

In the World Trade Organization

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

**European Union's Responses to the
Questions from the Panel following Second Meeting**

Geneva, 23 May 2013

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Short Title	Full Case Title and Citation
<i>Brazil – Retreaded Tyres</i>	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, 1527
<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>Korea – Various Measures on Beef</i>	Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, 5
<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 – 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
<i>US – Tuna II (Mexico)</i>	Panel Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , WT/DS381/R, adopted 13 June 2012, as modified by Appellate Body Report WT/DS381/AB/R

TABLE OF ABBREVIATIONS

Abbreviation	Description
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

Number	Title
Exhibit EU - 138	Government of Canada, <i>Ensuring a Sustainable and Humane Seal Harvest</i> , Report of the Standing Committee of the House of Commons on Fisheries and Oceans, April 2007, pp. 13-14. http://www.parl.gc.ca/content/hoc/Committee/391/FOPO/Reports/RP2872843/foporp04/foporp04-e.pdf
Exhibit EU - 139	The Globe and Mail, US wholesaler joins boycott over seal-pup hunt, 10 May 2005
Exhibit EU - 140	Statement by Jim Winter, the founding President of the Canadian Sealers Association, http://www.sealharvest.ca/html/commentary/nni_jwinter.html
Exhibit EU - 141	The Sudbury Star, Seal hunting well regulated, 26 April 2011 http://www.thesudburystar.com/ArticleDisplay.aspx?e=3095361
Exhibit EU - 142	Council Regulation (EC) No 1/2005, of 22 December 2004, on the protection of animals during transport and related operations and amending Directives 64/432/EEC and 93/119/EC and regulation (EC) No 1255/97
Exhibit EU – 143	Eurostat, statistics on imports of seal products into the European Union, 2002-2011
Exhibit EU – 144	United Kingdom Department for the environment, food and rural affairs , <i>Current and Future Deer Management Options</i> , December 2003 (DEFRA Report)
Exhibit EU – 145	NunatsiaqOnLine, of 23 April 2013, "European Commission representative visits Iqaluit on good-will trip, Christian Leffler says commission wants to give effect to Inuit exemption" http://www.nunatsiaqonline.ca/stories/article/65674european_commission_representative_visits_iqaluit_in_good-will_trip/
Exhibit EU – 146	NAFTA Certificate of Origin
Exhibit EU – 147	Form A - Certificate of Origin
Exhibit EU – 148	Greenland's request pursuant to Article 6(2) of the Implementing Regulation
Exhibit EU – 149	European Commission decision of 25 April 2013 recognising the Greenland Department of Fisheries, Hunting and Agriculture (APNN) for the purposes of Article 6 of Commission Regulation (EU) No 737/2010 of 10 August 2010

	laying down detailed rules for the implementation of Regulation (EC) No 1007/2009 of the European Parliament and of the Council on trade in seal products
Exhibit EU – 150	Deficiency letter to Greenland of 7 July 2011
Exhibit EU – 151	Greenland's response of 5 January 2012
Exhibit EU – 152	Supporting documentation to the submission of 5 January 2012
Exhibit EU – 153	Supplementary document received from Greenland on 1 November 2012
Exhibit EU – 154	Submission by Greenland of 29 January 2013
Exhibit EU – 155	Supporting documentation to the submission of 29 January 2013
Exhibit EU – 156	Sweden's request pursuant to Article 6(2) of the Implementing Regulation
Exhibit EU – 157	Deficiency letter to Sweden of 7 July 2011
Exhibit EU – 158	Sweden's response of 6 October 2011
Exhibit EU – 159	European Commission decision of 18 December 2012 recognising the County Administrative Boards of Norrbotten, Västerbotten, Västernorrland, Gävleborg, Uppsala, Stockholm, Södermanland, Östergötland, Kalmar, Västra Götaland and Halland in Sweden for the purposes of Article 6 of Commission Regulation (EU) No 737/2010 of 10 August 2010 laying down detailed rules for the implementation of Regulation (EC) No 1007/2009 of the European Parliament and of the Council on trade in seal products
Exhibit EU – 160	Email from Permanent Representation of Sweden to the EU
Exhibit EU – 161	Attesting documents issued by Greenland's Recognised Body
Exhibit EU – 162	Certificates issued by Greenlandic authorities prior to obtaining recognised body status

I. PRELIMINARY MATTERS

Question 100

(European Union) In the absence of an explicit reference to a general "ban" in the texts of the Basic and Implementing Regulations, is the ban imposed by necessary implication and/or expected operation of the Regulations? If so, to what extent were the explanations contained in Exhibit NOR-28 the basis for the current structure?

1. The Basic Regulation does not use the term "ban". But the existence of a General Ban is implicit in Article 3(1) of the Basic Regulation, which stipulates that the placing on the market of seal products shall be allowed only where the seal products result from hunts within the scope of the IC exception. Although Article 3(1) is formulated positively, its legal effects are the same as if it had been formulated negatively (e.g. "The placing on the market of seal products shall be banned/not allowed unless the products result from ...").
2. The wording of the Basic Regulation takes into account various considerations, including those mentioned in the document provided as Exhibit NOR – 28. Other relevant considerations were the concerns expressed with regard to the legal base for the Basic Regulation under the EU Treaties and the requests made by the sealing industry and the authorities of some exporting countries to the effect that certain activities should be excluded from the General Ban, given that the products concerned were not intended for the EU market (see below the reply to Question 101).

Question 101

(European Union) Please explain why the EU Seal Regime is structured in its current manner without an explicit reference, for instance, to the "import in, transit through, or export from" the European Union of seal products as provided in the Commission's proposed regulation (Exhibit JE-9, Article 3) or in the regulation banning "the placing on the market, and the import to and export from" the European Union of cat and dog fur (Exhibit EU-6).

3. Although the Basic Regulation does not use the terms "ban on imports", Article 3.1 has the effect of prohibiting, as a general rule, the placing on the EU market of seal products, including both domestic and imported products. In the case of imported products the ban applies at the time or point of import (See above reply to Question 100).

4. Whereas the EU Commission proposal also envisaged a ban on exports and on transit, the Basic Regulation does not prohibit those two activities.
5. Exports are, nevertheless, limited indirectly because, given that commercial seal hunting is not permitted within the European Union, exports depend on imports of inputs, which are themselves banned as a general rule.
6. As explained below in the response to Question 131, the decision not to ban the transit of seal products through the EU territory was based on grounds of comity.
7. Banning exports of seal products or the entry of goods in transit would have made a greater contribution to the public morals objective pursued by the European Union. But the exclusion of those activities does not prevent the EU Seal Regime from being justified under Article 2.2 of the TBT Agreement or Article XX of the GATT.
8. The 'all or nothing' approach advocated by the Complainants on the grounds of 'consistency' or 'coherence' has no basis in the WTO Agreement. A Member may choose to pursue each of its policy objectives to a limited extent only, so as to take into account other policy objectives. Thus, the Appellate Body has recently clarified that:

a panel's assessment should focus on ascertaining the degree of contribution achieved by the measure, rather than on answering the questions of whether the measure fulfils the objective completely or satisfies some minimum level of fulfilment of that objective.¹
9. The Appellate Body went on to find that the panel had erroneously interpreted Article 2.2 of the TBT Agreement by "consider[ing] it necessary for the COOL measure to have fulfilled the objective completely, or satisfied some minimum level of fulfilment".²
10. In the case at hand, notwithstanding the exclusion of exports and transit from the scope of the General Ban, the contribution of the EU Seal Regime to its public moral objective is very substantial.

¹ Appellate Body Report, *US – COOL*, para. 468. See also Appellate Body Report, *US – Tuna II (Mexico)*, para. 315.

11. Moreover, while banning exports and transit would have made an even greater contribution to the EU Seal Regime's public morals objective, it would have been also more trade-restrictive. Indeed, it would have been *prima facie* inconsistent with Articles XI and V of the GATT, respectively. This must be taken into account when assessing whether an 'alternative' measure makes an equivalent contribution to the EU's objective. An alternative measure which did not exclude exports and goods in transit would not be an adequate comparator because it would be more trade-restrictive.

Question 103

(All parties) What is the relevance, if any, of the Judgment of the European General Court dated 25 April 2013 (Inuit Tapiriit Kanatami and others v. Commission) to the Panel's consideration of the factual and legal issues in the present case? Are there any other judgments within the European Union that have any legal or factual bearing on the present case?

12. The judgement of the European General Court in the case T -526/10, *Inuit Tapiriit Kanatami et al. v. Commission* may be relevant in order to ascertain, as a factual matter, the meaning under EU law of the provisions of the Basic Regulation and the Implementing Regulation.
13. On the other hand, the findings reached by the General Court with respect to the legal characterization of those measures under EU law, including its findings on their compatibility with the EU Treaties, are irrelevant for the purposes of the legal characterization of the same measures under WTO law.
14. The main issue in the case T-526/10 was whether the European Union had the requisite competence under Article 95 of the EC Treaty (now Article 114 of the TFEU) in order to enact the Basic Regulation. The applicants had alleged that the Basic Regulation fell outside the scope of Article 95 EC because it was aimed at addressing public concerns with regard to the welfare of seals, rather than at facilitating the functioning of the EU's internal market. The General Court rejected this claim. The General Court clarified that the EU legislators cannot be prevented from relying on Article 95 EC on the ground that the protection of animal welfare

² Appellate Body Report, *US – COOL*, para. 468.

- is a "decisive factor in the choices to be made"³ when selecting the content of the harmonising measures. The General Court went on to find that the Basic Regulation had as its primary objective "improving the functioning of the internal market, while taking into account the protection of animal welfare and the particular situation of Inuit and other indigenous communities".⁴
15. The Complainants have argued that the judgement of the General Court in case T-526/10 shows that the EU Seal Regime does not pursue a 'public morals' objective because those terms were not mentioned by the General Court. However, the question of whether the concerns of the EU public with regard to the welfare of seals can be considered as a matter of 'public morals' (let alone as a matter of "public morals" within the specific meaning of Article XX(a) of the GATT) was not relevant in order to resolve the legal issue before the General Court. For that reason, that question was neither decided nor considered by the General Court. Therefore, it would be wrong to draw any implications from the General Court's silence.
16. On the other hand, it should be noted that the General Court described the Basic Regulation as "consisting essentially of a ban together with an exemption and two exceptions".⁵ This factual finding supports the characterization of the Basic Regulation made by the European Union in this dispute.
17. Inuit Tapiriit Kanatami et al. brought another action in annulment against the Basic Regulation before the General Court. The application was dismissed as inadmissible for lack of standing.⁶ Since the application was dismissed on procedural grounds, the judgement has no relevance for this dispute.

II. LEGAL CLAIMS

Question 104

³ Judgement of the General Court of 25 April 2013, T-526/10, *Inuit Tapiriit Kanatami et al. v Commission*, para. 41 (Exhibit CDA – 118).

⁴ Judgement of the General Court of 25 April 2013, T-526/10, *Inuit Tapiriit Kanatami et al. v Commission*, para.90 (Exhibit CDA – 118).

⁵ Judgement of the General Court of 25 April 2013, T-526/10, *Inuit Tapiriit Kanatami et al. v Commission*, para. 102 (Exhibit CDA – 118).

⁶ Judgement of the General Court of 6 September 2011, T-18/10, *Inuit Tapiriit Kanatami et al. v Parliament and Council*.

(European Union) Please confirm that the objective of the measure as defined by the European Union relates to the welfare of "seals" in particular, and not "animals" in general. In particular, is the European Union asserting a distinct public morality relating to seal welfare, e.g. on the basis that seals have a special status in the view of the EU public?

18. The EU Seal Regime seeks to uphold, with regard to seals, a general rule of public morality according to which humans ought not to inflict suffering upon animals without sufficient justification. This rule of morality is not specific to seals. It applies in respect of all sentient animals. It has been enshrined in Article 13 of the Treaty on the Functioning of the European Union as one of the fundamental values that must guide the EU's policies and has led to the adoption of a comprehensive body of animal welfare legislation, both at the EU level and at the level of the EU Member States.
19. The definition of precise legal requirements for giving effect in each situation to the above mentioned rule of morality involves balancing the welfare of the animals concerned and other relevant interests. The 'level of protection' of the welfare of animals 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 that are present in each situation. The EU Seal Regime reflects the outcome of the balancing of interests carried out by the EU legislators with regard specifically to seals.
20. More precisely, when applying the above described basic rule of morality, a Member can legitimately take into account, together with the risk that the animals concerned may experience suffering, other pertinent moral considerations relating, for example, to the following:
 - the purpose for which animals are killed: for example, whether the animals are killed mainly for purely commercial reasons or for other legitimate purposes, such as the subsistence of indigenous populations, the management of the ecosystem or scientific research;
 - the use given to the products obtained from the killed animals: for example, whether the animals are killed in order to meet basic food requirements or in order to manufacture inessential goods, such as fashion clothing items, aphrodisiacs or cosmetics ;

- whether the killing targets adults or young individuals (as in the case of the commercial seal hunts);
 - the way in which humans relate to each species (something which may vary from one cultural area to another): for example, it is a fact that the EU population cares more about marine mammals, such as whales, dolphins or seals, than about many other animals.
21. In sum, the EU Seal Regime seeks to uphold, with regard specifically to seals, a general rule of morality that applies to all sentient animals. The implementation of that general rule requires taking into account factors which may be specific to each species. As a result, the level of protection of the welfare of the animals concerned (to be distinguished from the level of protection of public morals) may differ from one species to another. Such factors may include, but are not limited, to the way in which humans relate to each species in a given community or culture.

Question 105

(All parties) The parties have referred to animal welfare outcomes in the killing of other wild animals as well as animals in commercial slaughterhouses in these proceedings. Please explain their factual and legal relevance to the animal welfare outcomes relating to seals.

22. The Complainants have argued that the EU Seal Regime is unnecessarily restrictive because the European Union does not ban the placing on the market of products from other animal species which, according to them, are killed in a manner involving worse welfare outcomes.
23. As clarified by the case law of the Appellate Body, the consideration by the Panel of measures applied to other species of animals could be relevant only in so far as such measures concerned sufficiently similar situations⁷ and then only as a mere "indication" of the availability of alternative measures.⁸
24. The measures applied by the European Union to other species cited by the Complainants in this dispute are not relevant as examples of available alternative

⁷ Cf. Appellate Body Report, *Korea – Various measures on Beef*, paras.170 and 172.

⁸ Cf. Appellate Body Report, *Korea – Various measures on Beef*, paras. 170 and 172.

- measures because, as explained by the European Union, there are major differences between the situations concerned.⁹
25. At any rate, even if the situations concerned were sufficiently similar, Article 2.2 of the TBT and Article XX of the GATT do not impose a requirement of "consistency".¹⁰ Members are entitled to select different levels of protection in respect of different products or, as in this case, in respect of different species of animals.¹¹
26. The European Union has compared the animal welfare outcomes in the slaughterhouses with those observed in the commercial seal hunts in response to the Complainants' suggestions that the commercial seal hunt is as humane, or even more humane, than the killing of animals at slaughterhouses.
27. Similarly, in promoting commercial sealing, sealing industry proponents (including Canadian government and sealing industry representatives) have often claimed that commercial sealing is as humane, or more humane than, the killing processes carried out in abattoirs. For example:
- Canada's House of Commons Parliamentary Standing Committee on Fisheries, in a report on commercial sealing, has stated that "[t]he methods used to kill seals — the hakapik and the rifle — satisfy standards for humane killing and euthanasia and compare favourably to methods used in slaughterhouses across the country."¹²
 - Canada's DFO has stated that "veterinarians have found that the hakapik, when properly used, is at least as humane as, and often more humane than, the killing methods used in commercial slaughterhouses..."¹³
 - Newfoundland Fisheries Minister Trevor Taylor defended the seal hunt by saying that "it is no worse than the slaughter of cattle and pigs in abattoirs" and

⁹ EU's first written submission, paras. 404-414; EU's Second written submission, paras. 86-103. See also

¹⁰ Cf. Appellate Body Report, *Korea – Various measures on Beef*, paras. 169-170. See also Panel Report, *US – Tuna II (Mexico)*, para. 7.442.

¹¹ Cf. Appellate Body Report, *Korea – Various measures on Beef*, paras. 176-177.

¹² Government of Canada, *Ensuring a Sustainable and Humane Seal Harvest*, Report of the Standing Committee of the House of Commons on Fisheries and Oceans, April 2007, pp. 13-14. <http://www.parl.gc.ca/content/hoc/Committee/391/FOPO/Reports/RP2872843/foporp04/foporp04-e.pdf> (Exhibit EU – 138).

¹³ Canada's DFO, *Canadian seal harvest, Myths and realities*, 3 March 2011, <http://www.dfo-mpo.gc.ca/fm-gp/seal-phoque/myth-eng.htm> (exhibit CDA - 38)

noting that “[t]he hunt is carried on in a sustainable way and in a humane way, in as humane a way you can make any killing.”¹⁴

- Jim Winter, the founding President of the Canadian Sealers Association, stated that “[t]he killing - while not pretty - is simply an outdoor abattoir and it is as efficient and as humane as any abattoir in the western world.”¹⁵
 - David Barry, Coordinator of the Seals and Sealing Network stated that: “[f]ollowed properly, [the Canadian sealing regulations] ensure that seal hunting adheres to accepted norms for animal welfare, comparable to or better than any abattoir.”¹⁶
 - Smith (2005), which is frequently invoked by Canada, opined that the commercial seal hunt “should be judged with reference to accepted practices for euthanasia, and in comparison with killing done in abattoirs.”¹⁷
28. The European Union has shown that, in fact, there are inherent and widespread practices in commercial sealing that would never be accepted in an abattoir, including high wounding rates¹⁸, long and unavoidable delays between stunning, monitoring and bleeding¹⁹ or the use of painful procedures (gaffing) prior to bleeding.²⁰
29. In so far as the Panel were to consider that the welfare outcomes for other animals might be relevant at all, the European Union submits that the killing of animals at slaughterhouses would provide a more relevant benchmark, having regard to both the purpose and the characteristics of the commercial seal hunts, which set them apart from the hunts of wild animals conducted in the European Union.
30. In the European Union wild terrestrial animals are generally hunted as an occasional activity for 'pest control' purposes (chiefly for safeguarding public health and safety, for protecting crops and stock or other species of flora or fauna), recreation or wildlife management. While the sale of by-products of these hunts

¹⁴ The Globe and Mail, US wholesaler joins boycott over seal-pup hunt, 10 May 2005 (Exhibit EU – 139).

¹⁵ http://www.sealharvest.ca/html/commentary/nni_jwinter.html (Exhibit EU - 140).

¹⁶ The Sudbury Star, Seal hunting well regulated, 26 April 2011 <http://www.thesudburystar.com/ArticleDisplay.aspx?e=3095361> (Exhibit EU – 141).

¹⁷ Smith (2005), p. 5 (Exhibit EU -33).

¹⁸ See e.g. EU's second oral statement paras. 19-20 and Exhibit EU – 128.

¹⁹ See e.g. EU's second oral statement paras. 19-20 and Exhibit EU – 128.

²⁰ See e.g. EU's second oral statement, paras. 29-32.

- (usually meat) may provide an incidental benefit to the hunters, this is not the main purpose of the hunts. In contrast, commercial sealing is an industrial scale operation conducted exclusively or primarily for the purpose of obtaining products for the market. In view of that, it should be held to the same standards as other commercial slaughter operations.
31. In any event, the European Union disagrees with the Complainants' contentions to the effect that commercial seal hunting is more humane than the hunting of terrestrial wild animals, such as deer.²¹
32. Deer are shot on land, where both the animal and the hunter are standing on completely stable platforms (the ground). As a result, accuracy in shooting is far higher than could ever be the case in commercial sealing, in which both the shooter and the seal are situated on moving vessels and sea ice on a moving ocean. Moreover, by definition, terrestrial hunts do not pose some of the welfare risks typically associated with seal hunting such as, for example, delays in approaching the seals due to the difficulty in manoeuvring the boat, the hooking of seals on board the vessels while still conscious, wounded seals that dive into the water and are irretrievable etc. In addition, unlike the commercial sealers in Canada and Norway, hunters are not subject to competitive pressure and usually select the most favourable conditions for hunting.
33. In its opening statement at the second Panel meeting with the Parties. Canada made much of the fact that, according to a paper by Urquhart & McKendrick cited in a report of the UK DEFRA²², 14 % of deer had received more than one shot.²³ However, Canada quotes very selectively from the DEFRA report. For example, it omits to mention that:
- according to the British Deer Association, only about 5 % of deer may require a second shot.²⁴ DEFRA's own conclusion was that "it is estimated that only up

²¹ EU's second written submission, paras. 90-91 and 103.

²² Canada has provided an excerpt of the DEFRA report as Exhibit CDA – 123. The European Union is providing the complete text as Exhibit EU – 144.

²³ Canada's second oral statement, para. 45.

²⁴ DEFRA report, para. 2.30 (Exhibit EU – 144)

to about 5 % of deer culled may require a second shot²⁵. This compares to reported wounding rates ranging between 11 % and 92 % in the Canadian commercial seal hunt;²⁶

- moreover, Urquhart & McKendrick observed that many deer had been shot by non-professional stalkers, who at the time were not required to follow any training, unlike in other EU Member States;²⁷
- according to another scientific paper by Bateson & Bradshaw only about 2 % of deer shot may escape wounded. This compares with a 5 % struck and lost rate in Canada's commercial seal hunt.²⁸ Moreover, in the case of deer, the animals may be retrieved, but struck and lost seals in the Canadian seal hunt are never retrieved because they dive or skin beneath the water's surface.

Question 106

(European Union) Please clarify the level of protection at which the European Union aims to achieve its defined objective of the EU Seal Regime.

34. The EU Seal Regime aims to achieve its public morals objective at a high level of protection. The intended level of protection is higher than that envisaged by the measure proposed by the EU Commission, which was based on a lower level of protection of the welfare of seals killed in commercial hunts.
35. The measure proposed by the EU Commission aimed at ensuring that seals were killed without *avoidable* suffering.²⁹ The EU legislators, however, considered that, in order to address the moral concerns of the EU public, it was not enough to address only the *avoidable* risks to the welfare of seals. According to the EU legislators' assessment, the *unavoidable* risks to the welfare of seals that are inherent in commercial seal hunting are excessive and morally unacceptable. Since a genuinely humane killing method cannot be applied consistently and effectively

²⁵ DEFRA report, Summary, para. 5 (Exhibit EU – 144).

²⁶ See the tables in Exhibit EU – 128 and the evidence cited therein.

²⁷ DEFRA report, paras. 2.32 and 2.33 (Exhibit EU – 144).

²⁸ DEFRA report, para. 2.31 (Exhibit EU – 144)

²⁹ EU's first written submission, paras. 372-373; EU's second written submission, paras. 304-307.

- monitored and enforced in the conditions of the commercial seal hunts, the EU legislators banned the marketing of all products resulting from those hunts.
36. Consistent with the high level of protection of the EU public morals sought by the EU legislators, the placing of seal products on the EU market is allowed only under three narrowly defined exceptions. Contrary to the Complainants' allegations, the IC exception and the MRM exception do not detract from the EU Seal Regime's contribution to its public morals objective. Seal products falling within those two categories do not raise the same moral concerns because the risk of suffering being inflicted upon animals is outweighed by the benefits to humans. In turn, the Travellers exception is based on reasons of administrative convenience and fairness and its trade impact is negligible.
37. The EU Seal Regime would make even a greater contribution to its public morals objective if it applied to exports and to goods which enter the EU territory in transit or under other suspensive customs procedures. But, despite those exclusions, the EU Seal Regime's contribution to its public morals objective is considerable.

Question 108

(European Union) Canada argues that, in examining the existence of specific public morals, "it is relevant whether the conduct arises outside or within the jurisdiction or territory of the Member whose measure is at issue, and whether it can be shown that such conduct would result in harm arising within that Member's jurisdiction or territory." (Canada's response to Panel question No. 48) Please explain whether it is relevant to the Panel's examination of the European Union's stated public morals in this case that seal hunting takes place mostly outside the European Union.

38. The statement by Canada quoted in the Panel question responds to another Panel question on "what evidence is necessary in order to establish the existence of public morals under Article XX(a) of the GATT". Canada's quoted assertion, however, does not explain how or why the circumstances cited by Canada would be 'relevant' for that purpose. Canada's response appears to suggest, nevertheless, that the exception provided in Article XX(a) of the GATT cannot be invoked in respect of conduct which takes place outside the territory of the invoking Member, unless it causes harm within its territory.

39. At the outset, it should be recalled that the EU Seal Regime does not seek to regulate seal hunting, but instead trade in seal products, including imports into its territory. Moreover, the public moral concerns invoked by the European Union in this dispute are not confined to the act of killing of seals as such, but extend also to other acts that take place within the territory of the European Union, such as selling and purchasing seal products, which are deemed morally reprehensible in themselves.³⁰ Therefore, contrary to Canada's assumption, the EU Seal Regime responds to harm that arises within the European Union's jurisdiction.
40. Moreover, Canada's restrictive interpretation has no basis on the text of Article XX of the GATT. Nor is it supported by any relevant authority. In *US – Shrimp* the Appellate Body left open the question of whether there was an "implied jurisdictional limitation" in Article XX(g) by noting that, in any event, there was a "sufficient nexus" with the United States. Similarly, even assuming that there was such an "implicit jurisdictional limitation" in Article XX(a), there is a "sufficient nexus" with the European Union to the extent that the EU Seal Regime seeks to address the moral concerns of the EU population with regard to conducts that take in place, at least in part, within the EU territory.
41. Moreover, in *US – Shrimp* the Appellate Body mentioned explicitly Article XX(a) as among the provisions of Article XX that would allow Members to condition imports upon the exporting country adopting certain policies:

³⁰ See EU responses to Panel Questions 9 and 10.

It appears to us, however, that conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX. Paragraphs (a) to (j) comprise measures that are recognized as *exceptions to substantive obligations* established in the GATT 1994, because the domestic policies embodied in such measures have been recognized as important and legitimate in character. It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies (although covered in principle by one or another of the exceptions) prescribed by the importing country, renders a measure *a priori* incapable of justification under Article XX. Such an interpretation renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply.³¹

42. The European Union also notes that Canada does not appear to contest that the European Union can invoke Article XX(b) of the GATT with regard to conduct occurring in Canada's territory, irrespective of whether such conduct results in harm arising within the EU territory. Thus, it seems that the restrictive interpretation invoked by Canada would limit exclusively the scope of Article XX(a). Again, however, there is no basis for making such distinction between those two provisions of Article XX, either in the wording of Article XX or in the case law of the Appellate Body.
43. In addition, Canada's interpretation would have manifestly anomalous and unreasonable results. For example, according to Canada's interpretation, a WTO Member could not ban imports of pornographic materials produced in a third country unless the acts shown in such materials threatened the health or life of the performers. Similarly, a WTO Member could not ban imports of human organs, unless it could be established that the extraction of the traded organs threatened the life or health of humans (which would not be the case whenever the organs are obtained from a deceased person).
44. Furthermore, as suggested by the Panel question, Canada's argument could be read as implying that, for example, Russia's ban on seal products could be justified under Article XX(a) because Russia has been traditionally engaged in commercial seal hunting. On the other hand, Members without a significant population of

³¹ Appellate Body Report, *US – Shrimp*, para. 121.

seals, or without a tradition of commercial seal hunting, would not be entitled to invoke Article XX(a) and could be forced to accept the marketing of seal products in their territory even if they are regarded as morally repugnant by a large majority of their population.

Question 112

(European Union) To what extent did the European Union rely on the results of the surveys in developing the EU Seal Regime?

45. The EU legislators were aware of the existence of opinion polls showing massive opposition to commercial seal hunting and did take them into account, together with all other relevant evidence. As explained by the European Union, however, opinion polls are useful, but not indispensable.³² While the EU legislators and the authorities of the Member States took them into account when available, they did not treat them as dispositive.
46. For example, the Opinion of the European Parliament's Committee on the Environment, Public Health and Food Safety, which inspired most of the amendments to the EU Commission proposal, states the following under the heading "Growing public concern":

Various opinion polls in the different EU Member States show that an overwhelming majority of the EU citizens opposes the large-scale commercial seal hunt and its methods and moreover a clear majority supports a total ban on trade in seal products. Also, on the international level, even in seal hunting countries like Canada, opposition against the commercial seal hunt is significant.³³

47. Similarly, the legislative history of the bans applied by Belgium³⁴ and the Netherlands³⁵ prior to introduction of the EU Seal Regime shows that the

³² EU's response to Panel Question 48; EU's second written submission, paras. 171-175.

³³ European Parliament, session document A6-0118/2009, 5 March 2009, p. 32, (Exhibit JE - 4).

³⁴ Loi relative a l'interdiction de fabriquer et de commercialiser des produits dérivés de phoques, 16 March 2007, Moniteur Belge of 18.04.2007, 20864 (Exhibit EU - 110).

³⁵ Decree of 4 July 2007 amending the Flora and Fauna Act (Designation of Species of Animals and Plants) Decree and the protected Species of Animals and Plants (Exemption) Decree in connection with the prohibition of the trade in products of harp seals and hooded seals, Bulletin of Acts, Orders and Decrees 2007, 253 (Exhibit EU - 112).

legislators of those EU Member States took into account the support for a trade ban evidenced by opinion polls.

48. According to one of the sponsors of the legislative proposal that led to the adoption of the Belgian ban:

Ce projet répond ainsi à l'attente de diverses organisations ayant pour objectif la protection desdits animaux, mais aussi à une forte demande de la population belge qui, d'après divers sondages menés notamment par l'IFAW, souhaiterait qu'un terme soit mis à ce procédé ainsi qu'à la commercialisation en résultant³⁶

49. In turn, the explanatory memorandum accompanying the decree that introduced the Dutch ban states the following:

In view of [...] the scale of hunting of young seals and the hunting method used, which have also caused great outrage in the Netherlands and are therefore an offence to public order and decency in this country, the grounds of justification are met. Scientific research does not at the moment provide sufficient certainty that the hunting can be described as humane. The vast majority of the Dutch population is opposed to seal hunting. This is apparent from opinion polls and petitions... [...]³⁷

Question 113

(European Union) Please explain whether, in harmonizing the EU internal market through the EU Seal Regime, the objectives of the EU Member states' measures on seal products are also reflected in the EU Seal Regime. If so, explain how.

50. The objectives pursued by the EU Member States measures that were harmonised by the EU Seal Regime are summarised as follows in recitals 4 and 5 of the Preamble to the Basic Regulation:

(4) The hunting of seals has led to expressions of serious concerns by members of the public and governments sensitive to animal welfare considerations due to the pain, distress, fear and other forms of suffering which the killing and skinning of seals, as they are most frequently performed, cause to those animals.

³⁶ Chambre des députés de Belgique, minutes of the session of 25.01.2007, p. 36. emphasis added (Exhibit EU - 111).

³⁷ Explanatory memorandum to the Decree of 4 July 2007 amending the Flora and Fauna Act (Designation of Species of Animals and Plants) Decree and the protected Species of Animals and Plants (Exemption) Decree in connection with the prohibition of the trade in products of harp seals and hooded seals, Bulletin of Acts, Orders and Decrees 2007, 253, at p. 3. Emphasis added (Exhibit EU - 112).

(5) In response to concerns of citizens and consumers about the animal welfare aspects of the killing and skinning of seals and the possible presence on the market of products obtained from animals killed and skinned in a way that causes pain, distress, fear and other forms of suffering, several Member States have adopted or intend to adopt legislation regulating trade in seal products by prohibiting the import and production of such products, while no restrictions are placed on trade in these products in other Member States.

51. As explained in the EU's second written submission, these objectives are also reflected in the legislative history of the EU Member States' measures. Thus, according to one of the sponsors of the legislative proposal that led to the adoption of the Belgian ban.³⁸

Le projet de loi exprime clairement la volonté de la Belgique de signifier au Canada, mais aussi aux autres pays qui autorisent la chasse aux phoques, que de telles pratiques non respectueuses des animaux ne peuvent être admises dans notre pays au nom de la morale publique.³⁹

52. In turn, the explanatory memorandum accompanying the decree that introduced the Dutch ban⁴⁰ states the following:

In view of [...] the scale of hunting of young seals and the hunting method used, which have also caused great outrage in the Netherlands and are therefore an offence to public order and decency in this country, the grounds of justification are met. Scientific research does not at the moment provide sufficient certainty that the hunting can be described as humane. The vast majority of the Dutch population is opposed to seal hunting. This is apparent from opinion polls and petitions. During the recent plenary debate on the private members' bill it became clear that a ban on the trade in products of harp seals and hooded seals can count on a very broad support in the Lower House of Parliament. The public outrage is reinforced by the special affection that Dutch people generally feel for seals, which is apparent, for instance, from the wide public support for the seal sanctuary that has been established in the Netherlands. [...]⁴¹

³⁸ Loi relative à l'interdiction de fabriquer et de commercialiser des produits dérivés de phoques, 16 March 2007, Moniteur Belge of 18.04.2007, 20864 (Exhibit EU - 110).

³⁹ Chambre des députés de Belgique, minutes of the session of 25.01.2007, pp. 33-42. Emphasis added (Exhibit EU - 111).

⁴⁰ Decree of 4 July 2007 amending the Flora and Fauna Act (Designation of Species of Animals and Plants) Decree and the protected Species of Animals and Plants (Exemption) Decree in connection with the prohibition of the trade in products of harp seals and hooded seals, Bulletin of Acts, Orders and Decrees 2007, 253 (Exhibit EU - 112).

⁴¹ Explanatory memorandum to the Decree of 4 July 2007 amending the Flora and Fauna Act (Designation of Species of Animals and Plants) Decree and the protected Species of Animals and

53. The immediate objective of the Basic Regulation was 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. It is obvious, however, that this objective could have been achieved in different ways. In selecting the content of the harmonising rules provided in the Basic Regulation the EU legislator took into account, as a "decisive factor"⁴², the same type of public moral concerns which had motivated the measures previously adopted by some EU Member States. This is made clear by recitals 9 and 10 to the Basic Regulation:

(9) In accordance with the Protocol on protection and welfare of animals annexed to the Treaty, the Community is to pay full regard to the welfare requirements of animals when formulating and implementing, *inter alia*, its internal market policy. The harmonised rules provided for in this Regulation should accordingly take fully into account considerations of the welfare of animals.

(10) To eliminate the present fragmentation of the internal market, it is necessary to provide for harmonised rules while taking into account animal welfare considerations. 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. Since the concerns of citizens and consumers extend to the killing and skinning of seals as such, it is also necessary to take action to reduce the demand leading to the marketing of seal products and, hence, the economic demand driving the commercial hunting of seals. In order to ensure effective enforcement, the harmonised rules should be enforced at the time or point of import for imported products.

54. The measures provided in the EU Seal Regime are largely similar to those stipulated in the Belgian and the Dutch measures. Like the Belgian and the Dutch measures, the EU Seal Regime bans, as a general rule, trade in seal products. Also, like the Belgian and the Dutch measures, that ban is subject to an exception covering the products resulting from traditional seal hunts by the Inuit.

Plants (Exemption) Decree in connection with the prohibition of the trade in products of harp seals and hooded seals, Bulletin of Acts, Orders and Decrees 2007, 253, at p. 3. Emphasis added (Exhibit EU - 112).

⁴² Judgement of the General Court of 25 April 2013, *Inuit Tapiriit Kanatami et al. v Commission*, para 41 (Exhibit CDA – 118).

Question 116

(Canada and European Union) Please confirm that, based on the requirements under the IC exception⁴³, the Inuit in Canada would qualify under the exception. If not, explain in detail why they would not qualify.

55. The European Union confirms that, based on the requirements under the IC exception and on the best information available, seal products derived from hunts conducted by the Inuit in Canada would qualify under the exception. In fact, the European Union has engaged in multiple efforts to assist the Inuit in Canada to benefit from the IC exception.⁴⁴

Question 118

(European Union) Is the "scale" of hunt relevant to the IC exception? If not, explain why.

56. The "scale" of the hunt is not, as such, a criterion to qualify under the IC exception. But the IC exception is subject to criteria which involve intrinsic limitations on the "scale" of the hunt.

57. Indeed, under the IC exception, the placing on the EU's market of seal products is permitted if they derive from hunts conducted "for subsistence purposes". This implies that the scale of the hunt cannot be unlimited to begin with. It must contribute to the subsistence of the Inuit and indigenous communities, either directly (by using the seal) or indirectly (by using the proceeds obtained from selling the seal or by-products to finance the costs of hunting). Thus, there is an intrinsic limit in the "scale" of hunt relevant to the IC exception, i.e., the number of seals that are needed to support the community in question.

58. There are more intrinsic limits into the "scale" of the hunt relevant to the IC exception. To recall,⁴⁵ the IC exception is framed by reference to the habit of the

⁴³ The Panel is aware of the parties' contentions regarding the characterization of the IC and MRM components of the EU Seal Regime. The term "exception" is used in these questions without prejudice to the Panel's ultimate determination as to the character of these components.

⁴⁴ See e.g. NunatsiaqOnline, dated 23 April 2013, "European Commission representative visits Iqaluit on good-will trip, Christian Leffler says commission wants to give effect to Inuit exemption" (available at http://www.nunatsiaqonline.ca/stories/article/65674european_commission_representative_visits_iqaluit_in_good-will_trip/) (Exhibit EU – 145).

⁴⁵ See European Union's second written submission, para. 228.

hunt in the community in question. The IC exception only covers hunts traditionally conducted by Inuit and other indigenous communities (a group of population limited in size). It does not cover communities where hunting was not a tradition before the EU Seal Regime either (i.e., if there was no tradition for such a hunt by a community in a particular geographical region, seal products derived from those hunts would not be covered by the IC exception). In this respect, the IC exception does not cover "new" hunts⁴⁶ conducted by Inuit and other indigenous communities so that this exception is not abused. Further, the tradition of the hunt in one community is limited by the resources they have (i.e., the number of seals that are at disposal to be hunted by those communities). In other words, those communities only have access to a particular number of seals in the geographical region where they live.

59. In sum, there are inherent "scale" concerns behind the IC exception and thus it is relevant to the IC exception.

Question 119

(European Union) Does the European Union consider the scale of Greenland's seal hunt large?

60. "Large" is a relative term which requires some benchmark or baseline to be compared with. If the scale of Greenland's seal hunt is compared to the Inuit population in Greenland (roughly 150,000 catches and 50,000 Inuit), the 1/3 ratio on annual basis (i.e., three seals caught by potential hunters each year) does not appear to be "large". More so given that only half of the catches or less are distributed through commercial channels (i.e., a 1/1.5 ratio per year). This contrasts with the ratio in commercial hunts, such as in Canada:

⁴⁶ By "new hunts" the European Union refers to hunts that did not take place by a particular community in a geographical region. The EU Seal Regime does not create an incentive for indigenous people to begin seal hunting in communities where there was no such tradition in order to take advantage of the IC exception.

In Nunavut, the largest Inuit territory where approximately 50 per cent of all Canadian Inuit live, it is estimated that approximately 35,000 (predominantly ring) seals are hunted annually. Of these, an estimated 10,000 ring sealskins end up on the market (although in recent years less). This amounts to approximately 1.5 seals hunted per person, and less than half a sealskin sold per person. Compared to the commercial hunt figures, which is estimated to employ 6,000 hunters from coastal communities and hunt up to approximately 330,000 (2006) harp seals alone, these numbers are very small.⁴⁷

61. Consequently, viewed from this perspective, the European Union does not consider the "scale" of Greenland's seal hunt to be "large".
62. In addition, the European Union would like to note that the "scale" of the hunts falling under the IC exception, irrespective of whether they are conducted in Greenland, Canada, or elsewhere, is not at the centre of the legitimate objective that the EU Seal Regime, through the IC exception, pursues. The IC exception aims at protecting the economic and social interests of Inuit and other indigenous communities traditionally engaged in the hunting of seals as a means to ensure their subsistence and preserve their cultural identity. 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 risk of suffering inflicted upon seals as a result of the hunts conducted by those communities. Accordingly, the IC exception permits the placing on the EU market of seal products resulting from hunts traditionally conducted by those communities and which contribute to their subsistence. In this respect, the "scale" of those hunt is of no direct concern in view of the intrinsic quantitative limits of those hunts as explained in Question 118.
63. In any event, even if the Panel were to find that, as argued by the Complainants, the EU Seal Regime does not pursue a public moral objective, the European Union has also explained that the protection of Inuit and other indigenous communities

⁴⁷ See 2010 COWI Report (Exhibit JE-21), p. 27. The ratio with respect to Norway's commercial hunt is even more dramatic. According to Norway, in 2012 only two ships participated in the hunt with a crew between 13 and 15 people each (see Norway's first written submission, para. 51). If the total national catch in Norway is estimated to be more than 10,000 seals, that implies that each hunter killed around 350 seals in a few weeks only.

would be a legitimate objective in itself.⁴⁸ Having that objective in mind, the "scale" of Greenland's seal hunt as "small" or "large" would be irrelevant insofar as such scale would be necessary to ensure the economic and cultural subsistence of the Inuit and other indigenous communities.

Question 120

(European Union) Please clarify whether, in considering the IC exception, the European Union has taken into account the impact assessment provided in COWI 2010 Report (p. 84) that only Greenland will be able to make the investments needed to make use of exemptions, as the scale of the Canadian hunt is too small and not as centrally organized as that in Greenland. Please also explain whether such consideration is reflected in the EU Seal Regime, and if so, how.

64. At the outset, the European Union observes that the 2010 COWI Report is dated March 2010 whereas Council Regulation No 1007/2009 containing the IC exception was adopted on 16 September 2009. Thus, it was not possible for the European Union to take into account any remarks included in that report when considering the IC exception.
65. That being said, the statement contained in the 2010 COWI Report is not supported by any evidence. It is just mere speculation as to what was considered to be "likely". In contrast, evidence shows that Greenland has not made any new investments to make use of the IC exception. Greenland has instead provided subsidies to preserve the industry.⁴⁹ In fact, Greenland has vigorously criticised the EU Seal Regime as not being effective and impairing their products.⁵⁰
66. In any event, the European Union has shown that the IC exception is origin-neutral. Any effects derived from the fact that operators in one country (like Canada) decide to sell locally seal products derived from hunts which could qualify under the IC exception⁵¹ cannot be attributed to the EU Seal Regime. The

⁴⁸ European Union's second written submission, paras. 223 – 226.

⁴⁹ 2012 Management and Utilization of Seals in Greenland (Exhibit JE-26), p. 28 ("If not subsidised by the Greenland Government, the hunter families in Greenland will once again be the first victims by the trade ban").

⁵⁰ See 2012 Management and Utilization of Seals in Greenland (Exhibit JE-26), pp. 31 – 36.

⁵¹ See the star.com Canada, "Nunavut government to keep track of tanned seal skins to help save money for local groups", available at http://www.thestar.com/news/canada/2012/01/25/nunavut_government_to_keep_track_of_tanned_seal_skins_to_help_save_money_for_local_groups.html ("The government buys raw seal skins from

same should be concluded in cases where neither a country (like Canada) nor individual operators in that country develop any infrastructure and distribution channels to facilitate the marketability of those products abroad.⁵² In fact, the government of Nunavut wrongly interprets the EU Seal Regime as requiring Inuit to process their own sealskin products to fall under the IC exception.⁵³ This is not the case. The IC exception applies to seal products derived from hunts for subsistence purposes. There is no need that Inuit and other indigenous communities process themselves the products that will be placed on the EU's market.

67. Consequently, the EU Seal Regime, through the IC exception, does not take into account whether the legitimate objective pursued by the exception will naturally benefit more imports from Greenland in comparison to other countries. The legitimate objective behind the IC exception applies no matter the level of development of particular communities as it is casted in origin-neutral terms, thereby allowing any seal products derived from hunts falling under the IC exception to be placed on the EU's market. Obviously, there are many factors that the European Union cannot control, such as the choices of the countries at issue mentioned before or the lack of applications to become recognised bodies.

Question 121

(European Union) Please respond to the following questions regarding the requirements under Article 3 of the Implementing Regulation:

hunters, and sells them at an auction or to private buyers (...) Nunavut has made an effort to cater to local consumers, who understand and support the seal trade, said Lynch. “We’ve seen our best market right now for seals in Nunavut from community groups”); and Nunavut's Department of Environment, <http://env.gov.nu.ca/programareas/fisheriesandsealing/fsprograms> ("Dressed Ring Seal Skins for Nunavummiut. This program assists Nunavut garment and apparel designers by making prepared (tanned) Nunavut ring seal skins available through the Fur Harvest Auction House in North Bay. This service is exclusively for Nunavut producers, not retailers, so the costs are kept as low as possible. Aside from a 10% mark-up (which will not increase), there are no additional production charges or labour costs on the skins. Postal charges are covered by the Government of Nunavut. Prices may vary occasionally, depending on the cost of the skins at the auction and the cost of dressing").

⁵² Nunavut Department of Environment, Fisheries and Sealing Division, *Report on the Impacts of the European Union Seal Ban*, p. 9 (Exhibit JE – 30).

⁵³ Nunavut Department of Environment, Fisheries and Sealing Division, *Report on the Impacts of the European Union Seal Ban*, p. 10 (Exhibit JE – 30).

- a. *What was the intended operation of the IC requirements under the EU measure? Please explain by making specific reference to each of the conditions imposed under the exception.*
68. Article 3.1(a) of the Implementing Regulation establishes the following condition: seal hunts conducted by Inuit or other indigenous communities which have a tradition of seal hunting in the community and in the geographical region. This condition was intended to identify the group of population affected by the exception by reference to the community to which the hunters belong (Inuit and other indigenous communities). The IC exception aims at protecting the economic and social interests of these particular communities clearly identified and broadly accepted as being characterised by their high dependence on seal hunting, and where seal hunting is part of their cultural identity. The condition also was intended to limit the exception to hunts traditionally conducted by Inuit and other indigenous communities, in the sense that the community in question must have a tradition of seal hunting in the geographical region. It does not cover communities where seal hunting was not a tradition before the EU Seal Regime entered into force (i.e., the EU Seal Regime does not create an incentive for indigenous people to begin seal hunting in communities where there was no such tradition in order to take advantage of the IC exception).
69. Article 3.1(b) of the Implementing Regulation establishes the following condition: seal hunts the products of which are at least partly used, consumed or processed within the communities according to their traditions. This was intended to guarantee that the results of the hunt would be used directly by the communities in question as well as preserving the cultural traditions in the processing and use of those seal products.
70. Article 3.1(c) of the Implementing Regulation establishes the following condition: seal hunts which contribute to the subsistence of the community. This was intended to operate as a key factor to distinguish seal products derived from hunts under the IC exception and seal products falling under the General Ban, with the implication that hunts under the IC exception should not be conducted primarily or exclusively for commercial purposes. The "purpose" of the hunt under the IC

- exception is the subsistence of the community, in economic, cultural and social terms.
71. Finally, Article 3.2 establishes the following condition: at the time of the placing on the market, the seal product shall be accompanied by the attesting document referred to in Article 7(1). This condition was intended to operate as a mechanism to ensure that the IC exception was not abused, by requiring a certificate issued by a recognised body.
- b. Please explain how the European Union developed the specific requirements in Article 3(1) of the Implementing Regulation and elaborate on the meaning of "contribute to the subsistence of the community" in Article 3(1)(c), including the percentage of the total harvest (e.g. 10%, 50%?) that must be used for "subsistence" to meet this requirement.*
72. The European Union identified the key elements behind the hunts falling under the IC exception, i.e., the community to which the hunters belong (Inuit and other indigenous communities), the habit of the hunt in the community in question (hunts traditionally conducted by those communities), the use of the results of the hunt (at least partially used, consumed or processed within those communities), and the contribution of the hunt to the subsistence of the community. Those requirements were identified as distinct features when compared to hunts within the scope of the General Ban, i.e., those conducted exclusively or primarily for commercial purpose, where the hunter does not belong to any specific community or group of population and there is no or limited use or consumption by the hunter (i.e., the hunter is paid in order to supply seal product processing enterprises on a regular and continued basis for commercial purposes).
73. 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. What is material should be determined on a case-by-case basis, having regard to all relevant considerations. While the economic contribution of seal hunting to the community may be susceptible of being measured (e.g. it is not contested that about 50% of sealskins in Greenland are not traded but used by the hunter, and that this percentage is higher with respect to seal meat), the social contribution of seal hunting is more difficult to quantify. Indeed, it should be recalled that seal

hunting is part of the cultural identity of the Inuit and other indigenous communities and that the IC exception seeks to preserve such a cultural identity.

74. Consequently, the European Union considers that the contribution of the hunt must be material, without the need to strictly quantify such a contribution. Obviously, if a hunt is conducted by Inuit with purely commercial purposes (e.g., as a newly created commercial activity in the community), this would not fall within the scope of the IC exception, even if it is conducted by Inuit.

Question 122

(European Union) In the process of developing the requirements under the IC and MRM exceptions, was any consideration given to imposing any quantitative limitation and/or animal welfare requirements on the hunt. Please elaborate on what would be the challenges, if any, of imposing such requirements in respect of each of the IC and MRM exceptions.

75. As explained in the responses to Questions 118 and 123 d), respectively, both the IC exception and the MRM exception are subject to conditions which operate so as to limit the quantity of products qualifying under those exceptions.
76. The imposition of some, minimal, welfare requirements in connection with the IC exception was considered and rejected in view of the fact the Inuit are required to use killing methods which are very problematic from an animal welfare perspective (e.g. trapping and netting). For that reason, making the IC exception conditional upon compliance with even minimal welfare requirements would have prevented the IC exception from achieving its intended objective at the level sought by the European Union (see response to Question 8). In addition, the following considerations were also taken into account:
- in those cases where the Inuit resort to similar methods as in the commercial hunts, the conditions of the hunt are, in some respects, less conducive to poor welfare outcomes (see response to Question 8).
 - the Inuit hunts take place all-round year and are highly dispersed. As a result, the effective monitoring and enforcement of even some minimal requirements would, in any event, have been extremely difficult (see response to Question 133).

77. In the case of the MRM exception, the decision not to make it conditional upon compliance with animal welfare requirements takes into account the following considerations:

- the regulation of hunting is, in principle, competence of the Member States. The laws of the Member States already stipulate specific welfare requirements with regard to the MRM hunts conducted within the European Union (see response to Question 53).
- the scope of the exception is very limited and the number of seals concerned very small (86 seals in Sweden in 2011);
- the conditions of the MRM hunts are, in some respects, less conducive to poor welfare outcomes than the those of the commercial hunts (see response to Question 8).

Question 123

(European Union) Please respond to the following questions regarding the requirements under Article 5 of the Implementing Regulation:

- a. *Please explain how the European Union developed the specific requirements in Article 5(1) of the Implementing Regulation, and indicate how these requirements were intended to operate. Please respond to the question by reference to the entire production process (from seal hunting to the placing on the market of products derived from qualifying seal hunts).*

78. Article 5(1) of the Implementing Regulation is meant to specify the requirements outlined in Article 3.2(b) of the Basic Regulation, which derived from the debates at the European Parliament. Specifically, the European Parliament's Committee on Agriculture and Rural Development noted as follows:

By not applying the blanket ban solely to commercial hunting and by not providing a definition of commercial hunting, the Commission proposal is, in some instances, liable to have the opposite effect to the one sought, which is to reduce animal suffering.

Indeed, in some cases, seals are not hunted for commercial purposes but simply to eliminate them, since they are viewed as pests that endanger fish stocks. In such cases, even direct consumption is a secondary consideration. If the regulation were to be applied in its current form, hunters would therefore no longer be able to derive any financial benefit, no matter how small, from their activities. That ban on trade would be liable to lead to an increase in poaching and to hunters shooting seals without caring which part of the body had been hit or checking whether the animal was dead or not.

(..)

It would therefore be appropriate to draw a distinction between large-scale commercial hunting and occasional hunting which, by definition, can only involve a limited number of animals.⁵⁴

79. Thus, it was deemed appropriate to distinguish between large-scale commercial hunting subject to the General Ban and "occasional hunting" for pest control reasons, which was considered to merit an exception.
80. Taking these comments on board, Sweden suggested the introduction of "a second exemption possibility for seal products originating from states with small scale, statutory controlled hunting with the main purpose to reduce damages from fisheries and which is done in accordance with a management plan".⁵⁵
81. Article 5(1) of the Implementing Regulation was drafted having those concerns in mind.
82. The first condition is that seal hunts must be conducted under a national or regional natural resources management plan which uses scientific population models of marine resources and applies the ecosystem-based approach. This element is intended to ensure that hunts under the MRM exception are conducted having the purpose of managing marine resources in accordance with well-accepted standards, i.e. in accordance with a natural resources management plan which uses scientific population models of marine resources and applies the ecosystem-based approach. This element is intended to address "seal culls" and the killing of individual seals and thus exclude hunts which are conducted without

⁵⁴ European Parliament, Session Document A6-0118/2009, 5 March 2009, p. 57 (Exhibit JE - 4).

⁵⁵ Council of the European Union, *Member States' Comments on the Proposal for a Regulation Concerning Trade in Seal Products*, 5404/09 (19 January 2009) (Exhibit JE-10), p. 18.

such a plan, mainly for commercial purposes (but also illegal hunting more broadly). Thus, the only reason for killing the animal is for the management of marine resources.⁵⁶

83. The second condition is that seal hunts must not exceed the total allowable catch quota established in accordance with the natural resources management plan. This element is intended to look into the practical application of the management plan and ensures that by-products falling within the MRM exception are indeed the result of those hunts. In other words, it aims at excluding by-products in situations where, for example, there is a management plan stating a TAC quota of 300 seals but, in practice, there is evidence that seals are hunted well exceeding such quota (e.g., 10,000 seals). That has been the case, for instance, in Canada.⁵⁷ This ensures that the purpose of managing marine resources is preserved by not permitting the marketing of products obtained beyond any reasonable quotas, which may indicate the commercial purpose behind the hunt.
84. The third condition is that the by-products of those hunts must be placed on the market in a non-systematic way on a non-profit basis. As explained in section c) of this question, this condition is intended to avoid circumvention of the General Ban. On the one hand, the systematic and repeated way in placing those products on the EU's market would indicate that the purpose of the hunt in question was commercial. Indeed, if seal products are repeatedly and systematically placed on the EU's market e.g. in certain periods of the year or through the same channels of commerce, this would indicate that they are being sold for a commercial purpose. On the other hand, the non-profitability condition both allows hunters to recoup their costs (which otherwise would be lost) by selling their products and reduces the chances that the animal will be wasted. Thus, this condition was intended to distinguish between "seal culls" or the killing of individual seals for the

⁵⁶ To be clear, the European Union consider that "the management of marine resources" includes actions to control seal population ("seal culls") as well as the killing of individual seals, when such population or individual seals are perceived as pests or competitors with humans and their activities (e.g. direct or indirect impacts on fishing, aquaculture, or as vectors of fish parasites) or as threats to other species of concern (e.g. predation upon endangered species).

⁵⁷ See e.g., Canadian Department of Fisheries and Oceans, *Canadian Commercial Seal Harvest Overview 2011*, statistical and economic analysis series (October 2012) (Exhibit JE-27), p. 8 (Table 8: Harp Seal Stock, TAC and Total Harvests, 1990-2011p).

- management of marine resources only and the exploitation of seals as a natural resource through seal hunting having a commercial purpose.
85. In order to respond to the Panel's question by reference to the entire production process (from seal hunting to the placing on the market of products derived from qualifying seal hunts), the European Union will refer to the case of Sweden.
86. A small-scale statutory controlled hunt for the purpose of sustainable management of marine resources is permitted and conducted in Sweden.⁵⁸ The Swedish Environmental Protection Agency has the authority to issue decisions allowing the controlled hunting of seals to prevent, among other things, damage to fisheries. Quotas of seals to be felled are decided by the Swedish Environmental Protection Agency and set specifically for each county, each year. There are areas within the counties where no hunting is allowed. There are only a few hunters able to conduct seal hunt as it is not a very easy hunt and they also must have a permission. For this permission, they apply to the County Administrative Board in the county where they ask to hunt. They must also be assured that there are still seals left on the quota and, for this purpose, the Swedish Coast Guards keep a daily record to which the hunters call in and report felled seals at the end of each day of hunting. The County Administrative Boards receive daily reports from the Swedish Coast Guard, stating the number of seals felled and by which hunter. Hunters are obliged to report their results to the Swedish Coast Guards, who also patrol the waters.⁵⁹
87. In 2007, around 50 seal hunters reported to have shot one or more seals. 20-30 of these were commercial fishermen whose primary aim with hunting of seal is to keep the seal away from their fishing equipment and to reduce the seals' damage to equipment and catch. The skin and meat is used by the hunter himself.⁶⁰ The hunter may also sell the seal to the local market and recover parts of his costs (in

⁵⁸ EFSA 2007 Report, (Exhibit EU-30), p. 32 ("The harvesting of seals is done on a non-commercial basis, largely for marine management purposes and to protect the sustainability of fisheries"); see also Swedish Environmental Protection Agency, HELCOM National Management Plan for Grey Seal Stock in the Baltic Sea The Grey Seal (*Halichoerus grypus*) http://meeting.helcom.fi/c/document_library/get_file?folderId=73894&name=DLFE-29609.pdf. (Exhibit CDA-54).

⁵⁹ 2008 COWI Report (Exhibit JE-20), p. 81 – 86; see also Sweden's response dated 6 October 2011(Exhibit EU-158).

⁶⁰ 2008 COWI Report (Exhibit JE-20), p. 80.

- Sweden the market price is be in the order of EUR 150). The seal is often sold to a local retailer (e.g. restaurant, shop). The retailer will sell on locally. The by-product that may end up on commercial markets would be a small amount of fur skin.⁶¹ In Sweden, a project has been promoting the use of seal products, including broad categories of clothing and other products from the local hunts.⁶²
88. In the absence of a market, the government could offer to payment for receipt of seals.⁶³ The public authority uses the products for research / scientific purposes and may under the Regulation also donate it for e.g. educational or medical purposes.⁶⁴
- b. *The European Union stated at the second substantive meeting that the MRM exception was targeted at nuisance or so-called 'problem' seals that presented a threat to the fish stock or fishing gear of individual fishermen. Please elaborate further on this statement, in particular with reference to each of the specific requirements set out in Article 5(1)(a) and 5(1)(b) of the Implementing Regulation. How would these requirements operate to limit these exceptions to nuisance seals?*
89. The European Union takes this opportunity to clarify the statements made at the second substantive meeting.
90. As explained in the European Union's response to Question 29, paras. 99 and 100, the MRM exception is premised on the "purpose" of the hunt being exclusively for managing marine resources. In this respect, such purpose was summarised in the 2007 EFSA Opinion as follows:
- because seals are perceived as pests or competitors with humans and their activities (e.g. direct or indirect impacts on fishing, aquaculture, or as vectors of fish parasites) or as threats to other species of concern (e.g. predation upon endangered species). In cases where individual animals (vs. a population cull) are the focus, the animals are often referred to as “nuisance seals”.⁶⁵

⁶¹ 2010 COWI Report (Exhibit JE-21), p. 85.

⁶² 2010 COWI Report (Exhibit JE-21), p. 37.

⁶³ 2010 COWI Report (Exhibit JE-21), p. 35.

⁶⁴ 2010 COWI Report (Exhibit JE-21), p. 85; 2008 COWI Report (Exhibit JE-20), p. 80 ("Out of the reported 96 killed seals so far in 2007, 15 of these have been used for scientific purposes (thus not keep by the hunter)").

⁶⁵ 2007 EFSA Opinion (Exhibit EU-30), pp. 12 – 13.

91. The term "nuisance seals" is defined e.g. under Canada's regulations as a seal that represents danger to the fishing equipment despite deterrence efforts or, based on a scientific recommendation, to the conservation of fish stocks.⁶⁶ Thus, the EU Seal Regime through the MRM exception seeks to permit the placing on the EU's market of by-products derived from hunts of seals representing a danger to fishing equipment or fish stocks. In some instances, those seals are individually identified because e.g. they are familiar to the fishermen in the area where they fish or they attack the same facilities where the fish is grown ("nuisance seal"). In other cases, those seals are not individually identified although, based on scientific studies, their population in a particular area poses a threat to fisheries and/or the ecosystem ("seal culling").
92. Article 5(1)(a) of the Implementing Regulation requires that, in order to place by-products on the EU's market, the seals are hunted following a national or regional natural resources management plan which uses scientific population models of marine resources and applies the ecosystem approach. The objective of those plans is to create conditions for a continued positive development of the seal population and to find a sustainable co-existence between seals and commercial fishery. This requirement applies, thus, to both "seal culling" and the hunt of "nuisance seals". In both cases, the EU Seal Regime requires that the hunting of individual seals or seal culling is regulated having in mind sustainable marine resource management principles.
93. Article 5(1)(b) of the Implementing Regulation requires that, in order to place by-products on the EU's market, the total allowable catch (TAC) quota established by those plans is not exceeded with respect to both, the hunt of individual seals as well as seal culling. In most cases, special permits to deal with nuisance seals are established every year on top of the usual quota identified in the national plan. In other cases, the number of nuisance seals would be included in the TAC quota for that particular country or region. Indeed, if a TAC quota has been achieved (thus ensuring a proper balance for the ecosystem), it is unlikely that killing more individual seals would be permitted.

⁶⁶ See Marine Mammal Regulations, S.O.R./93-56, (Exhibit CDA-21), p. 2.

94. To illustrate how these conditions operate with an example. A country should have a natural resources management plan based on scientific knowledge and research taking into account those species that are really relevant and for which scientific data are available. Such a plan will consider the needs for culling seal population in certain areas and may allow for the hunting of individual seals on an *ad hoc* basis (i.e., upon request in duly justified cases and generally where the TAC quota for that region is not exceeded).⁶⁷ If the killing of individual seals is not considered appropriate for sustainable management reasons or otherwise (e.g. because deterrence efforts have not been made), any by-product derived from such a hunt would not fall under the MRM exception.
95. The quotas established under the management plan of such country must also be respected. Therefore, if a national plan establishes a quota of 1,000 seals divided in 200 seals in each of the five regions of the country in question, and includes the possibility of hunting 10 – 20 "nuisance seals", the placing on the EU's market of seal products derived from hunts exceeding those quotas would not be permitted. As explained before, the reason for this condition is to ensure that the MRM exception is not used to permit the exploitation of seals as a natural resource for exclusively or primarily commercial purposes in view of the objectives pursued by the EU Seal Regime.
- c. *Please explain how placing on the market by-products of seal hunts "in a non-systematic way on a non-profit basis" contributes to the EU's defined objective of the EU Seal Regime.*
96. The requirement under the MRM exception that by-products of seal hunts be placed on the EU market "in a non-systematic way on a non-profit basis" serves as an anti-circumvention provision to ensure that the General Ban and that the objectives pursued by the General Ban are not eluded. As explained to the Panel, the EU legislators were concerned that the MRM exception could be abused in order to market products resulting from commercial seal hunts (i.e., where seals are killed exclusively or primarily in order to obtain profits from manufacturing

⁶⁷ As mentioned before, the possibility of hunting individual seals may be prohibited in certain regions, even if it is permitted elsewhere in the same country. See e.g. 2008 COWI Report (Exhibit JE-20), p. 81 ("Individual permits for seal hunt may also be issued by the EPA on application by affected fishermen").

- inessential goods), rather than seal "culls" conducted for genuine management purposes. If the by-products of those "culls" are placed on the EU market systematically (i.e. recurrently, through commercial channels, etc) and on profit basis, these may indicate that the purpose behind those "culls" was "commercial" and thus falling under the EU's concerns underlying the need for a General Ban.
97. Most of Canada's and Norway's seal hunts are not "seal culls", but rather the exploitation of natural resources with commercial purposes. The commercial motivations of both Norway and Canada in conducting sealing activities are well documented. For example, Canada describes its seal hunt as "a market-driven commercial hunt",⁶⁸ listing as its current objective as supporting a "market-driven approach to harvest levels". Canada further notes that "the hunt levels for harp seals were much higher before the market collapsed"⁶⁹ and states that "hunt levels depend on market demand", thus not on sustainable criteria.⁷⁰ Similarly, according to the Norwegian Ministry of Fisheries and Coastal Affairs, "the main objective of the Norwegian sealing policy is to make possible a profitable development of the sealing industry".⁷¹ Consequently, both Canada and Norway define their hunts as commercial endeavours and not as attempts to reduce populations to protect fish stocks.
98. Thus, the requirement of placing on the market by-products of seal hunts "in a non-systematic way on a non-profit basis" was constructed to prevent "rebranding" of commercial seal hunts to fall under the MRM exception.
- d. Is there any scale element to the requirements under Article 5 of the Implementing Regulation beyond the total allowable catch?*

⁶⁸ Fisheries and Oceans Canada. Seals and Sealing in Canada - Overview of the Atlantic Seal Hunt 2002. <http://www.dfo-mpo.gc.ca/fm-gp/seal-phoque/reports-rapports/mgtplan-plangest2002/mgtplan-plangest2002-eng.htm> at Section 6 (Management Measures)

⁶⁹ Fisheries and Oceans Canada. Overview of the Atlantic Seal Hunt 2006 – 2010 <http://www.dfo-mpo.gc.ca/fm-gp/seal-phoque/reports-rapports/mgtplan-plangest0610/mgtplan-plangest0610-eng.htm> at Section 3.5.1

⁷⁰ Fisheries and Oceans Canada. Overview of the Atlantic Seal Hunt 2006 – 2010 <http://www.dfo-mpo.gc.ca/fm-gp/seal-phoque/reports-rapports/mgtplan-plangest0610/mgtplan-plangest0610-eng.htm> at Section 13

⁷¹ Halvard P. Johansen, Norwegian Ministry of Fisheries and Coastal Affairs, Oslo, Norway from Prospects for future sealing in the North Atlantic; Proceedings of the 13th Norwegian-Russian Symposium Tromsø, 25-26 August 2008, p. 31 (http://www.imr.no/filarkiv/2009/06/IMR-PINRO_2008-5_til_web.pdf/nb-no).

99. Article 3.2(b) of Council Regulation No 1007/2009 specifies that "the nature and quantity of seal products [under the MRM exception] shall not be as such to indicate that they are being placed on the market for commercial reasons". The reference to "quantity" is there to avoid the situation where the volume of by-products being placed on the EU market is significant, thereby indicating the commercial purpose of the hunt they derived from. To illustrate this with an extreme example. If some Swedish operators put on the EU's market 96 seal skins derived from hunts falling under the MRM exception and they do so at different times of the year, it would be difficult conclude that there is a pattern indicating a commercial interest behind (instead of the alleged MRM purpose). In contrast, if a Norwegian or Canadian operator pretends to place on the market 10,000 sealskins in a given month of the year (e.g. very close to when the hunting season has finished), this would indicate that the purpose behind the hunt was commercial and not MRM.
100. The European Union observes that the dividing line between what quantity would indicate the commercial purpose of the hunt is not crystal clear. This analysis has to be made on a case-by-case basis, taking into account all attendant circumstances. This does not mean, however, that the requirement in question is discriminatory or lacks even-handedness. Like many anti-circumvention provisions, some guidelines are provided to indicate the relevant information necessary to determine that the provision at issue is being eluded. Canada and Norway argue that this requirement is "as such" discriminatory, which is not the case. Canada and Norway do not bring an "as applied" claim against this requirement in order to show how the application of this requirement is discriminatory. Thus, the European Union requests the Panel to reject Canada's and Norway's claims.

Question 124

(European Union) Does the European Union have commercial seal hunts within its territory? If not, please explain how a 'category-to-category' comparison could be made between imported and domestic seal products within the category of "non-conforming" products as explained in the European Union's response to the Panel question No. 23. In other words, are there any domestic seal products falling within the category of "non-conforming" products?

101. The seal population in some EU Member States is comparable to that of e.g. Norway.⁷² Commercial seal hunting is not permitted in the European Union. See response to Question 56 and to Question 135.
102. The fact that there are no domestic like seal products falling within the category of "non-conforming" products is not an obstacle to make a category-to-category comparison of the treatment granted by the EU Seal Regime. To be clear, the quantitative distribution of the data, in the sense that Canada and Norway have seal products falling under the category of "hunts for commercial purposes" and thus under the category of "non-conforming" products, does not mean that a comparison between the treatment granted to each category cannot be made. The "quantitative approach" cannot be dispositive of finding "less favourable treatment".⁷³ A comparison between the treatment granted to Canada/Norway's seal products falling under the category "non-conforming" products and domestic like seal products falling under the same category indicates that the same treatment is provided to those products, i.e., they fall under the General Ban. Thus, the fact that there are no domestic products is not an obstacle to examine the potential treatment that those domestic like products would receive under the EU Seal Regime.

Question 125

(European Union) In paragraph 225 of its second written submission, the European Union asserts that the TBT Agreement (Article 12.4) provides for the possibility of protecting the economic and social interests of indigenous communities. Does the European Union consider that all Inuit communities should equally benefit from such protection independently of their level of development?

103. The reference to Article 12.4 of the TBT Agreement serves to clarify that the covered agreements also consider the interests of indigenous communities as a legitimate objective, in particular by preserving indigenous technology and production methods in the TBT context. In this sense, Article 12.4 of the TBT Agreement, like the other references cited in paragraph 225 of the European Union's second written submission, provide context for concluding that protecting the economic and social interest of indigenous communities is a legitimate

⁷² See European Union's second written submission, paras. 244 – 246.

objective. Indeed, the Appellate Body has observed that objectives recognised in the provisions of the covered agreements may provide guidance for, or may inform, the analysis of what might be considered to be a legitimate objective under Article 2.2 of the TBT Agreement.⁷⁴

104. That being said, the European Union notes that the IC exception does not make any distinction among Inuit or other indigenous communities on the basis of their level of development. In fact, development is not an issue at all, but rather the protection of the economic and social interests of those communities, as a widely recognised group of population meriting such a protection.

Question 127

(All parties) Is the scope of "product characteristics or their related processes and production methods" in TBT Annex 1:1 limited to physical qualities, whether intrinsic or extrinsic, of a product? If so, what is the basis for your position?

105. The Appellate Body interpreted the term "product characteristic" as an "objectively definable" feature or quality, such as "a product's composition, size, shape, colour, texture, hardness, tensile strength, flammability, conductivity, density, or viscosity."⁷⁵ In the definition of a "technical regulation" in Annex 1.1, the *TBT Agreement* itself gives certain examples of "product characteristics" – "terminology, symbols, packaging, marking or labelling requirements". These examples indicate that "product characteristics" include, not only features and qualities intrinsic to the product itself, but also related "characteristics", such as the means of identification, the presentation and the appearance of a product.⁷⁶ A product characteristic is therefore a "distinguishing mark of a product" which is either intrinsic to the product or related to the product.
106. Conditions like the ones imposed under the IC and MRM exceptions under the EU Seal Regime, however, do not concern the intrinsic characteristics or features that are related to the products. These conditions are limited at establishing the identity

⁷³ See European Union's second written submission, paras. 244 – 246.

⁷⁴ Appellate Body Report, *US – Tuna II (Mexico)*, para. 313; Appellate Body Report, *US – COOL*, para. 370.

⁷⁵ Appellate Body Report, *EC – Asbestos*, para. 67.

⁷⁶ *Ibid.*

- of the hunter (for the IC exception) and the purpose of the hunt (for the IC and the MRM exception), since only these are relevant in determining whether a product falls under the exception to the general ban or not.
107. As explained already in response to Panel's Question 21, the European Union does not consider that the purpose of production falls within the scope of product characteristics and related process and production methods within the meaning of Annex 1.1 of the TBT Agreement.
108. The fact that not only intrinsic characteristics, but also characteristics related to a product can fall within the scope of Annex 1.1 of the TBT Agreement, does not, support an interpretation of "product characteristics", whereby virtually anything that bares any relation to a product – no matter how indirect and distant that relation may be – would be construed as a product characteristic. In interpreting Annex 1.1 of the TBT Agreement one must not lose sight of the object and purpose of the Agreement which was to avoid the creation of "technical" barriers to trade.
109. The Appellate Body in *EC – Asbestos* also unequivocally confirmed that the scope of the TBT Agreement is to be considered limited to certain measures and does not cover all internal measures covered by Article III:4 of the GATT 1994.
- We note, however – and we emphasize – that this does not mean that *all* internal measures covered by Article III:4 of the GATT 1994 "affecting" the "sale, offering for sale, purchase, transportation, distribution or use" of a product are, necessarily, "technical regulations" under the *TBT Agreement*. Rather, we rule only that this particular measure, the Decree at stake, falls within the definition of a "technical regulation" given in Annex 1.1 of that Agreement.
110. This intent to circumscribe the scope of the TBT Agreement is also clearly reflected in negotiating history.⁷⁷ Indeed, WTO Members only agreed to expand the scope of the Agreement on Technical Barriers to Trade to process or

⁷⁷ See G/TBT/W11, in particular para. 131.

production methods related to product characteristics during the Uruguay round negotiations.⁷⁸

111. If, however, one were to interpret product characteristics as broadly as Canada and Norway propose, whereby the identity of the hunter and/or purpose of the hunt (or indeed any condition for the placing on the market) would be subsumed into a characteristic related to a product, the category of "process or production methods related to product characteristics" would be virtually deprived of any useful purpose and the requirement that the process or production methods be related would equally be easily circumvented. The European Union submits that such a broad interpretation of product characteristics therefore would not be in accordance with customary rules of treaty interpretation.

Question 129

(European Union) The Implementing Regulation requires that, when a seal product is placed on the market, the original attesting document be delivered with the seal product (Article 7(3)) and a reference to the attesting document number be included in any further invoice (Article 7(4)). Model attesting documents provided in the Annex of the Implementing Regulation require a specific indication of, inter alia, "justification", "scientific name" (of the seal), and "country of taking". Please explain why a seal product placed on the market in compliance with these requirements cannot be considered as having "objectively definable features, qualities, attributes or other distinguishing mark of a product".

112. First, the European Union notes that the conditions to benefit from the IC and MRM exception under the EU Seal regime are set out Article 3(1) and Article 5(1) of the Implementing regulation and not in the model attesting documents provided in the Annex of the Implementing Regulation.
113. To benefit from the IC exception compliance with the following conditions must be established: (i) products originate from seal hunts conducted by Inuit or other indigenous communities which have a tradition of seal hunting in the community and in the geographical region; (ii) products originate from seal hunts the products of which are at least partly used, consumed or processed within the communities

⁷⁸ Notably, they also only agreed to extend the scope to "related" process and production methods and not all process and production methods.

- according to their traditions; (iii) products originate from seal hunts which contribute to the subsistence of the community.⁷⁹
114. To benefit from the MRM exception compliance with the following conditions must be established: (i) products originate from 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; (ii) products originate from seal hunts which does not exceed the total allowable catch quota established in accordance with the plan referred to in point (a); (iii) products originate from seal hunts the by-products of which are placed on the market in a non-systematic way on a non-profit basis.⁸⁰
115. In accordance with Article 7(1) of the Implementing regulation the recognised body has an obligation to ascertain that compliance with the requirements of Article 3(1) or 5(1) can be established. Compliance with which of the two sets of applicable requirements had been ascertained is reflected in Box 7 ("Justification") of the model attesting document. It should not be assumed, however, that the recognised body will - or indeed could - limit itself to checking the "scientific name", "country of taking", "HS heading", "ISO code" and other information included in the attesting document to ascertain compliance with Article 3(1) or 5(1) respectively. Such a limited verification would obviously not satisfy the requirement of Article 7(1).
116. While the information included in the attesting document is not sufficient for the purpose of assessing compliance with Articles 3(1) or 5(1) of the Implementing Regulation, information such as that to be included in Box 8 ("Scientific name"), Box 10 ("Country of taking"), as well as other information included in the attesting document can be relevant for enforcement authorities in exercising their duties, notably those pursuant to Article 7(7) of the Implementing Regulation.⁸¹ The European Union notes that this type of information, the purpose of which is to

⁷⁹ See Article 3(1) of the Implementing regulation.

⁸⁰ See Article 5(1) of the Implementing regulation.

⁸¹ C.f. Recital 8 of the Implementing Regulation, which explains that the models are set out in the Implementing Regulation to facilitate the management and verification of attesting documents.

accurately describe the goods at issue,⁸² is regularly requested on documents that must accompany goods for importation, such as e.g. certificates of origin.⁸³

117. In sum, a seal product is not permitted to be placed on the market as a result of the information included in the attesting document, rather the attesting document, which is the precondition for the placing on the market, is only issued if and when the recognised body has established that the requirements of Articles 3(1) or 5(1), as applicable, have been met.
118. As explained in prior submissions and in response to Question 128 above, the conditions for benefitting from the IC and MRM exceptions, which concern the identity of the hunter and the purpose of the hunt, are not "objectively definable features, qualities, attributes or other distinguishing mark of a product" and hence fall outside the scope of Annex 1.1 of the TBT Agreement.

Question 131

(European Union) Please explain how allowing the transit and processing of seal products within the European Union contributes to the objective of the EU Seal Regime.

119. As a preliminary remark, it should be clarified that the EU Seal Regime does not allow the 'processing' of seal products in general, but only so-called 'inward processing' i.e. the processing under customs control of imported inputs into products intended for export.
120. The European Union does not claim that allowing the transit and inward processing of seal products makes a positive contribution to the public morals objective pursued by the EU Seal Regime. To be clear, the EU Seal Regime would make an even greater contribution to that objective if it banned also transit and inward processing, in addition to the placing of seal products on the EU market. But the exclusion of those activities does not prevent the EU Seal Regime from being justified under Article 2.2 of the TBT Agreement or Article XX of the GATT. As clarified by the Appellate Body, a Member is not required to pursue the

⁸² As opposed to ascertain compatibility with the conditions under the IC and MRM exceptions.

⁸³ See e.g. Exhibit EU-146 and EU-147. With respect to certificates of origin, similarly to the context of attesting documents under the EU Seal regime, customs authorities perform a control and anti-fraud

complete achievement of its intended objectives.⁸⁴ A Member may choose instead to pursue each of its objectives to a limited extent only, so as to take into account other policy objectives.

121. The exclusion of transit and inward processing from the ban benefits mainly the Complainants' sealing industry and, indeed, was requested by that industry, with the support of the Canadian authorities. Allowing the transit of seal products through the EU territory confers no benefit upon the EU processing industry. Similarly, the EU processing industry could easily replace the inputs resulting from Canada's or Norway's commercial seal hunt under the inward processing regime with other inputs (including other types of fur or synthetic materials).
122. The European Union acceded to exclude transit and inward processing from the scope of the ban for reasons of comity. The EU legislators were mindful that banning transit and inward processing could be perceived by other nations as an unwarranted interference in trade between countries which do not share the EU's own public morals. Furthermore, the goods concerned by those activities are less offensive to the moral sensibilities of the EU population than the products placed on the EU market, because the EU citizens do not have to confront them in their daily lives.
123. While banning transit and inward processing would have made an even greater contribution to the EU Seal regime's public moral objective, it would have been also more trade-restrictive. Indeed, in the case of transit, it would have been *prima facie* inconsistent with Article V of the GATT. This must be taken into account when assessing whether an alternative measure makes an equivalent contribution to the EU's objective. An alternative measure that did not exclude those activities would not be an adequate comparator because it would be more trade-restrictive.

Question 133

(European Union) The European Union argues that commercial sealing is inherently inhumane because of the unique physical environment of the hunt, the competitive nature

function. The information which must be included on the certificate can assist customs authorities in assessing whether there is any reason to doubt the authenticity or correctness of a certificate.

⁸⁴ Appellate Body Report, *US – Tuna II (Mexico)*, para. 315; Appellate Body report, *US – COOL*, para. 373.

of commercial hunts, and practical difficulties in monitoring and enforcing humane killing methods. Apart from the alleged competitive nature of commercial hunts, wouldn't the unique physical environment of the hunting and the difficulties in monitoring and enforcing humane killing methods be present in any type of seal hunting?

124. As noted in the question, some of the inherent obstacles to the humane killing of seals in the commercial hunts (namely the environmental conditions and the difficulties in monitoring and enforcing welfare standards) are also present in the IC hunts and in the MRM hunts. There are, nevertheless, certain differences in the way in which those factors affect each type of hunt, some resulting in higher risks to animal welfare and some in lower risks.⁸⁵
125. As regards the environmental conditions, it is recalled that Canada's and Norway's commercial seal hunts are concentrated within a very short time span and take place always at the same time of the year. In contrast, Inuit hunts occur all-year round. In turn, the hunts within the scope of the MRM exceptional are occasional and may take place at any time of the year. These circumstances, together with the fact that the Inuit hunts and the MRM hunts are both non-competitive activities, have the consequence that, in both cases, hunters have more opportunities to select favourable environmental conditions for hunting, in particular by avoiding the most adverse weather conditions.
126. The difficulties in monitoring and enforcement also vary according to the type of hunt. In particular, effective monitoring and enforcement would be even less viable in the IC hunts than in the case of the commercial seal hunts, given that the Inuit hunts are generally a one-man activity conducted all-year round by thousands of hunters from every coastal settlement.
127. The European Union wishes to clarify that it has not argued that the IC exception and the MRM exception are justified because, in view of the above differences, the IC hunts and the MRM hunts are not 'inherently inhumane', unlike the commercial hunts. Instead, the IC exception and the MRM exception reflect the assessment by the EU legislators that the suffering which is unavoidably inflicted

⁸⁵ See also the response to the Panel's Question 8, paras. 19-21 and 24.

upon some seals in the IC hunts and the MRM hunts is justified by other relevant moral considerations, unlike in the case of the commercial hunts.

128. The above differences, nevertheless, were taken into account, together with other considerations, when deciding not to make access to the IC exception and the MRM exception conditional upon compliance with some minimal welfare requirements (see above response to Question 122).

Question 134

(All parties) There is evidence showing that Inuit sealing communities, including those of Greenland, are also opposed to the EU Seal Regime despite the existence of the IC exception under the Regime. How does this affect the question of whether the distinction drawn under the measure between the commercial seal hunting and the Inuit seal hunting is legitimate and/or justified?

129. It is not disputed that Inuit sealing communities are better off with the IC exception than without it and, thus, falling under the General Ban. The IC exception permits seal products derived from hunts conducted for subsistence purposes by those communities to be placed on the EU's market whereas, absent such an exception, those products could not be marketed in the European Union. Thus, the IC exception mitigates the impact of the General Ban on those communities.
130. It is also not contested that the Inuit sealing communities would be better off absent any regulation of the placing on the EU market of seal products, like was the situation before some EU Member States and the European Union itself, through the EU Seal Regime, establish regulations on this matter. The opposition of the Inuit sealing communities should be understood in that context.
131. Consequently, any opposition to the EU Seal Regime by the Inuit sealing communities has no effect on the legitimacy or justification of the objective pursued by the IC exception.

Question 135

The European Union states, "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".

- a. (Canada and Norway) *Given that seal hunts are mostly conducted outside the European Union, would the complainants agree that the European Union cannot fully control or address the welfare of seals, particularly the humane killing of seals in the hunts conducted outside of the European Union?*
- b. (European Union) *Does this mean that the European Union can fully control or address the welfare of seals with respect to the hunts conducted within the European Union?*
132. The European Union observes at the outset that the EU's statement quoted by the Panel concerns exclusively the commercial seal hunts, rather than seal hunting in general. The European Union does not advocate putting an end, on animal welfare grounds, to other types of hunts which are justified in view of other morally relevant considerations, such as the IC hunts or the MRM hunts, whether in the European Union or in other countries.
133. The European Union and its Member States can and do 'address' the hunting of seals (including the welfare aspects) within the territory of the Member States. Unlike Canada or Norway, the EU Member States do not allow commercial seal hunting. They allow hunting for other purposes only and they regulate the hunting methods, including the welfare aspects.
134. As explained in response to the Panel question 53, the competence for regulating hunting, including the animal welfare aspects of hunting, lies in principle with the EU Member States.
135. As further explained in the response to Question 53, the hunting of seals (including the welfare aspects) is regulated to some extent in the EU Habitats Directive.⁸⁶ More specifically, the Habitats Directive requires the Member States to take certain measures in order to maintain or restore the 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.⁸⁷ Species listed in Annex V (including most species of seals) may be hunted, provided that their conservation status is not endangered.⁸⁸ In those cases

⁸⁶ 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).

⁸⁷ Article 11 and 16 of the Habitats Directive (Exhibit EU - 84).

⁸⁸ Article 14 of the Habitats Directive (Exhibit EU - 84).

- where the killing is permitted, Article 15 of the Habitats Directive prohibits the use of certain killing methods.⁸⁹
136. The laws and regulations of the EU Member States either prohibit the hunting of seals or allow it (generally by using a licensing system) on very limited grounds, usually related to the protection of animal health, the protection against nuisance seals, the management of natural habitats or scientific research.
137. Unlike Canada or Norway, no EU Member State gives licenses for hunting seals for commercial purposes, i.e. for the sole or primary purpose of obtaining products such as skins or oil for the market. All the products resulting from seals killed in the European Union must be seen as mere by-products of hunts conducted for non-commercial purposes and are usually traded locally, if at all.
138. In those cases where hunting is permitted, the EU Member States regulate the hunting methods, including the welfare aspects (see below response to Question 137).

Question 136

(European Union) The European Union asserts that the specific moral concerns of the EU public addressed by the EU Seal Regime are those relating to a "rightness or wrongness of human actions which affect seal welfare" (EU's response to Panel question No. 9). To that extent, what is the relevance of a "basic rule of morality" to examining the rational connection between the specifically defined moral concerns identified as the objective of the EU Seal Regime and the IC or MRM exceptions?

139. The statement quoted from the Panel is part of an explanation provided by the European Union in order to elucidate, in response to the Panel Question 9, the conceptual distinction between the policy objective of improving 'animal welfare' and the policy objective of addressing 'moral concerns about animal welfare'. In the EU's view, however, both objectives are inextricable linked. If the public and the policy makers are concerned with animal welfare it is for moral reasons.⁹⁰
140. The rightness or wrongness of an action affecting the welfare of seals is to be determined in accordance with the rule of morality which the European Union

⁸⁹ Article 15 of the Habitats Directive (Exhibit EU - 84).

⁹⁰ See EU's second written submission, paras. 139-146.

seeks to uphold through the EU Seal Regime. That rule of morality underlies the entire body of EU legislation on animal welfare. For that reason, it is properly described as a 'basic' rule. In accordance with that rule, human actions that affect negatively the welfare of seals by inflicting suffering upon them are morally 'wrong', unless they are sufficiently justified in view of other morally pertinent interests, including in particular the benefits that such actions provide to humans.

141. According to the assessment made by the EU legislators, in the circumstances of the IC exception and the MRM exception, the suffering which is unavoidably inflicted upon some seals is justified by the benefits to humans or other animals. It follows that, in those specific circumstances, and in accordance with the basic rule of morality underlying the EU Seal Regime, it is not morally wrong to inflict suffering upon the seals when hunting them. Therefore, from a moral point of view it would not be justified to ban the placing on the market of the products falling within those exceptions, unlike in the case of the products resulting from commercial hunts.

Question 137

(European Union) Would there be any way of enforcing animal welfare standards, such as compliance with the three-step killing method, within the European Union so as to ensure that small-scale seal hunts conducted for the purpose of marine resources management meet animal welfare standards?

142. The humane killing of seals in the MRM hunts faces some of the inherent obstacles that are present in the commercial seal hunts (See above response to Question 133). It would have been possible, nevertheless, to make the MRM exception to compliance with certain minimal requirements, so as to reduce the risks to animal welfare. As explained in the response to Question 122, however, it was not considered necessary to impose such minimal welfare requirements having regard to the following types of considerations:

- the regulation of hunting methods is, in principle, competence of the EU Member States. The laws of the Member States already stipulate certain welfare requirements with regard to the MRM hunts conducted within the European Union (see response to Question 53).

- the scope of the exception is very limited and the number of seals concerned very small (86 seals in Sweden in 2011);
- the conditions of the MRM hunts are less conducive, in some respects, to poor welfare outcomes than the those of the commercial hunts (see responses to Questions 8 and 133).

Question 138

(European Union) When consumers purchase a certain product in the European Union, is there any way for them to tell whether that product contains seal inputs?

143. The EU Seal Regime does not impose any specific labelling or marking requirement in connection with the seal products marketed in the European Union under the IC exception or the MRM exception. The marketing of those products, nevertheless, must comply with generally applicable laws and regulations on consumer protection, which prohibit any claims that could mislead consumers as to the composition of the products.
144. The EU Seal Regime does not aim at providing additional information to consumers, so that each of them can choose whether or not to purchase seal products according to his own personal preferences. Instead the EU Seal Regime seeks to uphold a rule of *public* morality, equally applicable with regard to all consumers. (In this regard, the objective of the EU Seal Regime is fundamentally different from the measure at issue in *US – Tuna II (Mexico)*).
145. The EU legislators came to the conclusion that products within the scope of the IC exception and the MRM exception (the only ones which can be marketed legally within the European Union) do not raise moral concerns, unlike the products resulting from commercial hunts. Accordingly, in order to achieve the public moral objective pursued by the EU Seal Regime it was unnecessary to require that seal products marketed in the European Union under those exceptions bear a label.
146. Of course, it would have been possible to stipulate that seal products covered by those two exceptions bear a label, so as to facilitate that each consumer could make his own private moral choice. But such an additional labelling requirement would have been more trade-restrictive than the EU Seal Regime and, as just

mentioned, was unnecessary in order to achieve the public morals objective pursued by the EU Seal Regime.

147. The European Union notes that the Complainants do not contend that a labelling-only scheme would be a less trade-restrictive 'alternative measure' to the EU Seal Regime. Indeed, it is plain that such a labelling-only requirement would not protect the public morals at an equivalent level as the EU Seal Regime, as it would allow a minority of consumers to continue to purchase within the European Union products which the EU legislators (with the support of the majority of the EU population) regard as morally abhorrent.
148. Instead, the Complainants have identified as a less-restrictive measure a scheme combining a certification requirement with a labelling requirement. As explained by the European Union, however, the certification requirement would not achieve the same level of protection of the public moral objective pursued by the European Union (or of the animal welfare objective, were the Panel to consider that the EU Seal Regime does not pursue a public moral objective). The mere addition of a labelling requirement informing about compliance with an inadequate certification system cannot compensate for the inadequacy of the latter to achieve the intended policy objective at the same level of protection of the EU Seal Regime. Such a labelling requirement merely renders the alternative measure identified by the Complainants more trade-restrictive than the EU Seal Regime.

Question 139

(All parties) For most of its arguments on the claims under GATT Articles XX(a) and XX(b), the European Union makes cross-references to its arguments under TBT Article 2.2. Were the Panel to address the European Union's claims under GATT Article XX, is the Panel under an obligation to rely on the European Union's arguments under TBT Article 2.2 and/or any other parts of its arguments to assess whether the European Union has established its prima facie case for its Article XX claim? If so, please elaborate on the basis for your position.

149. The argument included in the EU's first submission with regard to its defence under Article XX(a) of the GATT makes two cross-references to the argument previously developed under Article 2.2 of the TBT Agreement.

150. Specifically, at paragraph 587, the European Union stated that the EU Seal Regime makes a substantial contribution to its policy objective for the reasons set out in Section 3.5.4.2. In turn, at paragraph 589, the European Union cross-referred to the arguments made in in Section 3.5.4.4 in order to show that the alternative measures identified by the Complainants do not make an equivalent contribution to the policy objective pursued by the EU Seal Regime.⁹¹
151. The EU's argument under Article XX(a) also includes cross references to the horizontal background sections 2.2, 2.3 and 2.5. The European Union understands, nevertheless, that the Panel does not object to these cross-references. Indeed, the EU's argument under Article 2.2 of the TBT Agreement makes similar cross-references to the same horizontal background sections.
152. The EU's argument under Article XX(b) of the GATT cross-refers to the argument under Article XX(a). Again, however, the European Union understands that the Panel does not object to those cross-references.
153. The European Union cross-referred in its arguments under Article XX(a) of the GATT to the arguments made in sections 3.5.4.2 and 3.5.4.4 of the first written submission in connection with Article 2.2 of the TBT Agreement because it considers that the legal issues addressed in those two sections (whether the EU Seal Regime makes a material contribution to its objective and whether there are less-restrictive alternative measures, respectively) arise under both provisions and, consequently, that the arguments put forward under Article 2.2 of the TBT Agreement are equally relevant and valid under Article XX(a) of the GATT.⁹² By making those two cross-references, the European Union has made the arguments included in sections 3.5.4.2 and 3.5.4.4 an integral part of its argumentation under Article XX(a) of the GATT. As an alternative, the European Union could have

⁹¹ Similarly, in its second written submission, the EU cross-referred under Article XX(a) and XX(b) to the arguments made previously under Article 2.2 of the TBT Agreement with regard to the measure's contribution to its objective and the lack of equivalence of the proposed alternatives. EU's second submission, paras. 385 and 386.

⁹² The European Union notes that the case law of the Appellate Body concerning the notion of necessity under Article 2.2 of the TBT often refers to its case law with regard to Article XX of the GATT and Article XIV of the GATS, which indicates that the Appellate Body considers it relevant by analogy also for the purposes of Article 2.2 of the TBT Agreement. See e.g. Appellate Body Report, *US – Tuna II (Mexico)*, para. 317 and footnotes 642-646.

- reproduced entirely the text of sections 3.5.4.2 and 3.5.4.4 under Article XX(a) of the GATT. But this would have lengthened considerably an already voluminous submission without making any substantive addition to the EU's arguments.
154. Cross-references to previous reasoning are a frequent technique in the reports of panels and of the Appellate Body, as well as in the parties' submissions, in particular where, as in the present case, the same or very similar issues arise under various legal provisions. The use of cross-references is unobjectionable where, as in the present case, the relevance of the cross-reference is beyond doubt and its scope is clearly specified.
155. The European Union notes that the Panel's questions concerning the two issues covered by the above mentioned two cross-references make no distinction between Article 2.2 of the TBT Agreement and Article XX of the GATT. (See, for example, questions 106, 144, 146 and 148.) This suggests to the European Union that the Panel neither requests nor expects different separate responses from the European Union in connection with each of those two provisions. In turn, this appears to indicate that, like the European Union, the Panel believes that the same or very similar issues arise under both provisions.
156. For the above reasons, the European Union submits that the Panel is required under Article 11 of the DSU to take into account the arguments which the European Union has submitted in connection with its defences under Article XX(a) and (b) by way of cross-references to argument previously made in other sections of its submissions.

Question 142

(European Union) Please elaborate on the basis for your position regarding de jure and de facto discrimination claims under the GATT 1994 as described in paragraph 79 of the European Union's oral statement at the second substantive meeting.

157. In that paragraph, the European Union seeks to rebut the Complainants' arguments that the analysis under Articles I:1 and III:4 of the GATT 1994 should be different than the analysis under Article 2.1 of the TBT Agreement, in the sense that the
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objectives pursued by the measure can only be examined under Article XX of the GATT 1994. The European Union maintains that this should not be the case regarding *de facto* discrimination claims under the GATT 1994.

158. In all recent cases, i.e. *US – Clove Cigarettes*, *US – COOL* and *US – Tuna II (Mexico)*, the Appellate Body has referred to the legitimate regulatory distinctions in cases of *de facto* discrimination only.⁹³ In the European Union's view, *a contrario* this implies that in *de jure* discrimination cases under Article 2.1 of the TBT Agreement, the Defending Member is not given the possibility to justify its measure on the basis of the objectives pursued. This is in line with the stricter disciplines imposed by the TBT Agreement, as compared with GATT Articles I:1 and III:4, where the possibility of invoking GATT Article XX remains open in *de jure* discrimination cases. Thus, the objectives of a regulation are relevant in order to establish the existence of *de facto* discrimination as part of the analysis under Article I:1 or III of the GATT 1994. In the case of regulations involving *de jure* discrimination, the analysis of the objectives would be confined to Article XX. In contrast, Article 2.1 of the TBT Agreement does not leave any room for considering the objectives of a technical regulation which is discriminatory *de jure*, and this is consistent with the fact that the TBT Agreement lays down more specific and stricter disciplines with respect to measures qualifying as "technical regulations".

Question 143

(European Union) Please explain if there is a moral distinction between a seal being killed inhumanely under the following different circumstances:

- a. In a commercial seal hunt;
 - b. As a nuisance or pest to a fishery and for the profit of the hunter(s) from sale of all or part of the seal(s); and
 - c. As a nuisance or pest to a fishery and for the profit of the hunter(s) from the operation of the fishery.
159. As explained repeatedly by the European Union, the EU Seal Regime seeks to uphold a basic rule of morality according to which humans should refrain from

inflicting suffering upon animals unnecessarily. In application of this rule of morality, the EU legislators have concluded that it may be justified to tolerate a higher level of risk to animal welfare where seals are hunted for subsistence or management purposes. In turn, a high level of protection is appropriate when seals are hunted for commercial purposes, in particular given that seals are killed in order to obtain profits from manufacturing inessential goods. The European Union has also repeatedly shown that a genuinely humane killing method cannot be applied on a consistent basis in the commercial seal hunts.

160. The non-profitability condition in the MRM was introduced as an additional safeguard in order to prevent that the MRM exception could be abused in order to market products from seals hunted primarily for commercial purposes, rather than for genuine management purposes, thereby undermining the General Ban. If the products resulting from MRM hunts cannot be sold for profit there is no incentive for hunting more seals than is strictly necessary for management purposes. In contrast, the fact that the hunter may derive an economic benefit from the protection of fisheries does not create, as such, an incentive to kill more seals than necessary for management purposes.

Question 144

(European Union) In your view, is the EU Seal Regime achieving the European Union's objective? If so, explain how.

161. As recalled above⁹⁴, neither Article 2.2 of the TBT Agreement nor Article XX(a) and (b) of the GATT require that the measure in dispute achieves *completely* its objective. The relevant issue is, rather, whether the measure is apt to make a *contribution* to the achievement of the objective.
162. For the reasons set out in previous submissions⁹⁵, the European Union considers that the EU Seal Regime is apt to make a substantial contribution to its objective, regardless of whether the Panel agrees with the EU's view that the EU Seal

⁹³ Appellate Body Report, *US – Clove Cigarettes*, para. 182; Appellate Body Report, *US – COOL*, paras. 267 – 271; and Appellate Body Report, *US – Tuna II (Mexico)*, paras. 211, 215 and 231.

⁹⁴ Response to Panel Question 101.

⁹⁵ See, in particular, EU's first written submission, paras. 359-366 and EU's second written submission, paras. 277-300.

Regime pursues the overarching objective of responding to the moral concerns of the EU population, or agrees instead with Complainants' view that the EU Seal Regime pursues various independent objectives, including in particular the protection of the welfare of seals and the protection of the economic and social interests of the Inuit and other indigenous populations. Here below, the European Union will recall briefly those reasons.

a) Contribution to the public morals objective

163. The European Union has explained in detail why the EU Seal Regime makes a substantial contribution to the objective of responding to the moral concerns of the EU population in Section 3.3.1.3 of its second written submission.⁹⁶ To recall, the EU Seal Regime contributes to its public moral objective in two different ways:
164. *First*, the General Ban reduces global demand for seal products resulting from commercial hunts and, consequently, limits the number of seals which are not killed in a humane way in those hunts. This improves the welfare of seals and, at the same time, addresses the public moral concerns with regard to the act of killing seals as such.
165. *Second*, the EU Seal Regime addresses the moral concerns with regard to certain acts performed within the EU territory which are morally reprehensible in themselves: selling and purchasing seal products from commercial hunts. By doing so, the EU Seal Regime also addresses the broader concern of the EU population not to render itself accomplice collectively to an immoral act, while shielding the EU public from being confronted with the products concerned.
166. As regards the first type of contribution, there are clear indications that, although the EU Seal Regime has been applicable for less than two years, it has already had "significant negative impacts" on global demand for seal products and on the level of catches by Canada and Norway.⁹⁷ These effects have been recognised by the

⁹⁶ EU's second written submission, paras. 277-284. Section 3.3.1.3 is included in the EU's argument under Article 2.2 of the TBT Agreement. But it has been made an integral part of the EU's argument under Article XX of the GATT by means of cross references. See EU's second written submission, paras. 385 and 386.

⁹⁷ EU's second written submission, paras. 280-282.

- Complainants themselves.⁹⁸ As regards the second type of contribution, the effects of the EU Seal Regime were immediate from the day of entry force of the General Ban.
167. The IC exception and the MRM exception do not detract from the EU Seal Regime's contribution to its public morals objective because the seal products falling within those two exceptions do not raise moral objections under the rule of morality which the European Union seeks to uphold through the EU Seal Regime.
168. As explained above⁹⁹, the EU Seal Regime would make an even greater contribution to its public morals objective if the General Ban applied also to exports and to goods in transit or under other suspensive customs procedures. But the contribution of the EU Seal Regime to its public morals objective is substantial, despite those exclusions. Moreover, without those exclusions, the EU Seal Regime would be more trade-restrictive.
- b) Contribution to the seal welfare objective
169. Were the Panel to agree with the Complainants' contention that the EU Seal Regime does not pursue a public morals objective, but instead various independent objectives, including the protection of the welfare of seals, the European Union has shown that the EU Seal regime does make a substantial contribution to that objective.
170. The European Union has summed up the relevant arguments and evidence in Section 3.3.1.4 of its second written submission.¹⁰⁰
171. Contrary to the Complainants' contention, the IC exception does not nullify the contribution made by the General Ban to the seal welfare objective. The Complainants' allegations that, as a result of the IC exception, exports from Greenland will replace exports from Canada and Norway, so that global demand

⁹⁸ EU's second written submission, para. 282.

⁹⁹ See Response to Panel Questions 101 and 131.

¹⁰⁰ Section 3.3.1.4 is included in the EU's argument under Article 2.2 of the TBT Agreement. But it has been made part of the argument under Article XX of the GATT by means of cross references. See EU's second written submission, paras. 385 and 386.

for seal products, and hence the number of seals killed inhumanely, will remain unchanged are speculative and implausible.¹⁰¹

172. It could be argued that the EU Seal Regime would make an even greater contribution to its seal welfare objective if it did not provide for the IC exception, or if it conditioned access to that exception to compliance with some minimal welfare requirements. But, in either case, the EU Seal Regime would make a lesser contribution to the objective of responding to the economic and social interests of the Inuit and other indigenous populations. Moreover, as a result, the measure would be more trade-restrictive.

173. The MRM exception does not detract from the contribution made by the EU Seal Regime to the seal welfare objective. In the first place, the scope of the exception is very limited and the number of seals potentially concerned very small (86 seals in 2011)¹⁰². Moreover, prohibiting the placing on the market of products within the scope of the MRM exception could be counterproductive from an animal welfare perspective.¹⁰³

174. To repeat, the EU Seal Regime would make an even greater contribution to its seal welfare objective if the General Ban applied to exports and to goods in transit or under other suspensive customs procedures. But the contribution of the EU Seal Regime to the seal welfare objective is substantial, notwithstanding those exclusions. Moreover, as indicated above, in the absence of those exclusions, the EU Seal Regime would be more trade-restrictive.

C) Contribution to the objective of responding to the interest of the Inuit and other indigenous populations

175. Were the Panel to agree with the Complainants' contention that the EU Seal Regime does not pursue a public morals objective, but instead various independent objectives, including the objective of responding to the economic and social interests of the Inuit and other Indigenous populations, the European Union has shown that the EU Seal Regime does contribute also to that objective.

¹⁰¹ EU's second written submission, paras.289-300. See also response to Panel Question 163.

¹⁰² EU's second written submission, para. 288.

176. The Inuit have a long tradition of hunting, which continues to make an important contribution to their subsistence. As stressed by Canada, seal hunting is an "intrinsic part of the Inuit way of life, and an integral part of Inuit culture and survival".¹⁰⁴ The same could be said of other indigenous communities. Canada has recognised that "protecting the economic and social interests" of the Inuit and other indigenous populations is a legitimate objective.¹⁰⁵
177. Further, Canada has conceded that the EU Seal Regime does contribute to such objective.¹⁰⁶ Indeed, as stressed by the Inuit authorities, Inuit hunters "depend on the income derived from the sale of their seal products to support their traditional subsistence hunting."¹⁰⁷ Canada itself has stressed this link.¹⁰⁸
178. The IC exemption does not seek to promote exports from Greenland or Nunavut, but instead to mitigate the necessarily adverse impact of the EU Seal Regime on the Inuit and other indigenous populations. The authorities of both Greenland and Nunavut have complained about the EU Seal Regime and made it clear that they would like it to be repealed.¹⁰⁹ But this does not mean that the IC makes no contribution to the objective of responding to the interests of the Inuit. Clearly, the Inuit would be worse off without the IC exemption, because they could not export any seal products at all to the European Union.
179. The hunting methods used by the Inuit are different from those used in Canada's and Norway's commercial hunts¹¹⁰ and, in some cases (e.g. trapping and netting) very problematic from an animal welfare perspective.¹¹¹ It is generally recognised,

¹⁰³ EU's response to Panel Question 8.

¹⁰⁴ Canada's first written submission, para. 40.

¹⁰⁵ Canada's first written submission, paras. 462-463.

¹⁰⁶ Canada's first written submission, para. 525.

¹⁰⁷ Government of Greenland, *Management and utilization of seals in Greenland*, p. 33 (Exhibit JE - 26). See also Nunavut Department of Environment, Fisheries and Sealing Division, *Report on the Impacts of the European Union Seal Ban*, p. 8 ("The cash generated from the sale of sealskins that are a by-product of the traditional subsistence hunt finances continued hunting activities which have become increasingly expensive due to higher capital and operating costs")(Exhibit JE – 30).

¹⁰⁸ Canada's first written submission, para 45. See also Canada's first written submission, para. 39.

¹⁰⁹ Government of Greenland, *Management and utilization of seals in Greenland*, pp. 31-36 (Exhibit JE - 26).

¹¹⁰ 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).

¹¹¹ EFSA Opinion, pp. 46-48 (Exhibit EU - 30).

nevertheless, that the use of those methods is indispensable.¹¹² For those reasons, making access to the IC exception conditional upon compliance with even minimal animal welfare requirements, would have eviscerated that exception.

Question 145

(All parties) How should the Panel evaluate the level of contribution of (a) the EU Seal Regime and (b) the alternative measure of animal welfare certification and labelling to the fulfilment of the EU's defined objective?

180. The case law of the Appellate Body provides some guidance on *how* the level of contribution of a measure to its objective should be evaluated for the purposes of both Article 2.2 of the TBT Agreement and Article XX of the GATT.¹¹³
181. Thus, in recent cases under Article 2.2 of the TBT, the Appellate Body has indicated that degree of contribution must be ascertained "from the design, structure, and operation of the technical regulation, as well as from evidence relating to its application"¹¹⁴
182. Previously, in *Brazil – Retreaded Tyres* the Appellate Body had noted that:

The selection of a methodology to assess a measure's contribution is a function of the nature of the risk, the objective pursued, and the level of protection sought. It ultimately also depends on the nature, quantity, and quality of evidence existing at the time the analysis is made. Because the Panel, as the trier of the facts, is in a position to evaluate these circumstances, it should enjoy a certain latitude in designing the appropriate methodology to use and deciding how to structure or organize the analysis of the contribution of the measure at issue to the realization of the ends pursued by it. This latitude is not, however, boundless. Indeed, a panel must analyze the contribution of the measure at issue to the realization of the ends pursued by it in accordance with the requirements of Article XX of the GATT 1994 and Article 11 of the DSU.¹¹⁵

¹¹² See EU's Response to Panel Question 8.

¹¹³ The European Union notes that the case law of the Appellate Body concerning the notion of necessity under Article 2.2 of the TBT often refers to its earlier case law with regard to Article XX of the GATT and Article XIV of the GATS, which suggests that the Appellate Body considers it relevant by analogy also for the purposes of Article 2.2 of the TBT Agreement. See e.g. Appellate Body Report, *US – Tuna II (Mexico)*, para. 317 and footnotes 642-646.

¹¹⁴ Appellate Body report, *US – Tuna II (Mexico)*, para. 317; Appellate Body Report, *US – COOL*, para. 373.

¹¹⁵ Appellate Body Report, *Brazil – Retreaded – Tyres*, para. 145.

183. In the same case, the Appellate Body clarified that there is no requirement to quantify the contribution to the achievement of the measure's objective. Instead, panels may rely on a qualitative analysis.¹¹⁶
184. The Appellate Body also cautioned that in the short term it may prove difficult to isolate a measure's contribution to its objective. For that reason, panels should not confine themselves to evidence or data pertaining to the past or the present. Instead, they must examine the *aptitude* of the measure to meet its objective by resorting, if necessary, to quantitative projections or qualitative reasoning.¹¹⁷
185. The European Union has explained in detail how the EU Seal Regime contributes to its objectives in its previous submissions, as well as in its response to Question 144. Bearing in mind that guidance, the European Union has relied upon quantitative evidence, where available, as well as on qualitative analysis. Moreover, given that the EU Seal Regime has been in operation for less than two years, the European Union has sought to establish its aptitude to meet its intended objective, instead of focusing on the immediate effects.
186. Using the same methodological approach, the European Union has shown that the alternative measure proposed by the Complainants which is mentioned in the question would not make an equivalent or even a meaningful contribution to the seal welfare objective, and hence to the public morals objective, for the reasons explained in previous submissions and summarised below in the response to Question 148.
187. Furthermore, the Complainants' contention that the alternative measure would make an equivalent, or even a greater contribution to the animal welfare objective, is largely based on the allegation that the various exceptions and exclusions stipulated in the EU's Seal Regime detract from that objective. However, that approach is flawed, because a measure which did not include those exceptions and exclusions would be more trade-restrictive and, therefore, is not an appropriate comparator.

¹¹⁶ Appellate Body Report, *Brazil – Retreaded – Tyres*, paras. 146-147.

¹¹⁷ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

188. Were the Panel to agree with the Complainants that the EU Seal Regime does not pursue a public morals objectives, but instead several independent objectives, the European Union submits that the Panel should evaluate whether the proposed alternative measure make an equivalent contribution to each of those independent objectives. In other words, a greater contribution to one of those objectives (e.g. animal welfare) could not compensate for a lesser contribution to another objective (e.g. protecting the interests of the Inuit and other Indigenous populations).
189. Indeed, it is well-established that it is each Member's prerogative to choose its own level of protection. Accordingly, where a measure pursues simultaneously various competing policy objectives, it is for the responding Member to choose at which level it wishes to protect each of them. Panels should be careful not to substitute a policy mix of their own choice to that selected by each Member. In this regard, the European Union notes that, in particular, given that the proposed alternative measure does not provide for an IC exception, it is plain that it would fail to make an equivalent contribution to the objective of responding to the economic and social interests of the Inuit and other Indigenous populations.

Question 146

(All parties) The Appellate Body stated in US – Gasoline,

"the chapeau by its express terms addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied. It is, accordingly, important to underscore that the purpose and object of the introductory clauses of Article XX is generally the prevention of 'abuse of the exceptions' ... The provisions of the chapeau cannot logically refer to the same standard(s) by which a violation of a substantive rule has been determined to have occurred."
(emphasis added, p. 3 at 20, 21)

In light of the Appellate Body's statement quoted above, please clarify the specific aspects of the EU Seal Regime that the Panel should review under the chapeau of GATT Article XX.

190. The European Union considers that both the General Ban and the various exceptions provided in the Basic Regulation are part of the basic structure and design of the EU Seal Regime and cannot be examined under the chapeau of Article XX of the GATT. It is rather the *application* of those elements that might be relevant under the chapeau.

191. The Complainants have failed to identify any aspects relating to the *application* of the EU Seal Regime that would be in breach of the chapeau. Instead, the Complainants have sought to recycle the same arguments which they have advanced in support of their claims that the IC exception and the MRM exception are inconsistent as such with Article I:I and III:4 of the GATT, respectively.

Question 148

(European Union) *Does the European Union agree that the certification and labelling system as proposed by the European Commission and the complainants would make at least some contribution to the European Union's objective?*

192. The relevant issue, under both Article 2.2 of the TBT Agreement and Article XX of the GATT, is not whether the 'alternative' measure makes *some* contribution to the policy objective, but instead whether it makes an *equivalent* contribution.
193. A certification-and-labelling system is but a mechanism to attest compliance with certain substantive requirements (*in casu* animal welfare requirements). For that reason, the contribution of any given certification system to the intended policy objective is, to a large extent, a function of the underlying substantive requirements and cannot be measured without taking into account the specific content of such requirements.
- a) The certification system proposed by the EU Commission
194. The certification system proposed by the EU Commission would have made *some* contribution to the objective of seal welfare and, consequently, to the public morals objective. But such contribution would not have been *equivalent* to the contribution made by the EU Seal Regime, as finally enacted by the EU legislators.
195. The certification system proposed by the EU Commission did not seek to ensure that seal are killed humanely on a consistent basis. It had a more limited purpose: attesting compliance with some minimal welfare requirements aimed at ensuring that seals were killed without *avoidable* suffering.¹¹⁸

¹¹⁸ EU's first written submission, paras. 372-373; EU's second written submission, paras. 304-307.

196. The EU legislators considered that it was not enough to address the *avoidable* risks, because the *unavoidable* risks to animal welfare that are inherent in commercial seal hunting are excessive and morally unacceptable. Since a genuinely humane killing method cannot be applied consistently and effectively monitored and enforced in the conditions of the commercial seal hunts, the EU legislators banned the marketing of all products resulting from those hunts.
197. As the certification system proposed by the EU Commission aimed at ensuring compliance with certain minimal welfare requirements, which could be implemented on a consistent basis, the EU Commission proposal envisaged that the certificates could be issued on a country or hunt basis. In contrast, as explained below, a certification system that aimed at attesting compliance with a genuinely humane killing method would necessarily have to take the form of a seal-by-seal certification system, because such method cannot be implemented consistently and effectively. Yet a seal-by-seal certification system would be a practical impossibility.

b) The certification system proposed by the Complainants

198. The Complainants have multiplied the examples of certification systems. But they have failed to specify the content of the underlying welfare requirements to be attested by such systems. Yet, as explained above, the contribution of a certification system to the seal welfare objective, and consequently also to the public moral objective pursued by the EU Seal Regime, cannot possibly be evaluated without taking into account the content of such requirements.
199. The Complainants appear to concede that the European Union is entitled to select its own level of protection of animal welfare and, to that effect, to define the content of the underlying substantive welfare requirements for the certification system that they propose. In this regard, it must be recalled, again, that the EU legislators made it clear that they did not consider as sufficient a set of minimal welfare requirements aimed at preventing *avoidable* suffering, such as those contemplated in the European Commission proposal. Instead, the EU legislators were of the view that seals should be killed according to a genuinely humane method or not at all.

200. The European Union agrees that, in theory, it would be possible to define welfare requirements for killing seals in a genuine humane way based on the so-called 'three-step method'. More precisely, a genuinely humane killing method would involve the following steps:¹¹⁹

- the animal should be stunned, using a humane stunning method, without causing unnecessary pain, fear or distress. There should be no need to repeat application of the stunning method, except in *rare* cases of mis-stunning.
- the animal should be monitored *immediately* to confirm unconsciousness by using reliable indicators.
- the animal should be bled *without delay* so that recovery of consciousness does not occur before death. The operator should be able to inspect and access the animal at all times during the bleeding process.
- no painful procedures (such as gaffing) should be administered between these steps.

201. The European Union has shown, however, that in practice seals cannot be killed humanely on a consistent basis. To be clear, the European Union does not argue that it is always impossible to kill seals in a humane way. Nor is the European Union advocating a zero risk policy. The EU's position is that, while some seals are killed humanely, a genuinely humane method cannot be applied on a consistent basis in the commercial hunts as a result of inherent obstacles which cannot be properly addressed through better regulation or enforcement.

202. More specifically, the European Union has shown that:

- Canada's and Norway's sealing regulations fail to prescribe a genuinely humane killing method.¹²⁰ ;
- there are inherent obstacles which render it impossible to effectively apply humane killing methods on a consistent basis¹²¹; and

¹¹⁹ See e.g. EU's second written submission, paras 109-112; EU's first written submission 99-110.

- there is strong evidence that in practice many seals are not killed in a humane way.¹²²
203. While it is not possible to quantify exactly the precise number or proportion of seals which are not killed humanely in the commercial seal hunts, the scientific evidence provided by the European Union to the Panel indicate that such number is far from negligible and can indeed be very considerable.
204. The EU's assessment is supported by adequate scientific evidence, including the scientific studies invoked by the Complainants themselves (Daoust (2002), Daoust (2012) and Øen (1995)).¹²³ The Complainants have failed to show that the scientific evidence relied upon by the European Union is not credible or reputable¹²⁴ and, therefore, have not met their burden of proof.¹²⁵
205. Prohibiting the shooting of seals in or near the water¹²⁶ or the gaffing of seals on board the vessels before bleeding them would reduce the number of seals killed inhumanely.¹²⁷ But it would not be enough to ensure that seals are killed humanely on a consistent basis. Other major welfare problems, such as the high rates of inaccurate shooting and clubbing¹²⁸, the difficulties in monitoring consciousness¹²⁹ or the unavoidable excessive delays in completing the steps of humane slaughter¹³⁰, are inherent in the conditions under which the commercial hunt takes place and cannot be addressed through better regulation or enforcement. The regulatory changes enacted by Canada in 2009 did not address these problems.¹³¹

¹²⁰ EU's first written submission, paras 112-121 and 171-175; EU's second written submission, paras. 109-102.

¹²¹ EU's first written submission, paras. 122-156, 176-187.

¹²² EU's first written submission, paras. 157-169, 183-187, 389-395; EU's second written submission, paras. 46-68; EU's second oral Statement, paras. 12-42.

¹²³ EU's first written submission, paras. 388-396; EU's second written submission, paras. 50-53, EU's second oral Statement, paras. 33-36.

¹²⁴ EU's second written submission, paras. 3-49; EU's second oral statement, paras. 4-11.

¹²⁵ Cfr. Appellate Body Report, *EC – Asbestos*, para. 178.

¹²⁶ Cfr. Panel Question 169.

¹²⁷ Cfr. Panel Question 170.

¹²⁸ EU's second oral statement, paras. 12-20.

¹²⁹ EU's second oral statement, paras. 21-24.

¹³⁰ EU's second oral statement, paras. 25-28.

¹³¹ EU's second written submission, paras. 75-85.

- Commercial sealing is not becoming more humane, but rather the opposite, due to the deterioration of the sea ice conditions.¹³²
206. As already explained by the European Union,¹³³ because a genuinely humane killing method cannot be applied consistently and monitored effectively, compliance with such a method could not be certified on a country basis or on a hunt basis, unlike compliance with the minimal welfare requirements envisaged in the EU proposal. Instead, compliance with a genuinely humane method would have to be certified necessarily on a seal-by-seal basis.
207. The implementation of a seal-by-seal certification scheme would, however, be unviable in practice. Indeed, the implementation of such a system would require that a qualified veterinary inspector could observe without interruption the entire killing process of each individual seal, from the moment it is approached to be stunned until the moment where the bleeding is completed. As explained by the European Union, even if a sufficient number of inspectors could be made available at a reasonable cost, the inspectors would still face insurmountable obstacles to observe adequately the entire killing process of each seal.¹³⁴
208. Even more important, a seal-by-seal certification system would not make an equivalent contribution to the objectives pursued by the EU Seal Regime and, in fact, could achieve the opposite effect. The fact that the seal products marketed in the European Union had been obtained from seals certified to have been killed in a humane way would not meet the concerns that led to the adoption of the EU Seal Regime. Those concerns would persist because of the impossibility of killing seals humanely on a consistent basis and of anticipating whether a given seal will be killed humanely. Not even the most conscientious sealer can avoid killing seals in an inhumane way in many instances. For example, in many cases the sealer will mis-shoot a seal due to the unpredictable movements of the boat, or of the seal, or both. In many cases the sealer will then fail to take immediate action to re-stun the seal because fails to recognise from the vessel that the seal is still conscious. As a

¹³² EU's second written submission, paras. 113-129.

¹³³ EU's second written submission, paras. 308-316.

¹³⁴ EU's response to the Panel's Question 65, paras. 208-209. See also *Amicus curiae* brief by Anima *et al.*, paras. 221-223. (Exhibit EU – 81). See also EU's Response to Questions 64 and 154.

result, in order to kill the requisite number of seals certified to have killed in a humane way, it would be necessary and unavoidable to kill many other seals in an inhumane way. Thus, far from meeting the moral concerns of the EU public the proposed system could actually have the perverse effect of increasing the number of seals that are killed in an inhumane way.¹³⁵

Question 149

(European Union) Please confirm that the conformity assessment procedures in the Implementing Regulation entered into force on the same day of the application of Article 3 of the Basic Regulation. Did the European Union consult with or otherwise account for the needs of developing countries and/or Inuit or other indigenous communities?

209. The European Union confirms that the Implementing Regulation entered into force the same day of the application of Article 3 of the Basic Regulation.
210. An Internet-based public consultation was conducted by the European Commission providing the possibility for EU citizens as well as non-EU citizens to express their views on regulation of seal hunting, as an input to the policy-making process. 73,153 answers were received from citizens in 160 countries worldwide.
211. Furthermore, a stakeholder consultation was organised by the European Food Safety Agency (EFSA) in the framework of its work to establish a scientific opinion on the animal welfare aspects of the killing and skinning of seals (see below). Moreover, the European Commission organised a workshop with experts from sealing countries, animal welfare non-governmental organisations as well as fur trade and hunters associations with the objective to receive feed-back on the factual information under the country reporting exercise (national hunt management systems) conducted in the framework of the overall Commission assessment. Bilateral meetings were also held with a whole range of stakeholders and took place at political as well as at technical level.
212. As explained in the first written submission¹³⁶ and in the opening statement at the second meeting of the Panel with the Parties, the Implementing Regulation puts in

¹³⁵ *Amicus curiae* brief by Anima *et al.*, para. 226 (Exhibit EU – 81).

¹³⁶ See paras 464-468.

place a system of certification which takes into account the remoteness of a significant part of the potential beneficiaries from the exceptions and the related interests in bringing certifying bodies as close as possible to the potential beneficiaries. It does so in a manner which avoids giving a systemic advantage – even if only temporarily – to potential beneficiaries in the European Union or its immediate proximity.

III. FACTUAL DATA / INFORMATION

Question 151

(All parties) Please elaborate on the specifics of seal hunting in Greenland, including the following information:

- a. composition of the sealing communities in Greenland (e.g. different Inuit communities, non-Inuit sealing communities);*
- b. the number of sealers, sealing period, and sealing methods; and*
- c. processing facilities for seal products, and scope and use of products derived from seals within Greenland.*

213. The sealing community in Greenland is almost exclusively composed of Inuit. This is the case in view of the fact that, in order to get a full time hunting licence, it is required that the applicant has a solid attachment to the Greenlandic society and citizenship in Greenland of at least two years.

214. The number of seal hunters (understood as the number of persons who hunted at least one seal per year in the period 2006 – 2010) is as follows:

Year	Full-time seal hunter	Leisure-time seal hunters	Total
2006	2,119	1,777	3,896
2007	1,924	1,585	3,509
2008	1,807	1,480	3,287
2009	1,705	1,319	3,024
2010	1,697	1,486	3,183

215. The number of full-time hunters hunting seals has gradually decreased from 2006 to 2010. Only full-time seal hunters are qualified to trade seal skins to the tannery Great Greenland A/S.

216. The sealing period allowed for hunting is all year round, except for the species that are fully protected. The sealing periods for harp seals and ringed seals (the most

hunted species) vary due to severe fluctuations in ice and weather conditions. For harp seals, the pick of the hunting takes place between June and November, whereas for ringed seals, such a pick occurs between November and May.

217. With respect to sealing methods, processing facilities, etc, the European Union refers to the document in Exhibit JE-26 where the Government of Greenland addresses these matters.¹³⁷

Question 154

(All parties) There is some evidence suggesting practical difficulties faced by an inspector in fully monitoring the implementation by sealers of the sealing regulations in actual seal hunting due to the imbalance between the number of sealers and inspectors, as well as other circumstances unique to seal hunting. Do similar difficulties arise in slaughterhouses or in other wildlife hunting? Do similar difficulties arise in the transport to slaughterhouses?

a) Slaughterhouses

218. The difficulties in monitoring commercial seal hunting are unique and have no equivalent in the slaughterhouses.
219. As explained in the response to Question 64, the degree of effectiveness of 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, to a large extent, on the degree of difficulty in complying with the applicable regulations, the existence of incentives to breach those regulations and the importance of any natural obstacles to effective monitoring and enforcement.
220. Slaughterhouses provide a controlled, predictable and safe environment, where both the effective implementation of the prescribed killing methods and adequate monitoring and enforcement is possible and common in practice.
221. Slaughterhouses are always physically accessible to inspectors, and all parts of the stunning and killing process can be viewed and checked at close range by

¹³⁷ 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.

- inspectors or by other trained and government approved staff. Checks generally consist of the following:
- all animals are inspected on arrival at the slaughterhouse to ensure that they can stand and walk and are fit to continue to normal slaughterhouse procedures;
 - each animal is checked immediately after stunning and killing to ensure unconsciousness and death and to examine organs for pathology in order to prevent diseased organs from being used as human food; and
 - restraint, stunning and killing equipment are inspected regularly.
222. In the slaughterhouses animals are processed by trained and supervised staff using tested equipment and proven stunning/killing methods. Extensive study has been performed on the physiological responses of the animals to the permitted slaughterhouse stunning methods (gas, captive bolt, etc.) and only methods that result in consistent and immediate unconsciousness/death are permitted. Maximum delays to bleeding have also been established as a result of that study.
223. In the slaughterhouses animals are restrained at stunned at close range and can be immediately and carefully inspected by the worker, supervisor and/or inspector for signs of consciousness. In the very small percentage of cases in which a mis-stun occurs, action can be immediately taken to re-stun the animal, even though the mis-stun often does not actually result in retained consciousness. If high 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.
224. Because in the slaughterhouses the conditions are controlled, and the killing methods reliable and fail-safe, there is little opportunity for workers to deviate from approved practice, and no incentive for them to do so.
225. Given the above factors, the likelihood of a poor welfare outcome in an abattoir is very small. Thus, routine, random checks by independent veterinary inspectors appear to be sufficient to ensure strict adherence to humane slaughter protocols.
- b) Commercial seal hunts

226. The situation is very different in the case of commercial sealing. In contrast with the conditions prevailing in the slaughterhouses, commercial sealing takes place in a uniquely harsh, unpredictable and potentially unsafe environment. These conditions make the likelihood of poor welfare outcomes considerable. Thus, only on-site, close inspection of the entire killing process, performed by a qualified and independent veterinary inspector, could offer any assurance of humane killing. However, as the following points detail, such inspection is not possible:

- Commercial sealing is often not physically accessible to inspectors and it is impossible for inspectors to observe all parts of the stunning and killing process.
- Canada's commercial hunt may involve thousands of vessels spread over a vast area.¹³⁸ It would be economically unviable to have qualified inspectors carry out inspections from the vessels. Moreover, much of the sealing activity happens far away from the vessel and there is a great deal of sealing activity happening simultaneously. Smaller vessels (skiffs) often depart from the main vessel and work far away from the larger vessels
- Norway's commercial hunt is a smaller operation and, *a priori*, easier to monitor. Yet, as shown by the inspectors' reports, not even the presence of an inspector on board can be considered as a sufficient guarantee.¹³⁹
- There are inherent obstacles to effective aerial monitoring of commercial sealing. Much sealing activity occurs too far offshore for land-based helicopters to reach. While the Canadian authorities can operate a helicopter from a Coast Guard icebreaker, the icebreaker can only be in one area of the hunt at a time, and the seal hunt occurs in many areas, simultaneously, in an area of ocean measuring hundreds of thousands of square kilometres, separated by landmasses. Moreover, helicopters are unable to operate in freezing rain, high winds and low visibility
- Shooting from long distances (40-50 metres in Canada¹⁴⁰ and 30-70 metres in Norway¹⁴¹) has become the preferred method of stunning in both the Canadian and Norwegian seal hunts. This is for crew safety¹⁴² and to ensure the seals are not alerted by the vessel motion/noise and do not escape into the water. This makes immediate monitoring for consciousness following stunning impossible,

¹³⁸ EU's first written submission, paras.152-156 and 397-400

¹³⁹ EU's first written submission, paras. 181-182. EU's second written submission, para. 57. NOAH Report, pp. 3-4 (Exhibit EU – 43).

¹⁴⁰ Smith (2005), p. 9 (Exhibit EU – 33)

¹⁴¹ EFSA Opinion, p. 26 (Exhibit EU – 30).

¹⁴² Daoust and Caraguel (2012) at 450 (“By the time (the seals) showed some evidence of consciousness, mainly through head movements, the vessel was already close to the ice floe, thus preventing the hunter from taking another shot for safety reasons”).

and the delay between stunning and monitoring creates a potential for a substantial period of poor welfare

- 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 EU's response 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.¹⁴³ 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.
- Because the conditions are uncontrolled, and the killing methods difficult and fallible, there is considerable opportunity for workers to deviate from approved practice. Moreover, given the time, financial and safety pressures, there are strong incentives for them to do so.

c) Transport of animals

227. The transport of animals is strictly regulated in the European Union, on the basis of the standards agreed within the Council of Europe.¹⁴⁴ The applicable regulations prescribe that the means of transports must be inspected and approved and that animals must be checked before loading, upon unloading and when they leave the EU territory. In addition, the applicable regulations provide that the Member States authorities must conduct random and targeted checks during the journey.

228. The considerations made above in relation to the slaughtering of animals at abattoirs are also relevant here. The transport of animals takes place under largely predictable conditions designed to ensure their welfare during the entire journey. It

¹⁴³ EU's first written submission, para. 145.

¹⁴⁴ Council Regulation (EC) No 1/2005, of 22 December 2004, on the protection of animals during transport and related operations and amending Directives 64/432/EEC and 93/119/EC and regulation (EC) No 1255/97 (Exhibit EU - 142).

would be both unnecessary and economically unviable to provide for constant observation of the animals by independent inspectors during the entire journey.

d) Other wild life hunting

229. As explained above (response to Question 105), in the European Union the hunting of wild terrestrial animals is an occasional, opportunistic and highly dispersed activity. This would make close inspection during the hunt unviable.

Question 155

(All parties) Apart from on-site observations, what kind of methods are most suitable to check whether humane killing methods can be and/or are being applied properly in seal hunting?

230. In commercial sealing, there are no reliable methods of observation, either on-site or off-site, that can effectively determine whether humane killing methods are being applied on a consistent basis

231. As explained in the response to Question 154, on-site observation faces insurmountable obstacles.

232. Carcass examinations performed after the seal has been killed can help indicate poor or positive welfare. However, examination of a seal carcass to describe injuries cannot reveal whether or not a seal had been subjected to stress prior to stunning. For example, such examination would not show if a seal had been chased on the ice by a sealer prior to stunning (which has been frequently observed in video evidence of commercial sealing).

233. A carcass examination might allow the conclusion that the remaining part of the killing process was humane if, for example, it could be ascertained that one shot had hit the head of the seal and destroyed its brain. Damage by a bullet that did not destroy the brain could not be identified as humane

234. In contrast, brain destruction by blows from a club could be the result of one blow or multiple blows so it is very difficult to know whether or not the clubbing was humane from a carcass inspection (for a stun to be humane, the animal must be rendered unconscious by the first blow or bullet)

235. Observations of carcasses might reveal that the seal's welfare was poor during stunning if the animal had been hit in a place other than the brain, or because there were multiple injuries, or because there were other signs of consciousness after injury by a bullet or club. These could include:

- Blood in the gut: on almost all occasions when a dead seal has blood in the stomach, this will be the result of a conscious seal swallowing the blood produced by an injury. It is theoretically possible for a swallowing reflex in an unconscious seal to result in blood in the stomach but it is not known how often this occurs.
- Hormones, haematological measures, blood parameters, enzymes etc. in body fluids: whilst scientific papers have been published in which the welfare of farmed, other domestic and some wild terrestrial animals has been studied using animal welfare indicators such as cortisol, prolactin, creatine kinase, lactate dehydrogenase, and many other chemical indicators, it is important to note that no studies on seals during seal hunting have been conducted or published. Thus, there is no indication that existing studies on other animals would be reliable measures for seals that, as deep diving marine mammals possess unique physical adaptations that make their physiological responses very different from terrestrial animals.
- Brain measures: various brain measures, taken post-mortem, give information about the welfare of an animal in the period shortly before death. No work of this kind has been conducted during seal hunts.

236. However, while carcass examination can reveal some indicators of poor welfare, as mentioned, on-site inspection is limited to areas of the seal hunt accessible to inspectors. Even if veterinarians working with the sealers were stationed on sealing vessels, they would be unable to examine carcasses of seals skinned on the ice far away from the vessel. Moreover, performing detailed post-mortems on seal carcasses would be impractical in the field.

237. Off-site carcass examination is also not reliable or practical for the following reasons:

- The vast majority of carcasses are abandoned at sea because there are few markets for seal meat.
- The seals are skinned (by necessity, to preserve the pelt) on the ice or on the vessel. Thus, even if the carcasses were brought back to land, there is no way to at that point to match a carcass to a seal skin, and thus no way to identify the skins of seals who died in inhumane (or humane) fashions.

- Carcasses would take up a considerable amount of valuable space in the 'hold' of the vessel, thus making commercial sealing even less economically viable.
- Sealing vessels often operate for several days at a time at the seal hunt, without going back to port. In this time, the carcasses would likely deteriorate significantly, compromising several of the post mortem tests available.

Question 156

(European Union) The European Union stated at the second meeting that an entity from Greenland had recently been added to the list of recognised bodies authorized to issue attesting documents for placing on the market under the IC or MRM exceptions. Please provide further information on this application, including a copy of its application form, details about the requesting body, and how it met the specific requirements set out in Article 6 of the Implementing Regulation.

238. As requested by the Panel, the European Union provides as Exhibit EU-148 Greenland's request pursuant to Article 6(2) of the Implementing Regulation. Furthermore, the European Union provides the European Commission decision of 25 April 2013 concerning Greenland's request as Exhibit EU-149.

Question 157

(European Union) Please provide a copy of the "formal deficiency letter of 7 July 2011" as well as translated copies of the additional documentation and communications from Greenland mentioned in the European Union's response to Panel question No. 88.

239. As requested by the Panel, the European Union provides as Exhibit EU-150 the deficiency letter that the European Commission Services, sent to Greenland on 7 July 2011. Greenland's response, dated 5 January 2012 and submitted to the European Commission via the Danish Ministry of Foreign Affairs on 19 January 2012, is submitted as Exhibit EU-151, the supporting documentation is provided as Exhibit EU-152. The supplementary document received by email on 1 November 2012 is provided as Exhibit EU-153. The further submission made by Greenland in support of its request on 29 January 2013 is provided as Exhibit EU-154 and Exhibit EU-155.

Question 158

(European Union) Please provide translated copies of all documentation and communications between the Swedish Ministry of Agriculture (including its request of 20

January 2011) and the European Commission as described in the European Union's response to Panel question No. 83.

240. As requested by the Panel, the European Union provides as Exhibit EU-156 Sweden's request pursuant to Article 6(2) of the Implementing Regulation for 11 entities located within its territory.
241. The European Union provides as Exhibit EU-157 the deficiency letter that the European Commission Services sent to Sweden on 7 July 2013. Sweden's response, dated 6 October 2011, is submitted as Exhibit EU-158. The European Commission decision concerning Sweden's application is provided as Exhibit EU-159.

Question 159

(European Union) Please provide copies of all attesting documents issued by any recognised body under the EU Seal Regime.

242. To the best of our knowledge no attesting documents have been issued by the recognised bodies located in Sweden since their recognition on 18 December 2013.¹⁴⁵
243. Attesting documents issued by recognised body located in Greenland are provided as Exhibit EU-161. The European Union notes that certificates provided by the recognised body in Greenland do not necessarily reflect the quantity of seal products imported to the European Union. It is our understanding that certificates are requested systematically for the eventuality that products from Greenland would subsequently be imported to the EU market.

Question 160

(European Union) Article 7 of the Implementing Regulation provides that a recognised body shall issue an attesting document "[u]pon request". Please clarify who makes this request, and whether the same issued document can apply to subsequent shipments (or, conversely, if it is necessary to have a new attesting document issued for each shipment).

¹⁴⁵ Email from Permanent Representation of Sweden to the EU, Exhibit EU-160.

244. The Implementing Regulation does not explicitly provide who can make a request for an attesting document pursuant to Article 7. In practice, the applicant will in most cases be the person or entity wishing to place a seal product on the market in the EU.
245. An attesting document only applies to the shipment with respect to which it has been issued and cannot be used for subsequent shipments.¹⁴⁶

Question 161

(European Union) Please provide copies of all "certificates unilaterally issued by the Greenlandic authorities in accordance with the criteria of the IC exception" mentioned in the European Union's response to Panel question No. 97. Further, please explain how Danish customs authorities were able to process the imports referred to in the European Union's response to Panel question No. 97, and what, if any, consequences there are for this under the EU Seal Regime.

246. The European Union provides as Exhibit EU-162 the certificates issued by the Greenlandic authorities before 25 April 2013. As in the context of the response to Question 159, the European Union notes that attesting documents issued do not necessarily reflect the quantity of seal products imported from Greenland to the European Union, since attesting documents were requested systematically for the eventuality of importation into the European Union.
247. Danish customs authorities processed imports based on certificates issued by the Greenlandic authorities prior to the Greenlandic entity obtaining recognised body status based on an interpretation of the Implementing Regulation whereby the issuance of attesting documents complying with the Implementing Regulation would also be allowed during the application process for recognised body status and not only once the process has been completed.

Question 162

(European Union) Please provide import and export data for seal products derived from seals hunted in Greenland using the list of products provided in Exhibit JE-3.

248. The requested import data is provided as part of the response to Question 166.

¹⁴⁶ C.f. In accordance with Article 7(3) of the Implementing Regulation, the original attesting document must always be delivered with the seal product, when the product is placed on the market. A copy of the original document would therefore not satisfy the requirement of Article 7(3).

249. The export data available to the European Union has been provided as part of its second written submission (paragraph 296).

Question 163

(All parties) Please provide further information on the nature and the role of "Great Greenland" in the production, processing and trade of seal products in Greenland.

250. Great Greenland is 100% owned by the Greenland government. Great Greenland has a network of purchasers who buy the skins from the local hunters, and today Great Greenland contracts close to 100% of the purchasers in Greenland. Part-time hunters are currently not allowed to sell seal skins to the purchasers of Great Greenland. Their skins are used by themselves or their families or sold locally.¹⁴⁷
251. Great Greenland has interests in many parts of the trading chain. They run the 49 receiving stations, the GG Tannery and do also have manufacturing, design and marketing facilities in Greenland. The North Atlantic Fur Group (NAFG) trades all seal skins coming from Great Greenland.¹⁴⁸
252. The European Union further refers to the document in Exhibit JE-26 where the Government of Greenland addresses these matters.¹⁴⁹

Question 165

(European Union) Please confirm whether "the Greenland trade is more than enough to cover the EU demand by itself" as indicated in COWI 2010 Report (p. 84).

253. The statement by COWI quoted in the Panel Question is not supported by any evidence or reasoning and it is not possible to know on what basis COWI came to that view. For the reasons already explained in previous submissions¹⁵⁰, the European Union does not agree with COWI's assertion.

¹⁴⁷ 2010 COWI Report, Annex 5, p. 8/30.

¹⁴⁸ 2010 COWI Report, Annex 5, p. 18/30.

¹⁴⁹ Greenland Home Rule Department of Fisheries, Hunting and Agriculture, Management and Utilization of Seals in Greenland (revised in April 2012) (Exhibit JE-26), pp. 21, 25 – 28.

¹⁵⁰ See in particular EU's second written submission, paras. 289-300.

254. First, a large part of the sealskins (as much as 50 % in some years) are not traded.
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255. Second, a large part of the traded sealskins are exported to markets outside the European Union.¹⁵² There is no reason to assume that Greenland will abandon all its other export markets in order to supply exclusively or primarily the EU market.
256. Third, like the European Union, other countries which have recently banned trade in seal products for public moral reasons (Russia and Chinese Taipei) have provided for an Inuit exception.¹⁵³ The Russian market, in particular, is much larger than the EU market. The ban proposed in Switzerland also envisages an Inuit exception.¹⁵⁴ It is not plausible that Greenland would be able to supply by itself the markets of the increasing number of countries banning trade in seal products while providing for an exception in favour of the Inuit.
257. Fourth, COWI appears to assume that global demand for seal products will remain unchanged at the currently depressed level. That level, however, is to a significant extent, the consequence of the EU ban, as conceded by Canada.¹⁵⁵ In measuring the contribution of the EU Seal Regime to its intended objective, the relevant benchmark is the situation that would have existed but for the EU Seal Regime. There is no reason why, in the absence of the EU ban, both the EU and the global demand for seal products could not have returned to the levels prevailing at the beginning of the last decade or even increased further.
258. Fifth, as explained in the response to Question 118, the IC exception is subject to certain conditions which operate as implicit quantitative limits. As a result Greenland's supply of seal products qualifying under the exception cannot be expanded beyond traditional levels.

¹⁵¹ Based on the figures shown in Government of Greenland, *Management and utilization of seals in Greenland*, Table 3, p. 27 (Exhibit JE - 26).

¹⁵² EU's Second written submission, para. 296, Table 1.

¹⁵³ EU's first written submission, para. 76; EU's second written submission, paras 161-168.

¹⁵⁴ EU's second written submission, paras. 169-170.

¹⁵⁵ Canada's response to Panel's Question 40, para. 161.

259. Sixth, the level of catches in Greenland declined by 26 % between 2006 and 2010, whereas the number of hunters fell by 25 % between 2006 and 2009.¹⁵⁶
260. Last, imports into the European Union during 2011 remained stable at the same, relatively low levels of 2009.¹⁵⁷

Question 166

(European Union) In reference to Exhibit EU-88 provided in response to Panel question No. 97:

- a. Please provide the same yearly data for imports of seal products beginning in 2002.*
 - b. For the data provided in Exhibit EU-88 and in response to sub-part (a) of this question, please specify the source of the imports indicated under the column headings "Partner: Extra-EU" and "Partner: Other".*
 - c. For Exhibits EU-87 and EU-88, please clarify the meaning of the row heading "Seals". For instance, does this refer to the number of seals killed corresponding to the imported or exported seal products?*
261. The requested import data is provided as Exhibit EU – 143.
262. As explained in the response to Question 97, 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 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.
263. It is recalled 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, which cover the period 2009-2011, did not include imports of raw seal skins. The import statistics provided as Exhibit EU – 143 include data for raw skins (tariff lines 43017010 and 43017090) from 2002 through 2006.

¹⁵⁶ *Management and utilization of seals in Greenland*, p. 21 (Exhibit JE - 26).

¹⁵⁷ EU's Second written submission, para. 297.

264. The row "seals" in Exhibits EU – 87 and EU – 88 shows the total of the preceding rows. The relevant unit is mentioned in the upper left corner of each table (000 €, Tons or other statistical unit available).
265. The column headings "Partner: Extra-EU" includes the total of the other three columns (i.e. Canada, Norway, Greenland and Other). The column "Other" includes other third countries and has been broken down in one of the tables provided as Exhibit EU – 143.

Question 168

(European Union) Please provide the source of all the video data submitted by the European Union as evidence in this dispute. Please also confirm whether the video footage in Exhibit EU-38 has the exact same content as the video submitted by the group of amici NGOs annexed to the EU submission, and/or as the video evidence reviewed by Butterworth et al. in Exhibit EU-37.

266. The European Union has provided five sets of video evidence to the Panel: Exhibits EU-38, EU-79, EU-82, EU-129 and EU-135.
267. The video evidence contained in Exhibits EU-38, EU-79, EU-129 and EU-135 has been recorded by licensed observers affiliated with the NGOs Humane Society International and International Fund for Animal Welfare. The video evidence contained in Exhibit EU-82 was recorded by a by a freelance journalist in 2000 in the Cape Cross area of Namibia, both during and after a press conference on commercial sealing held by the Namibian government.
268. Exhibit EU-38 has the same content as the video clips mentioned in the various appendixes to Butterworth (2012) (Exhibit EU-37). The European Union provided this video evidence in DVD format in order to facilitate its viewing by the Panel.
269. The European Union understands that the video evidence annexed to the *amicus curiae* brief submitted by Anima et al., and attached to the EU's submissions as Exhibit EU-81 contains the video clips mentioned in the appendixes to Butterworth (2012) and thus has the same content as Exhibit EU-38.
270. Exhibit EU-79 is a video compilation provided by the European Union at the first hearing to illustrate inherent welfare problems in commercial sealing that cannot

- be overcome by improved regulations and increased monitoring. This video compilation does contain some footage included in Exhibit EU-38. However, there is also footage that is not contained in Exhibit EU-38.
271. Exhibit EU-129 is a video compilation provided by the European Union at the second hearing to illustrate specifically the challenges faced by sealers in determining consciousness in wounded seals from a distance. This video evidence was from the 2011 and 2013 seal hunts. Some of the 2011 images are also contained in Exhibits EU-38 and EU-79.
272. Exhibit EU-135 contains video evidence from the 2013 commercial seal hunt. Some of the images are also contained in Exhibit EU-129. However, there are many other images that are not included in Exhibit EU-129.
273. It should be noted that the video evidence reviewed by Butterworth (2007) (Exhibit EU-34), is not the same as the video evidence provided in the EU exhibits listed above. Exhibits EU-38, EU-79 and EU-129 all primarily focus on video evidence from the 2009, 2010, and 2011 seal hunts, whereas Butterworth (2007) reviewed video evidence from the 2003, 2004, 2005, 2006 and 2007 commercial seal hunts. The authors of Butterworth (2007) reviewed raw (unedited) videotapes from both Humane Society International and the International Fund for Animal Welfare, which contained all the images filmed by the licensed observers during the relevant days, and were not edited by NGOs in any way. The clips were reviewed in full, from the beginning to the end of the sequence, by the authors of Butterworth (2007). The authors considered all the evidence, including sequences in which the animals appeared to die quickly, and sequences that revealed poor welfare outcomes for the seals.

Question 175

(European Union) Reference is made to Exhibits EU-87 and EU-88 providing data on the European Union's imports and exports, respectively, of seal products. Please explain the existence of data indicating imports and exports of products from harp seal whitecoat pups and hooded seal blueback pups (under Combined Nomenclature headings 43021941 and 43023051). In this regard, please elaborate on the application of the 1983 Seal Pups Directive within the European Union (Exhibit CDA-12).

274. The importation for commercial purposes of skins of whitecoat pups of harp seals and of blueback pups of hooded seals was prohibited under Council Directive 83/129/EEC (the Seal Pups Directive)¹⁵⁸. That prohibition does not apply to products resulting from traditional hunting by the Inuit people.¹⁵⁹
275. The EU Seal Regime is without prejudice to the Seal Pups Directive. The imports of skins of whitecoats and bluebacks shown in Exhibit EU – 88 consist of non-commercial imports or of imports under the Inuit exception provided in that Directive.
276. Unlike the EU Seal Regime, the Seal Pups Directive, being in the form of a directive, rather than a regulation, is not directly applicable, but must be implemented by the Member States. The implementing measures, including with regard to the Inuit exception, differ from one Member State to another.

Question 177

(European Union) In light of the European General Court's conclusions as to the EU Seal Regime's scope of application, particularly regarding the processing of seal products in the European Union, please clarify whether seal products are being processed within the European Union regardless of their source. If so, please provide specific information regarding such processing activities that have been taking place following the adoption of the EU Seal Regime.

277. The EU Seal Regime has been interpreted by the customs authorities of the Member States as allowing the importation of seal products under the inward processing regime. The judgement of the General Court in the case T - 526/10 has endorsed that interpretation.
278. During 2011 the value of seal products which entered the EU territory under the inward processing regime amounted to 812,000 €. Of them, 713,000 € originated in Canada and 99,000 € in Norway.

Question 178

¹⁵⁸ Exhibit CDA – 13.

¹⁵⁹ Article 3 of the Seal Pups Directive (Exhibit CDA – 13).

(European Union and Norway) Please explain the meaning of the caption "(Text with EEA relevance)" in the chapeau of the Basic and Implementing Regulations.

279. Under the [Agreement on the European Economic Area](#) (the 'EEA Agreement'), the EEA EFTA States (Iceland, Liechtenstein and Norway) have agreed to apply the EU legislative and regulatory acts listed in a series of annexes to the EEA Agreement.¹⁶⁰
280. The EEA Agreement provides for a procedure whereby the annexes are to be amended by the EEA Joint Committee in order to include new acts in the fields covered by the agreement or amendments to the existing acts.¹⁶¹ Failure to amend an annex may trigger a partial suspension of the EEA Agreement.¹⁶²
281. The caption "text with EEA relevance" indicates that, in the view of the EU institutions concerned, the act in question is within an area governed by the EEA Agreement and should be included in the corresponding annex to the EEA Agreement.
282. In the case at hand, the EU legislators were of the view that the EU Seal Regime is 'EEA relevant' because it was based on Article 95 EC (Article 114 TFEU) and has as its primary objective improving the functioning of the internal market.

¹⁶⁰ Cfr. Article 7 of the EEA Agreement.

¹⁶¹ Cfr. Article 98 of the EEA Agreement.

¹⁶² Cfr. Article 102 of the EEA Agreement.