 (Exhibit EU - 31); Smith, p. 10 (Exhibit EU - 33); Butterworth (2012), p. 6 (Exhibit EU - 37); and EFSA Opinion, section 3.6.1, point 5 (Exhibit EU – 30).

confirming unconsciousness and bleeding.<sup>170</sup> Sealers are also likely shooting more seals in open water.

260. *Second*, beater harp seal pups are far more agile on the ice than the whitecoat (newborn) harp seal pups killed decades ago in both Canada and Norway. This means that sealers are now shooting and clubbing moving targets on moving sea ice, and accuracy in both shooting and clubbing is compromised by moving targets.<sup>171</sup> Beater seals also often assume a defensive posture when threatened (raising their heads with their jaw facing the sealer) making it more difficult for sealers to deliver accurate blows to the top of the skull when clubbing.

### **Question 93**

*(European Union) Please provide the tariff rates (bound and applied) for products listed in the note in JE-3.*

261. The information requested is provided as Exhibit EU – 86.

### **Question 94**

*(All parties) Does any WTO Member have an animal welfare certification and labelling scheme which is similar to that proposed by the complainants as an alternative to the EU Seal Regime?*

262. To the best of the EU's knowledge, no such certification and labelling scheme is applied by any WTO Member in respect of seal products. All WTO members which have considered necessary to take action with regard to seal products based on animal welfare grounds have opted for banning all trade in such products.
263. The Complainants have not articulated or designed an animal welfare certification and labelling scheme to apply to seal products. They have merely asserted the possibility of creating such a scheme. While they have offered various examples of existing certification schemes, none of them is really pertinent.
264. *First*, both Canada and Norway have referred to the system of certification provided in the EU Seal Regime in connection with the IC exception and the MRM exception.<sup>172</sup> However, that system does not certify compliance with animal

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<sup>170</sup> EU's first written submission, paras. 140-144 and 172-175.

<sup>171</sup> EU's first written submission, paras. 127, 130-131, 132, 137-138

<sup>172</sup> Canada's first written submission, paras. 655-661. Norway's first written submission, paras. 853-854.

welfare requirements because those exceptions are not subject to any such requirement. Therefore, this example is entirely devoid of relevance.

265. *Second*, Canada alludes to the certification system envisaged in the EU Commission's proposal.<sup>173</sup> But it must be recalled that the EU Commission's proposal sought a lower level of protection than that provided in the EU Seal Regime. Indeed, according to Article 4 of the proposal, the placing on the market of seal products would have been allowed where those products

Have been obtained from seals killed and skinned in a country where, or by persons to whom, adequate legislative provisions or other requirements apply ensuring that seals are killed and skinned without causing *avoidable* pain, distress and any other form of suffering.<sup>174</sup>

266. The EU legislators, nevertheless, considered that it was not enough to address only the *avoidable* risks, because the *unavoidable* risks to animal welfare that are inherent in commercial seal hunting are excessive and unacceptable. They reached this conclusion on the basis of scientific evidence showing that a genuinely humane method cannot be effectively and consistently applied in the context of the commercial seal hunts.<sup>175</sup>

267. Since a humane killing method cannot be effectively and consistently applied it is not possible to certify *a priori* that all products originating in a given country or region or hunted by a certain person will comply with the requirements of such method, contrary to what had been envisaged in the EU Commission's proposal. Instead, it would be necessary to certify that each and every individual seal from which the marketed products are obtained has been hunted humanely. The practical viability of such a certification system, however, is very questionable (see above the reply to Question 64). Even more crucially, such a certification system would fail to make an equivalent contribution to the objective of the EU Seal Regime. The fact that the seal products marketed in the European Union had been obtained from seals killed in a humane way would not meet the concerns that led to the adoption of the EU Seal Regime. Those concerns would subsist because, of the impossibility of killing seals humanely on a consistent basis. As a result, in

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<sup>173</sup> Canada's first written submission, paras. 662-666.

<sup>174</sup> EU Commission proposal, Article 4 (Exhibit JE – 8.). Emphasis supplied.



- order to kill the requisite number of certified seals in a humane way, it would be necessary to kill many other seals in an inhumane way. Indeed, the proposed system could even have the perverse effect of increasing the number of seals killed in an inhumane way. The European Union refers on this point to the more detailed argument and evidence contained in the amicus brief submitted by Anima *et al.* at paragraphs 218-228<sup>176</sup>, which are hereby incorporated by reference.
268. *Third*, Canada and Norway refer to the certification system provided in the Agreement on International Humane Trapping Standards.<sup>177</sup> However, that agreement concerns very different species of animals which are hunted in accordance with very different killing methods and in a very different environment. Moreover, that agreement provides for a system of certification on a country basis, rather than on a seal-by-seal basis. Yet, for the reasons explained above, in the case of seals a certification on that basis would fail to achieve the level of protection sought by the EU legislators because no genuinely humane method can be applied on a consistent basis.
269. *Fourth*, Norway refers to the system of certification of dolphin-safe tuna provided under the AIDCP.<sup>178</sup> Again, however, that agreement concerns very different species fished according to very different methods in a very different environment. Moreover, both the objective and the level of protection of the AIDCP system of certification (i.e. verifying that tuna is "captured in sets in which there is no mortality or serious injury of dolphins") are very different from that pursued by the EU Seal Regime.
270. Last, Norway also cites that certification systems operated by MSC and Friend of the Seas<sup>179</sup> for the purposes of certifying the sustainability of fisheries. It is obvious, nevertheless, that these systems pursue a very different objective unrelated to animal welfare and are, as such, manifestly irrelevant.

### **Question 95**

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<sup>175</sup> EU's first written submission, paras. 54-57.

<sup>176</sup> Anima *et al.*, *amicus curiae* brief (Exhibit EU – 81).

<sup>177</sup> Canada's first written submission, paras. 672-676; Norway's first written submission, paras. 866-868.

<sup>178</sup> Norway's first written submission, paras. 854-859.

<sup>179</sup> Norway's first written submission, paras. 860-865.

*(European Union) Can the European Union identify and describe any Inuit or indigenous communities within the European Union that engage in seal hunts and/or placement on the market of seal products?*

271. To its best knowledge, the European Union understands that there are no Inuit or indigenous communities within the European Union's territory that engage in seal hunts and/or place seal products on the EU market. Even assuming that there is hunting by Saami indigenous communities in Sweden,<sup>180</sup> the number of seals hunted by them would be very small.

### **Question 96**

*(All parties) Please provide the most updated data available for: (i) the number of seals hunted in Canada, Norway, Greenland, Namibia, the EU Member States, and other sealing countries; and (ii) exports of seal products (preferably disaggregated by product type and destination) for the past ten (10) years.*

272. The most recent data available for the number of seals hunted in the relevant EU Member States are as follows:

- Finland (2011): 380 grey seals
- Sweden (2012): 96 grey seals
- United Kingdom (Scotland) (2011): 366 grey seals

273. The requested exports statistics for all tariff lines covering exclusively seal products are provided as Exhibit EU -87.

### **Question 97**

*(European Union) Provide details on the seal products imported into the European Union since the adoption of the EU Seal Regime (including trade volume, origin of imports, and the exception under which the products were imported). In providing the information, please use the list of products contained in the Technical Guidance Note as a reference (Exhibit JE-3).*

274. The requested import statistics are provided as Exhibit EU – 88.

275. The majority of product codes included in the Technical Guidance Note cover many other products in addition to seal products. The EU official import statistics

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<sup>180</sup> COWI Report (2010) (Exhibit JE-21), p. 33.

- do not allow distinguishing between seal products and other products within each of those codes. In view of this, the European Union is providing import data only for the tariff lines covering exclusively seal products.
276. It should be noted, in particular, that since 2007 raw seal skins fall within a basket heading together with raw skins of other animals (CN 430180 – "Raw skins – not elsewhere specified"). For that reason, the statistics provided as Exhibit EU -88 do not include imports of raw seal skins. Prior to the application of the ban, most of Canada's exports to the European Union were composed of raw skins.<sup>181</sup>
277. While the EU Seal Regime was enacted in 2009 it did not become applicable until August 2010. In view of this, import data are provided for the period 2009-2011. Definitive data for the year 2012 are not available yet.
278. The import data include imports of goods released for free circulation.
279. The figures for imports originating in Greenland in 2011 correspond to imports into Denmark on the basis of certificates unilaterally issued by the Groenlandic authorities in accordance with the criteria of the IC exception, despite the fact that those authorities have not been approved yet as "recognised body" by the EU Commission.
280. During the period 2009-2011 there were no imports from Namibia. The figures for imports from Canada and Norway in 2011 correspond to imports into Denmark of goods processed in those countries from seal products originating in Greenland and covered by the above mentioned certificates issued by the Groenlandic authorities.

**Table 4**

Year	Canada <sup>182</sup>				Greenland <sup>183</sup>			
	Number of skins	Value (millions CAD)	EU	Outside EU	Number of skins	Value (thousands DKK)	EU	Outside EU

<sup>181</sup> Canada's first written submission, para. 83.

<sup>182</sup> Figures for the number and value of skins taken from Exhibit JE-27, Table 14. Percentages represent rough calculations of the volume (rather than value) of seal skins exported based on country-specific data.

<sup>183</sup> Figures for the number and value of skins taken from Exhibit JE-26, Table 4.

2004	280,140	\$11.7	27%	73%	115,723	45,477	71%	29%
2005	202,844	\$13.4	11%	89%	108,372	54,399	69%	31%
2006	248,899	\$16.4	44%	46%	91,026	59,681	66%	34%
2007	90,513	\$8.6	14%	86%	45,043	20,889	43%	57%
2008	123,332	\$6.5	35%	65%	31,307	11,132	16%	84%
2009	6,209	\$0.18	89%	11%	19,602	5,201	22%	78%
2010	27,451	\$0.81	99%	1%	23,167	5,760	26%	74%
2011	28,386	\$0.85	100%	0%	-	-	36%	64%

### **Question 98**

*(All parties) Please confirm whether seal products, including those from Canada and/or Norway, have been placed on the European Union market, specifically in light of the data illustrated in Table 4. If yes, please explain the complainants' indications in the first written submissions that there are currently no recognized bodies capable of satisfying the EU Seal Regime's conformity assessment requirements.*

281. As explained above, 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 “recognised body”. In addition, exports from Greenland shown in Table 4 may include also exports not released for free circulation in the EU customs territory.
282. In turn, the differences between the exports from Canada shown in Table 4 and the imports shown in Exhibit EU - 88 can be explained by the fact that the latter do not include imports of raw skins, while it appears that the data in Table 4 do not include exports of tanned skins.<sup>184</sup> In addition, it appears that Canada's statistics count as exports to the European Union all shipments of goods to the EU territory, whether or not they are released for free circulation in the customs territory of the European Union.

### **Question 99**

*(All parties) Has the overall trade in seal products on the global and/or European Union market been reduced? If yes, has the EU Seal Regime affected the trade volume of seal products?*

283. The trade impact of the EU Seals Regime is difficult to quantify precisely. As explained above, the available statistics do not allow identifying trade in all seal products and cover just one year of the application of the EU Seal Regime. In addition, trade in seal products was already at a very low level on the date where

<sup>184</sup> Canada's first written submission, para. 78.

the EU Seal Regime became applicable. This was due, at least in part, to the anticipation by traders of the effects of the EU Seal Regime, following the submission of the EU Commission proposal in 2008, and to the earlier bans enacted or projected by various EU Member States since 2007. Moreover, the impact of the trade ban is difficult to separate from the effects of other factors, such as the financial crisis or weather conditions. Last, since 2011 the effects of the EU trade ban may have been amplified by the Russian ban.

284. There are, nevertheless, clear indications that the EU Seal Regime, and the bans of the EU Member States which preceded it, have had a significant impact on the global market for seal products. The volume of catches declined considerably in both Canada and Norway after 2006, coinciding with the introduction of the first EU bans.<sup>185</sup> While the level of catches appears to have stabilized in the most recent years, thanks to the subsidies provided by the Canadian and the Norwegian authorities, they remain at very low levels in Canada. Exports from Canada declined even more drastically after 2006.<sup>186</sup> Again, while they have recovered slightly in the last two years, they remain far below the levels reached during the last decade
285. The Canadian Government has lamented that the EU Seal Ban has had “significant negative impacts” on Canada's sealing industry:

While Canadian exports of raw seal skins, marine mammal fats and oils, and seal meat and offal sharply increased from 2001 to 2006-07, they dropped almost as drastically during the subsequent years. In 2010, the export value of those commodities combined dropped to CAD 2.2 million, a decrease of 88 percent compared to 2006 and of 83 percent compared to 2007.

While there may be other factors explaining the drastic decrease of Canadian exports of seal products in recent years, including ice conditions and the recent economic downturn, there can be little doubt that a key contributing factor is the restrictions on seal products in the European Union. The 2007 Belgian and the Dutch prohibitions and the 2009 EU Seal Regime have had significant negative impacts on the Canadian industry's ability to export seal products by decreasing the demand for such products.<sup>187</sup>

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<sup>185</sup> *Canadian Commercial Seal Harvest Overview*, tables 2, 8, 9 and 10 (Exhibit JE – 27). See also *amicus curiae* brief by Anima et al, pp. 61-62 (Exhibit EU - 81).

<sup>186</sup> *Canadian Commercial Seal Harvest Overview*, tables 3-7 and 12-15 (Exhibit JE – 27).

<sup>187</sup> Canada's first written submission, paras. 80-81.

286. The above analysis of the impacts of the EU Seal Regime is shared by many other authorities and market participants, as shown by their public statements reproduced in Exhibit EU – 89.