BEFORE THE WORLD TRADE ORGANIZATION

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

Second Opening Statement of Norway

29 APRIL 2013

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Thailand – Cigarettes (Philippines)	Appellate Body Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/AB/R, adopted 15 July 2011
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US – Tuna II (Mexico)	Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012

LIST OF ABBREVIATIONS

Abbreviation	Description
AVMA	American Veterinary Medical Association
Basic Seal Regulation	European Parliament and Council of the European Union, *Regulation (EC) No. 1007/2009 on Trade in Seal Products*
Commission Impact Assessment (or Impact Assessment)	European Commission, *Impact Assessment on the potential impact of a ban of products derived from seal species*, COM(2008) 469 (23 July 2008)
Conduct Regulation	*Regulation Relating to the Conduct of the Seal Hunt in the West Ice and East Ice*, adopted by the Norwegian Ministry of Fisheries and Coastal Affairs as Regulation of 11 February 2003 No. 151, amended by the Regulation of 11 March 2011 No. 272
Danielsson Statement	Expert Statement of Mr Jan Vikars Danielsson (7 November 2012)
Danielsson Second Statement	Expert Statement of Mr Jan Vikars Danielsson (13 March 2013)
Danielsson Third Statement	Expert Statement of Mr Jan Vikars Danielsson (26 March 2013)
EC Treaty	Treaty establishing the European Community
EFSA	European Food Safety Authority
EU	European Union
First OS	Opening Statement at the First Substantive Meeting of the Panel
FWS	First Written Submission
GATS	*General Agreement on Trade in Services*
GATT	*General Agreement on Tariffs and Trade*
HS	Harmonized Commodity Description and Coding System
IC	Indigenous Communities
ICES	International Council for the Exploration of the Sea
Implementing Regulation	European Commission, *Regulation (EU) No. 737/2010 Laying Down Detailed Rules for the Implementation of Regulation (EC) No. 1007/2009 of the European Parliament and of the Council on Trade in Seal Products*

ITK	Inuit Tapiriit Kanatami
Knudsen Statement	Expert Statement of Professor Siri Kristine Knudsen (6 November 2012)
Knudsen Second Statement	Expert Statement of Professor Siri Kristine Knudsen (25 March 2013)
LRD	Legitimate regulatory distinction
MFN	Most favoured nation
NAFO	Northwest Atlantic Fisheries Organization
NAMMCO	North Atlantic Marine Mammal Commission
NEAFC	The North East Atlantic Fisheries Commission
NGO	Non-Governmental Organization
Proposed Regulation	European Commission, *Proposal for a Regulation of the European Parliament and of the Council Concerning Trade in Seal Products*, COM/2008/0469, 2008/0160 COD (23 July 2008)
PU	Personal Use
RC	Canada's Royal Commission on Sealing
SCM Agreement	*Agreement on Subsidies and Countervailing Measures*
SRM	Sustainable Resource Management
TAC	Total allowable catch
TBT Agreement	*Agreement on Technical Barriers to Trade*
TPS	Third Party Submission
WGHARP	ICES/NAFO/Joint Working Group on Harp and Hooded Seals
WTO	World Trade Organization
2007 EFSA Scientific Opinion	[EFSA Panel on Animal Health and Welfare], *Scientific Opinion on Animal Welfare Aspects of the Killing and Skinning of Seals*, The EFSA Journal (2007) 610, pp. 1-122 (6 December 2007)
2008 COWI Report	COWI, *Assessment of the Potential Impact of a Ban of Products Derived from Seal Species* (April 2008)
2010 COWI Report	COWI, *Study on Implementing Measures for Trade in Seal Products*, Final Report (January 2010)

2012 Animal Welfare Assessment	European Commission, *Impact Assessment accompanying the Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the European Union Strategy for the Protection and Welfare of Animals 2012-2015*, COM (2012) 6 final, SEC(2012) 56 final (19 January 2012)
2012 Management and Participation Regulation	*Regulation Relating to Regulatory Measures and the Right to Participate in Hunting of Seals in the West Ice and East Ice in 2012*, adopted by the Norwegian Ministry of Fisheries and Coastal Affairs as Regulation of 30 January 2012 No. 108
2012 Management and Utilization of Seals in Greenland	Greenland Home Rule Department of Fisheries, Hunting and Agriculture, *Management and Utilization of Seals in Greenland* (revised in April 2012)

I. INTRODUCTION

1. Mr Chairman, members of the Panel, thank you for this further opportunity to appear before you. Today, given the time limits, Norway will focus only on issues arising under Articles I, III and XX of the GATT 1994, as well as Article 2.2 of the *TBT Agreement*.

2. Before doing that, I wish to outline the importance of this dispute for Norway's policies relating to the sustainable management of marine resources. To date, the EU has tried to relate its measure almost exclusively to animal welfare, overlooking its own sustainable resource management objective. Animal welfare is important to Norway, but it is not the only policy area that is implicated by the EU Seal Regime. A critical issue for Norway in bringing this dispute is that the EU's measure frustrates Norway's desire to manage sustainably the resources of the sea, and trade in the resulting products.

3. Norway produces annually two to three million tons of fish and seafood for the global market, with exports of around USD 9 billion or 5% of Norway's total goods exports. Many societies make a sustainable living from products, like food and clothing, derived from domestic and wild animals. Norway's sealing industry is a good example: it relies on renewable living marine resources and, together with other activities in the fisheries sector, makes an important contribution to employment in remote coastal areas.

4. Sustainable marine resource management fosters human exploitation of a natural resource, such as seals, in a way that avoids the long-term decline of that resource. For the past forty years, the international community has consistently recognized that sustainable management must encompass exploitation which ensures that human use does not lead to long-term environmental decline.[1] The *Convention on Biological Diversity* recognizes that, in formulating sustainability policies, governments must align the ecological dimensions of policy with other policy dimensions, including economic development.[2]

5. These objectives are reflected in the legislation governing living marine resources both in Norway[3] and the EU, for instance, the EU's Common Fisheries Policy, which covers

[1] Norway's FWS, paras. 723-724.
[2] *United Nations Convention on Biological Diversity*, adopted on 5 June 1992, entered into force on 29 December 1993, 1760 UNTS 79; 31 ILM 818 (1992), Exhibit NOR-66, Article 2.
[3] *Act on the Management of Wild Living Marine Resources*, promulgated by the Norwegian Parliament as Act of 6 June 2008 No. 37, Exhibit NOR-44.

the "*available and accessible living marine aquatic species*".[4] Under Article 2: "*The Common Fisheries Policy shall ensure exploitation of living aquatic resources that provides sustainable economic, environmental and social conditions*".[5] In fisheries management, in both Norway and the EU, the basic concepts of conservation and utilization go hand in hand.

6. Applied to marine ecosystems, the management of stocks requires knowledge of their size, biological characteristics, and the ecosystems of which the stocks are part. Multispecies management must also take account of the interactions between species, including, for example, the role of seals in the food chain. In addressing these issues, policy choices must be based on the best available scientific advice.

7. Harp seals are top predators in the marine food chain, their main prey being crustaceans, capelin, cod, and herring.[6] They consume significant amounts: for example, one estimate is that the current Barents Sea seal population of around 2.2 million seals, consumes more than 3.35 million tonnes of prey each year.[7] Consistent with SRM principles, a quota is set at a level allowing population stability over a ten year period.[8] In some cases, it may be desirable, for ecosystem management, to reduce the population of top predators. This is currently the case with the harp seal population in the Greenland Sea, which is estimated to comprise 650,000 seals in 2011 – the largest population on record for this stock.[9] Due to this historically high population, the quota in recent years has been set at a level to stabilize the population at a lower level over a ten year period.

8. At times, key fish stocks in the marine food chain do not spawn in sufficient numbers. We have witnessed this in the Barents Sea, with consequently low fish stock levels. When this happened in the late 1980s in the North East Atlantic, harp seals migrated to the coast in Northern Norway to feed, creating significant problems. The seals damaged fish catches and many drowned after becoming entangled in fishing gear. For instance, in 1987, up to 60,000

[4] Council of the European Union, *Regulation (EC) No 2371/2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy*, Official Journal of the European Union (2002) L 358/59 (20 December 2002) ("Regulation (EC) No 2371/2002"), Exhibit NOR-90.
[5] Regulation (EC) No 2371/2002, Exhibit NOR-90.
[6] K.T. Nilssen et al., "Food consumption estimates of Barents Sea harp seals", *NAMMCO Scientific Publications*, Vol. 2 (2000), Exhibit NOR-17, p. 9.
[7] *See* K.T. Nilssen et al., "Food consumption estimates of Barents Sea harp seals", *NAMMCO Scientific Publications*, Vol. 2 (2000), Exhibit NOR-17, p. 9.
[8] TACs are determined based on advice from NAFO and ICES: see Norway's SWS, para. 81.
[9] NAFO Scientific Council Meeting, *Report on the Joint ICES/NAFO Working Group on Harp and Hooded Seals Meeting Held in St. Andrews, Scotland, 2011*, NAFO SCS Doc. 12/17 (June 2012), Exhibit NOR-19, p. 2.

carcasses were found.[10] The government had to support the fishermen and find ways to dispose of seal carcasses.

9. Despite its objective of encouraging sustainable resource management, the EU's measure frustrates Norway's ability to respond rationally to the challenges of sustainable marine management. It does so on the basis of an irrational patchwork of unsubstantiated objectives and unjustified means. The result is a measure that is also inconsistent with the EU's WTO obligations. We turn now to Articles I and III of the GATT 1994.

II. THE EU'S ERRONEOUS INTERPRETATION OF ARTICLES I:1 AND III:4 OF THE GATT 1994

10. Through the course of its submissions, the EU has made a number of erroneous arguments concerning the appropriate legal standard for the non-discrimination analysis under Articles I:1 and III:4 of the GATT 1994. To depict these fundamental flaws in the EU's argumentation, Norway directs the Panel's attention to the diagrams in Annex 1.

11. Diagrams 2 and 4 *on the right* illustrate the proper approach to the *de jure* and *de facto* discrimination analyses under Article 2.1 of the *TBT Agreement*, on the one hand, and under Articles I:1 and III:4 of the GATT 1994, on the other hand. These diagrams reflect panel and the Appellate Body case law to date. Crucially, they highlight that, despite overlapping elements of the analysis, Article 2.1 includes elements that do not form part of the analysis under Articles I and III. As the Appellate Body has explained, the legitimacy of regulatory distinctions is assessed *under Article 2.1 itself*, whereas, in the case of the GATT 1994, this is considered *under separate GATT provisions*, such as Article XX.

12. Contrast this position with Diagrams 1 and 3 on the left which represent the EU's approach to the same analyses. Norway highlights **in red** the five main flaws that the EU has perpetuated with respect to these analyses.

[10] See Norwegian Ministry of Fisheries and Coastal Affairs, *White Paper No. 27 (2003-2004) on Norway's Policy on Marine Mammals* (19 March 2004) ("White Paper No. 27"), Exhibit NOR-11. Section 3.5.2 of the White Paper, available at http://www.regjeringen.no/nb/dep/fkd/dok/regpubl/stmeld/20032004/stmeld-nr-27-2003-2004-.html?id=404057 (last checked 27 April 2013), reads: "3.5.2. Direct interaction between marine mammals and fisheries – Marine mammals caught in fishing gear can cause significant damage to the fishing gear. During the invasion of harp seals to Finnmark's coast in 1987 around 60 000 seals drowned in cod fish nets, mainly during the spring cod fishery in Eastern Finnmark. The damage to the fishing gear was compensated with ex gratia payment of 3-400 NOK per animal. The extent of the damage to the fisheries due to direct interaction with marine mammals is not much documented". (p. 45, unofficial translation)

13. *First*, the EU states the wrong legal standard for *de jure* discrimination. It argues that *de jure* discrimination exists only when a measure *explicitly* distinguishes on the basis of origin.[11] However, *de jure* discrimination also arises by *necessary implication* of the words used in the measure.[12] In this dispute, *de jure* discrimination arises because the *words used* in the EU Seal Regime distinguish, by *necessary implication*, the goods from a closed group of Members, whose goods qualify for market access under the IC requirements, from all the goods of other Members, whose goods do not so qualify.[13]

14. *Second*, as regards *de facto* discrimination, the EU wrongly persists in considering the relative treatment *within sub-categories* of the like products. For the EU, if products from all sources are subject to the same origin-neutral conditions *within* each regulatory category, and if all products can *theoretically* meet the legal requirements, no *de facto* discrimination arises.[14] This approach eliminates *de facto* discrimination, which occurs where *ostensibly* origin-neutral conditions operate predominantly to benefit products from some sources.

15. *Third*, also with respect to *de facto* discrimination, the EU wrongly equates the legal standard for "less favourable treatment" under Articles I:1, III:4 and Article 2.1.[15] The EU argues that, under each of these three provisions, a panel determines whether any detrimental impact on imports results from a legitimate regulatory distinction or "LRD".[16]

16. The EU ignores that the Appellate Body has already said that the "scope and content of these provisions is not the same".[17] Under Articles I:1 and III:4, a panel determines whether a regulatory distinction has a detrimental impact on imports. If so, the legitimacy of that distinction may then be examined *under a separate GATT exception*, such as Article XX. Under Article 2.1, if a regulatory distinction has a detrimental impact on imports, a panel may assess its legitimacy *under Article 2.1 itself*.[18]

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[11] See EU's SWS, para. 356.
[12] See Norway's FWS, paras. 360-361.
[13] The Implementing Regulation, Exhibit JE-2, provides that qualifying products must be derived from seals that were: hunted by persons living in defined *territories*, who belong to a community that has long inhabited and has a seal hunting tradition in those *territories*; and the products of the seal hunt must be, at least partly, used in the relevant *territories*, by the community to which the hunters belong. Norway's FWS, paras. 378-383.
[14] EU's SWS, paras. 204, 205, 207, 209, 245, 247, 248, and 365. See also Norway's first OS, paras. 26-36.
[15] EU's SWS, para. 347.
[16] See EU's SWS, paras. 338-349; EU's responses to Panel questions Nos. 7, para. 18; 24, para. 28; and 28, paras. 90 and 96.
[17] Appellate Body Report, *US – Tuna II (Mexico)*, para. 405.
[18] Appellate Body Report, *US – Clove Cigarettes*, para. 109.

17. *Fourth*, the EU wrongly argues that the legal standard for "less favourable treatment" involves a "quantitative" assessment of detrimental impact and a "qualitative" assessment of the legitimacy of the regulatory distinctions.[19] Norway disagrees that the consideration of the detrimental impact is a purely *quantitative* exercise. It is true that there is often a quantitative aspect in analysing whether a regulatory distinction alters competitive opportunities to the detriment of imports. However, that analysis also has important *qualitative* aspects relating to the design, structure and expected operation of the measure. Indeed, it is hard to conceive of the analysis being conducted *without* qualitative aspects. Nonetheless, the *legitimacy* of the contested regulatory distinction is not part of the analysis under Articles I:1 and III:4.

18. *Fifth*, the EU argues that the legitimacy of regulatory distinctions need not be examined under Article XX in cases of *de facto* discrimination, because this issue is addressed under Articles I:1 and III:4. Moreover, for the EU, regulatory distinctions may be legitimized under these two provisions on grounds *not* covered by Article XX.[20] On this view, Article XX becomes superfluous, or, in the EU's words "utterly useless". This interpretation improperly circumvents the drafters' choice to limit the policy justifications in Article XX, by allowing for *additional* justifications of regulatory distinctions under Articles I:1 and III:4.

III. ARTICLE XX OF THE GATT 1994

19. The Appellate Body has explained that what must be justified under Article XX is the *aspect of the measure that gives rise to a WTO-inconsistency*.[21] In a discrimination case, this is "the *differential treatment* afforded to imported versus domestic" (or between different imported) products under the measure.[22]

20. Thus, the EU must justify discrimination resulting from two sets of restrictive conditions – the IC and SRM requirements – that have the effect of: (1) banning seal products from some sources, notably Norway; and (2) allowing seal products from other sources, in particular Greenland and the EU. The EU could justify the discrimination by explaining the differences in treatment under a *single* sub-paragraph of Article XX or it could explain the differences in treatment under *different* sub-paragraphs.

[19] See, e.g. EU's SWS, paras. 339, 348 and fn 353 thereto, 361.
[20] EU's SWS, para. 350.
[21] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 177.
[22] See Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 179 (emphasis original).

21. For example, it could argue that it is necessary *both* to ban Norwegian products, *and* allow Greenland/EU products, in order to protect EU public morals; or, as another example, it could argue that it bans Norwegian products to protect animal welfare, allows Greenland products to protect EU public morals, and allows EU products to conserve an exhaustible natural resource.

22. It is not, however, sufficient for the EU to explain just that it bans Norwegian products to protect public morals or animal welfare. It must also show that its decision to *carve out* products from Greenland and the EU is more than a political choice. Rather, that discrimination must contribute to achieving an objective enumerated in Article XX. Although the EU has sought to justify the ban on Norwegian products, it has not clearly articulated, much less proved, its justification for the *carve out* for Greenland and the EU.

23. The EU has chosen to argue that the discrimination is justified under sub-paragraphs (a) and (b) of Article XX of the GATT 1994. However, it has failed to meet its burden of proving that the discrimination is justified under these sub-paragraphs.[23]

A. The EU has not proven that its measure aims to "protect public morals"

24. The EU has not proven the existence of the "public morals" it alleges are protected by the EU Seal Regime.[24] The EU makes its arguments on EU public morals under Article 2.2 of the *TBT Agreement*. This approach obscures the scope and content of the different public morals, and fails to explain why they compel discrimination. In any event, given the EU's approach, Norway addresses public morals in the context of Article 2.2.[25]

25. At this point, it suffices to note that the EU has failed to prove the existence of the alleged public morals that compel the discriminatory treatment of seal products. In particular, the EU has not proved that its public morals regarding seals include, or are limited by, concerns regarding indigenous communities and resource management. Absent proof of the alleged "public morals", the EU has no basis on which to say that preferring seal products from some origins, over others, is "necessary to protect public morals".

[23] See Norway's first OS, para. 49. See also, e.g. Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 176.
[24] Norway's SWS, paras. 135-137 and 171-205.
[25] See paras. 51-52 below.

B. The EU Seal Regime is not "necessary" to protect animal welfare, whether considered as "animal ... life or health" or as part of "public morals"

26. Just as the EU has not proven the existence of relevant "public morals", so too has it failed to demonstrate that the discriminatory treatment of seal products from IC and SRM hunts is *necessary* to protect the welfare of seals, whether welfare is considered as "animal ... life or health" or as part of "public morals".

1. The EU incorrectly defends the "General Ban" not the discrimination

27. The EU argues that its measure is "necessary" because it limits global demand for seal products, thereby reducing the number of seals killed inhumanely every year.[26] The EU's logic is that, *despite* admitting seal products from *some* sources irrespective of animal welfare, its measure contributes to animal welfare by reducing the number of seals killed every year through a ban on seal products from *other* sources. Thus, any contribution to animal welfare is derived solely by considering the impact of the measure on *unfavoured* sources.

28. The EU thereby defends the *prohibitive* elements of the EU Seal Regime, effectively ignoring that the violation arises from the *differential* impact of the measure on seal products from Norway, Greenland and the EU. This argument does not explain why the *differential treatment* of products from these sources is necessary in light of the asserted public morals, in particular in respect of animal welfare.

29. Indeed, from an animal welfare perspective, the facts support *more* favourable treatment of seal products from Norway, and *less* favourable treatment of seal products from Greenland and the EU.[27] Yet, the EU has taken precisely the opposite approach.

2. The contribution to animal welfare is undermined by the IC and SRM requirements

30. Even leaving to one side the EU's failure to prove that its public morals compel *discrimination*, the EU Seal Regime makes no "material" contribution[28] to animal welfare for

[26] EU's FWS, paras. 359, 364, 591; EU's SWS, paras. 278, 280, 289; EU's responses to Panel questions Nos. 9, para. 35; and 10, para. 41.
[27] See, e.g. Norway's FWS, paras. 231-257, 679-704; Norway's first OS, paras. 84-85, 117-123; Norway's responses to Panel questions Nos. 14, paras. 101-102; and 73, paras. 402-410; Norway's SWS, para. 232.
[28] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 210.

another reason. Specifically, even if the *prohibitive* aspects of the measure were to reduce the number of seals killed in *unfavoured* sources, this contribution would be undermined by the *permissive* aspects of the measure under the IC and SRM requirements, which permit seals to be killed, without regard to animal welfare, in the *favoured* sources.

31. As a result of the IC and SRM requirements, the EU recognizes that it pursues, within one measure, two conflicting levels of protection. Thus, while the EU pursues a "high level of *protection*"[29] in banning Norwegian seal products on the basis that there are "unavoidable" risks to welfare,[30] it tolerates "a higher level of *risk*"[31] for seal products from IC and SRM hunts, allowing seal products irrespective of animal welfare requirements. The EU simultaneously adopts *zero tolerance* and *unlimited tolerance* approaches.

32. In respect of the sources benefitting from unlimited tolerance, there is no limit on the degree to which the marketing of seal products may undermine the EU's animal welfare objective. There is no limit on the amount of seal products that can be placed on the market under the IC requirements and, despite the EU's assertions,[32] Greenland could readily meet all EU demand with seal products derived from seals suffering poorer animal welfare outcomes than seals in the Norwegian hunt.[33]

33. The EU Seal Regime also allows trade in seal products in five other circumstances, without consideration of animal welfare, namely: (i) under the SRM requirements, (ii) under the PU requirements, (iii) for trans-shipment; (iv) for sale at auction and re-export, and (v) for manufacture in the EU under inward processing rules.

34. In sum, there is *nothing* in the design, structure or expected operation of the EU Seal Regime that is apt to reduce the number of seals killed inhumanely. Instead, the EU Seal Regime simply prefers Greenland and the EU (Sweden and Finland) as suppliers, while denying Norway and Canada an opportunity to place seal products on the EU market.

[29] EU's FWS, para. 39 (emphasis added).
[30] EU's SWS, para. 307.
[31] EU's FWS, para. 39 (emphasis added). See also EU's SWS, para. 94.
[32] EU's SWS, para. 289.
[33] See Norway's first OS, para. 120; Norway's SWS, paras. 10, 162.

3. The contribution to resource management is completely undermined by the three conditions imposed under the SRM requirement

35. The EU alleges that the SRM requirements form part of its umbrella rule of public morality[34] and, therefore, suggests that the discriminatory treatment suffered by Norwegian seal products, in violation of Article III:4 of the GATT 1994, is "necessary" to pursue that alleged moral. As we noted above, and explain in more detail in the context of our Article 2.2 arguments, the EU has not proved that its public morals regarding seals include, or are otherwise limited by, concerns regarding resource management.

36. However, even if the EU could prove the scope and content of its alleged moral norms, it has not shown under Article XX(a) that the *differential treatment* of Norwegian versus EU seal products under the SRM requirements is justified by SRM concerns.

37. Under the SRM requirements, seal products enjoy market access where, among others, three conditions are satisfied, namely, the seal products (i) are placed on the market on a *non-profit* basis, (ii) in a *non-systematic* way, and (iii) are by-products of hunts conducted for the *sole purpose* of sustainable resource management. These conditions are not necessary for, or even rationally connected to, the sustainable management of marine resources and, in fact, they undermine that goal.[35] Consequently, the discriminatory treatment meted out to Norwegian seal products, *based on these conditions*, is not necessary to address the moral concerns regarding sustainable resource management that allegedly trump the moral concerns regarding animal welfare.

4. An equivalent contribution to animal welfare and resource management objectives can be made through less restrictive alternative measures

38. Norway has identified three alternatives that would be less trade restrictive, but which would contribute to a greater extent than the EU Seal Regime to the EU's legitimate objectives regarding animal welfare and sustainable resource management. Each of these alternatives would be less trade restrictive, and would make an equivalent or greater

[34] EU's SWS, para. 276. See also EU's FWS, para. 41.
[35] See Norway's FWS, paras. 717-757.

contribution to the relevant objectives. Norway will not repeat its arguments today but refers the Panel to them for purposes of Article XX.[36]

C. The EU Seal Regime constitutes arbitrary or unjustifiable discrimination between countries where the same conditions prevail and a disguised restriction on international trade, contrary to the *chapeau*

39. The EU's measure is also applied in a manner that constitutes arbitrary or unjustifiable discrimination between countries where the same *animal welfare* conditions prevail, contrary to the *chapeau*, since the risks faced by seals are the same in all countries where seals are hunted. The unlimited tolerance is rationally disconnected from the higher animal welfare risks in the IC and SRM hunts.

40. Additionally, the SRM requirements also give rise to arbitrary and unjustifiable discrimination between countries that have established a resource management plan according to scientific criteria. In that regard, the "sole purpose", "non-profit" and "non-systematic" conditions draw an arbitrary line as to when the sustainable management of marine resources prevails over animal welfare, without that line being rationally related to *either* resource management or animal welfare considerations.[37]

41. The EU Seal Regime gives rise to unjustifiable discrimination for another reason. In *US – Shrimp*, the Appellate Body observed that arbitrary or unjustifiable discrimination arose because of "the failure" of the respondent "to engage" the complainants "in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, before enforcing the import prohibition against ... exports" of certain Members.[38]

42. In this case, just as in *US – Shrimp*, the primary targets of the EU's "unilateral and non-consensual"[39] action are third countries. The EU has not, however, engaged "in serious, across-the-board negotiations" with Norway on seal hunting. Norway's Prime Minister emphasized the importance of the sustainable use of marine resources, and offered to negotiate international standards for seal hunting, which would cover animal welfare and

[36] Norway's FWS, paras. 773-919; Norway's SWS, paras. 274-316; Norway's responses to Panel questions Nos. 14, para. 99; and 94, paras. 434-449.
[37] See Norway's FWS, paras. 717-757; Norway's SWS, paras. 239-249, 266-268.
[38] Appellate Body Report, *US – Shrimp*, para. 166.
[39] Appellate Body Report, *US – Shrimp*, para. 171.

sustainable resource management.[40] Instead, the EU unilaterally prohibited Norwegian seal products.

43. Yet, the EU was prepared to accommodate the interests of Greenland (a self-governing territory of one of its Member States) and of certain EU Member States, whose fishermen eliminate seals as pests. As in *US – Shrimp*, the willingness of the EU to accommodate the interests of some, but not other, countries is "plainly discriminatory" and "unjustifiable".[41]

IV. ARTICLE 2.2 OF THE *TBT AGREEMENT*

44. With respect to Article 2.2 of the *TBT Agreement*, Norway will focus on only two issues: *first*, the correct articulation of the *objectives* of the EU Seal Regime; and, *secondly*, whether there are less restrictive *alternatives* that could make, at least, the same contribution as the contested measure to the legitimate objectives of the EU Seal Regime.

A. The objectives of the EU Seal Regime

1. It is important for the Panel to articulate properly the objectives of the EU Seal Regime

45. The analysis under Article 2.2 hinges on a proper identification of the objectives pursued by the technical regulation at issue. The Appellate Body has stated that "the importance of a panel identifying with sufficient clarity and consistency the objective or objectives pursued by a Member through a technical regulation cannot be overemphasized".[42]

46. Accordingly, a panel must objectively assess the objectives pursued by a measure, having regard to "the texts of statutes, legislative history, and other evidence regarding the structure and operation of the measure".[43] A panel's articulation of the objectives needs to be clear and unambiguous, based on the evidence on record. Only with a clear understanding of the objectives can a panel properly assess the contribution of a measure to those objectives, and consider whether less-restrictive alternative measures would make an equivalent or greater contribution, taking account of the risks of non-fulfilment.

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[40] Letter from Norwegian Prime Minister Jens Stoltenberg to the President of the European Commission José Manuel Barroso (23 March 2009), Exhibit NOR-29.
[41] Appellate Body Report, *US – Shrimp*, para. 172.
[42] Appellate Body Report, *US – COOL*, para. 387.
[43] Appellate Body Report, *US – Tuna II (Mexico)*, para. 314. For discussion, see Norway's FWS, paras. 545-548.

2. The parties agree that the measure pursues several goals but differs in how these goals should be characterized in terms of objectives

47. Norway argues that the measure pursues multiple, separate objectives, including: the protection of the welfare of seals; the prevention of consumer confusion; the protection of the economic and social interests of indigenous communities; encouragement of sustainable resource management; and personal choice. Each of the objectives must be considered against the standards of "legitimacy" and "necessity" laid down in Article 2.2.

48. The EU agrees that the measure pursues certain of these goals, in particular, relating to animal welfare, indigenous communities, and resource management. However, it suggests that these goals are not *separate* "objectives" but are part of an *umbrella* public moral regarding seal products, reflecting diverse "interests" and "concerns" of the EU public.[44] Norway notes, however, that, in this case, the EU's own articulation of its objectives, and the related public morals, has been confused, unclear, and has altered with time.

49. Despite the EU's "overarching" animal welfare objectives,[45] it asserts that the public's concerns regarding indigenous communities and resource management "outweigh"[46] its concerns for seal welfare. In other words, as reflected in the legal norms at issue, the interests of indigenous communities and resource management *trump* animal welfare. The EU explains this by arguing that the EU's moral norms regarding seal products encompass, among others: seal welfare, indigenous communities and resource management. On this view, the distinctive features of the measure are perfectly matched with the distinctive contours of the alleged moral norms.

50. In this way, the EU uses an umbrella moral objective to justify the two *completely different levels of protection* for seals, one involving *zero tolerance* of poor animal welfare outcomes for seal products that do not meet the IC and SRM requirements,[47] and the other *unlimited tolerance* of poor animal welfare outcomes for seal products that meet those requirements.

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[44] EU's response to Panel question No. 10, paras. 43-45, 48, 106, 130. See also, e.g. EU's FWS, paras. 4, 38-43; EU's SWS, paras. 208, 221, 226, 230, 232, 255, 256; EU's first OS, paras. 13, 18.
[45] EU's SWS, para. 132 (quoting European Commission, *Impact Assessment on the potential impact of a ban of products derived from seal species*, COM(2008) 469 (23 July 2008) ("Commission Impact Assessment"), Exhibit JE-16, p. 23), 272-273; EU's response to Panel question No. 10, paras. 46-47. See also Norway's FWS, para. 613.
[46] EU's SWS, paras. 208, 221, 230, 232, 255, 283. See also EU's FWS, paras. 268, 308, 308, 329.
[47] See, e.g. EU's FWS, para. 39; EU's SWS, paras. 94, 304.

3. The EU must prove the specific contours of its "public morals" but it has failed to do so

a. A panel cannot simply accept a Member's assertions about the contours of its public morals

51. As the EU appears to recognize, "*virtually anything* can be characterized as a moral issue".[48] This makes it important for a panel to scrutinize asserted morals closely, and not simply accept assertions that public morals involve particular requirements and qualifications. The need for close scrutiny is even more crucial where a respondent asserts public morals that involve conflicting requirements and qualifications, such as the zero and unlimited tolerance of adverse animal welfare outcomes asserted by the EU.

52. For these reasons, the need for the Panel objectively to scrutinize the existence of the asserted public morals is particularly high. The EU has sought deference to its own assertions, claiming that if a "basic standard of conduct" is proved, a panel should not inquire into each "separate rule of public morality" that underlies the basic norm.[49] However, the standard under Article 11 of the DSU requires that the Panel assess whether the EU has proved *each aspect* of the alleged public moral, which it has failed to do.

b. The EU's arguments about public morals fail to demonstrate the particular contours of morality that the EU alleges

i. The EU's umbrella moral is beset with contradictions

53. The EU claims that its public has very high moral standards regarding the welfare of seals. It has presented evidence that seal welfare is a moral issue.[50] Norway does not contest that, as a general principle, seal welfare can be a moral issue. Indeed, if that were the extent of the EU's arguments about public morals, and if the measure did not contain elements contradicting that alleged moral, the questions surrounding the scope and content of the EU public morals would be simpler.

54. However, the alleged umbrella moral encompasses much more than seal welfare. In particular, the EU alleges, and must prove, that the umbrella moral norm allows commerce in seal products in at least six situations *irrespective* of animal welfare; namely, where seal products are: (i) derived from hunts conforming with the IC requirements; (ii) derived from

[48] Exhibit EU-35, quoting Steve Charnowitz (emphasis added). See Norway's first OS, para. 77.
[49] EU's response to Panel question No. 31, para. 107.
[50] EU's SWS, paras. 131-175; EU's response to Panel question No. 48, paras. 161-173.

SRM-compliant hunts; (iii) imported for personal use by travellers; (iv) sold at auction in the EU for re-export; (v) used in EU manufacturing for export under inward processing rules; or (vi) where they transit the EU. In relation to these aspects of the umbrella moral – which contradict the animal welfare objective – the EU has provided virtually no evidence.[51]

55. In respect of this alleged umbrella moral, Norway notes that the EU's General Court gave judgment last week on a challenge to the EU Seal Regime. The Court found that the measure's objective is harmonizing the internal market, and that the choice of harmonized rules took into account several diverse interests, including preventing consumer confusion in the internal market, animal welfare, and others.[52] Strikingly, the Court did not find that the harmonized rules were chosen to protect an umbrella public moral unifying the conflicting interests at stake. Indeed, the judgment offers *no support whatsoever* for the EU's assertion, in this forum, that the measure reflects the existence of, and protects, any such unifying umbrella moral.

ii. The EU has not shown that the asserted moral concerns about animal welfare of seals disappear when seal products are derived from an IC-conforming hunt

56. In relation to the first of these alleged moral contours – that the interests of indigenous communities "outweigh" seal welfare in EU public morality[53] – the EU has not provided evidence that meets its burden.

(1) The measure itself cannot be sufficient evidence of moral norms embodied in the measure

57. The EU argues that the "structure and design" of the measure are "fully consistent with the public morals objective invoked", and that the measure's contours are "best explained" by that objective.[54] The fact that a discriminatory measure may be "explained" by an alleged moral – which happens to fit with the contours of the measure – does not prove

[51] EU's SWS, paras. 131-175; EU's response to Panel question No. 48, paras. 161-173.
[52] General Court of the European Union (Seventh Chamber), Judgment, *Inuit Tapiriit Kanatami v. European Commission*, Case T-526/10, (25 April 2013), available at http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130d5708fecd272ff44e2ba90b6184274b9b4.e34KaxiLc3eQc40LaxqMbN4OaheOe0?text=&docid=136881&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=233545 (last checked 17 April 2013) ("*Inuit Tapiriit Kanatami v. European Commission*"), paras. 35, 43, 45-47, 62, 64, 70, 83 and 90.
[53] The EU characterizes the IC requirements as upholding a "moral imperative" and a "rule of public morality". See EU's SWS, paras. 222, 226. See also EU's responses to Panel questions Nos. 10, paras. 44, 48; 31, para. 106; and 39, paras. 130, 141.
[54] EU's SWS, para. 132. See also EU's response to Panel question No. 48, para. 163.

that the moral *actually* exists. This argument simply begs the question because the challenged legal norm is "explained" by reference to a moral norm that is, in turn, proved by the challenged legal norm, which happens to be "fully consistent" with the moral norm.

58. The obvious shortcomings of this circular approach are compounded because the EU has gradually shifted its description of the moral objectives of its measure, seeking to calibrate its expression of EU public morals to match, as closely as possible, the dissonant features of the political compromise reflected in the EU Seal Regime.

(2) Views from the Rapporteur of the ENVI[55] Committee are not dispositive of the "public morals" of the EU community

59. The EU also refers to a quotation from the Rapporteur of the ENVI Committee of the EU Parliament that "the European public moral can only be sufficiently protected with a limited exemption for [I]nuit communities".[56] It is not clear if the EU believes that this quote proves that protection of indigenous communities is a "moral imperative".[57]

60. In any event, the quote does not prove that point. Although the Rapporteur clearly intended that the animal welfare moral should be subject to an "exemption" for Inuit communities, she does not clarify the *reason* for that "exemption". In particular, her statement does not prove that the proposed "exemption" reflects a *moral norm* of the EU population. The "exemption" could, for example, be a *political choice* to protect Inuit communities. Political choices and moral norms cannot be conflated, even if a political choice pursues a good cause.

61. Whatever the reason for the "exemption", the EU also fails to point out that the "limited exemption" that the ENVI Rapporteur had in mind would have carved out seal products resulting from *purely subsistence* hunting.[58] This is fundamentally different from the IC requirements that were adopted, which open the market to seal products from indigenous hunts that are in large part *commercial*.

[55] The Environment, Public Health and Food Safety Committee ("ENVI").
[56] EU's SWS, para. 135 (emphasis added).
[57] EU's response to Panel question No. 39, paras. 130 and 136.
[58] See European Parliament, *Report on the Proposal for a Regulation of the European Parliament and of the Council concerning Trade in Seals Products* (COM(2008)0469 – C6-0295/2008 – 2008/0160(COD)), A6-0118/2009 (5 March 2009), Exhibit JE-4, pp. 39-45.

(3) Opinion polls do not provide support for the proposition that IC-conforming products do not raise moral concerns or raise separate moral concerns

62. The EU points to a 1986 Canadian survey as support for the view that "a very large majority found acceptable subsistence hunting by indigenous populations".[59] This survey was conducted nearly 30 years ago, and covers only two of the 27 current EU Member States, plus one part of another Member State.[60] On any view, this survey is not probative of the alleged "public morals" in the EU-27 today.

63. More significantly, the survey does not support the view that (ill-informed) public concerns in France, the UK, and West Germany regarding seal welfare disappear where seals are hunted by indigenous communities. According to the survey, just 9 to 16% of respondents in those countries felt that seal hunting by indigenous communities was acceptable *if it was for cash or to finance hunting*,[61] which is the purpose of allowing commerce in Inuit seal products.[62] As such, the 1986 Canadian survey does *not* provide evidence in support of the EU's argument.

64. Norway has already addressed the other opinion polls that the EU submitted with its first written submission.[63] Even the EU seems to accept that these surveys provide no evidence that indigenous community interests "outweigh"[64] seal welfare in EU public morality, because it argues only that the surveys show EU public "demand for a *ban*".[65] In fact, the surveys indicate that the views of respondents did not change with the type or purpose of the hunt.[66]

iii. The EU has not shown that the asserted moral concerns about animal welfare of seals disappear in other situations

65. Turning to the other claimed contours of EU public morality, Norway notes that, other than referring to the text of the measure itself, the EU has presented *no evidence whatsoever*

[59] EU's SWS, para. 175.
[60] The survey covered France, West Germany, and the United Kingdom.
[61] Report of the Royal Commission on Seals and Sealing (1986), Volume I, Chapter 11, "Public Opinion on Sealing", Exhibit EU-48, p. 169.
[62] EU's FWS, para. 266; EU's responses to Panel questions Nos. 32, para. 112; 66, para. 211.
[63] Norway's SWS, paras. 191-199.
[64] EU's SWS, paras. 208, 221, 230, 232.
[65] EU's SWS, para. 172; EU's response to Panel question No. 48, para. 172.
[66] See Norway's SWS, paras. 191-199.

that the asserted moral concerns about animal welfare disappear entirely in other situations, namely, when:

- seal products are derived from an SRM-conforming hunt;
- seal products are imported for personal use;
- when seal products are auctioned, in transit, or being processed in the EU.

66. The evidence suggests that the EU made a commercial policy choice, not a moral one.[67] For instance, in its Impact Assessment, the European Commission found that a ban on inward processing "would have *medium* economic impacts on the EU Member States" and "could be *significant* for Finland and Germany, if such ban would also cover transit trade". The EU chose not to extend its measure to these commercial activities, thereby avoiding these adverse economic impacts for its own Member States.[68]

c. Conclusion on the evidence of EU public morals

67. The EU has sought to cloak its pursuit of various different "interests" and policies beneath a blanket of "public morals" to insulate the measure from scrutiny. It has, however, failed to prove the peculiar contours of morality that it has asserted and, accordingly, has failed to show that its measure is aimed at the protection of the diverse "public morals" it alleges.

4. Conclusion on the objectives of the EU Seal Regime

68. In conclusion, and without commenting today on the *legitimacy* of each of these objectives,[69] the *objectives* of the EU Seal Regime, therefore, should not be analysed as protecting an umbrella public moral regarding seal products, but as pursuing the following distinct objectives: protection of animal welfare of seals; protecting the economic and social interests of indigenous communities; encouragement of the sustainable management of marine resources; allowing consumer choice; and prevention of consumer confusion.

[67] Commission Impact Assessment, Exhibit JE-16, p. 6 (emphasis added).
[68] See *Inuit Tapiriit Kanatami v. European Commission*, paras. 70, 83.
[69] Norway has addressed the legitimacy of each of these objectives in its previous submissions. Norway recalls that the "protection of the economic and social interests" of producers located in certain territories is *not* a "legitimate objective" in the sense that term is used in Article 2.2: see Norway's FWS, paras. 641-657; Norway's first OS, paras. 106-111; Norway's response to Panel question No. 39, paras. 200-215; Norway's SWS, paras. 208-216.

B. Less restrictive alternative measures are reasonably available that would make an equivalent contribution to fulfilment of the EU's legitimate objectives

69. Norway now turns to address issues raised by the EU in relation to two of the three *alternative* measures put forward by Norway.

1. The alternative of removing the sole purpose, non-systematic and non-profit conditions of the SRM requirements

a. The alternative is less trade restrictive than the EU Seal Regime and makes a greater contribution to sustainable marine resource management

70. Norway proposes an alternative to the current SRM requirements. Under this alternative, the EU could maintain other features of its measure, but remove the sole purpose, non-systematic and non-profit conditions from the SRM requirements.[70] This would make a *greater contribution* to the objective of encouraging sustainable management of marine resources than the actual measure.[71]

71. Successfully implementing an SRM plan requires, simply put, that a living resource is managed in a sustainable manner. If the quota of the resource is properly established according to scientific principles, a *rational biological limit* is placed on the quantity of the resource that may be exploited in order to ensure that the resource is managed within the limits of ecological and biological sustainability.

72. The three contested conditions bear no rational relationship to the biological limits established under a scientific plan. Instead they draw arbitrary lines that prevent the sale of seal products when a quota is relatively large. In this way, the three unnecessary conditions *frustrate* sustainable resource management, rather than encouraging it.

73. During the first hearing, the EU said that the SRM requirements reflect the fact that some seals are "pest animals" for fishing and related enterprises, notably in Finland and Sweden. Norway notes that the problems caused by growing seal populations to sustainable ecosystems in EU waters continue to garner attention in the EU Parliament.[72] Although the

[70] The alternative is described in Norway's FWS, paras. 717-753 and 912-917.
[71] See Norway's FWS, paras. 912-917.
[72] See e.g., questions to the Commission from Alain Cadec, E-003518-13, available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2013-003518+0+DOC+XML+V0//EN&language=en (last checked 27 April 2013), and Veronique Mathieu Houillon,

SRM requirements cater to these problems, they are tailored to the situation of EU fishermen. Further, they place the cost of dealing with seals on the taxpayer, because no profit can be made, which undermines incentives for resource management and needlessly burdens the public purse. Norway notes that the Swedish Environmental Protection Agency has estimated the damage done by seals to its fisheries to be around EUR 6 million annually.[73]

b. The alternative would not undermine the animal welfare objective of the EU Seal Regime

74. The EU contends that Norway's SRM alternative "would enlarge" the scope of the SRM requirements, "thereby undermin[ing]" the animal welfare objective of the EU Seal Regime.[74] This argument is unconvincing for several reasons. *First*, the three conditions do not address animal welfare and, instead, serve as the means for the EU to cherry-pick among seal products from different origins.

75. *Second*, the EU itself has created an "enlarged" scope of application for its so-called exceptions. In particular, the EU allows an unlimited volume of seal products to be placed on the market where they originate from hunts that comply with the IC and SRM requirements. The evidence shows that these hunts could satisfy the entire EU demand[75] and that the incidence of poor animal welfare outcomes is high on such hunts.[76]

76. *Third*, as noted, the EU's "enlargement" argument draws an arbitrary line between situations in which the sustainable management of marine resources trumps animal welfare, without that line being rationally related to *either* resource management *or* animal welfare considerations. The line has nothing to do with the pursuit of either goal: it simply serves to allow seal products from certain sources, notably the EU itself, to be placed on the market, irrespective of animal welfare, while excluding products from other sources, including

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E-003565-13, available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2013-003565+0+DOC+XML+V0//EN ((last checked 27 April 2013).

[73] See Swedish Environmental Protection Agency web site, *Decision on culling grey seals 2011*, available at http://www.nrm.se/download/18.42129f1312d951207af800025698/Beslut+om+skyddsjakt+efter+gr%C3%A5s%C3%A4l+2011.pdf (last checked 27 April 2013): "The Fisheries Agency estimated in 2005 that the value of the seal stock's damage on the Swedish commercial fishery amounted to about SEK 55 million per year. Although the work of the "Program Seals and Fisheries" to develop seal-safe fishing gear and practices has intensified, it is not possible today to solve all problems with seal damage simply by damage prevention. The Government designated in 2011 in its Wildlife Damage Facility" (Appropriations 1:8, Jo 2010/3690) SEK 25 million for support and compensation for seal damage to fisheries". (p. 6, unofficial translation)

[74] EU's FWS, para. 417.

[75] Norway's first OS, para. 120; Norway's SWS, paras. 10, 162.

[76] Greenland Home Rule Department of Fisheries, Hunting and Agriculture, *Management and Utilization of Seals in Greenland* (revised in April 2012), Exhibit JE-26, pp. 18-20. See also Norway's FWS, paras. 680-684.

Norway, irrespective of whether the excluded products are produced in a way that promotes the sustainable management of marine resources.

77. Norway thus disagrees that "enlarging" the scope of the SRM requirements by removing the unnecessary conditions would undermine the EU's animal welfare objective. In any event, if the EU wishes to ensure that the SRM requirements do not undermine animal welfare, it could – as a modified version of this SRM alternative – allow seal products from SRM hunts that *additionally* meet minimum animal welfare standards.

2. Conditioning market access on animal welfare requirements is reasonably available alternative

a. The alternative is less restrictive than the EU Seal Regime and it contributes to the legitimate objectives of the EU Seal Regime to a level greater or equal to that of the actual measure

78. Norway has also demonstrated that another of its less-restrictive alternative measures – namely, conditioning market access upon compliance with animal welfare requirements – is reasonably available to the EU. Norway has shown that this alternative would contribute to a greater or equal degree to all the legitimate objectives pursued by the EU.[77]

b. The EU's arguments against an animal-welfare based alternative are flawed

79. The EU continues to contest that it is possible to lay down and consistently enforce standards for the protection of the animal welfare of seals that would achieve the same contribution to animal welfare as does the EU Seal Regime. Norway disagrees.

i. The EU Seal Regime embodies two different levels of protection to the welfare of seals that nullify any contribution to animal welfare

80. The EU focuses on features of the Canadian and Norwegian hunts, while turning a blind eye to hunting practices in Greenland and within the EU itself. As Norway has stated, the IC and SRM hunts are capable of satisfying the entirety of EU demand for seal products.[78] As a result, the EU Seal Regime makes no contribution to animal welfare and gives rise to arbitrary and unjustifiable discrimination between countries where the same conditions prevail.

[77] Norway's FWS, paras. 912-917; Norway's first OS, para. 138; and Norway's SWS, paras. 313-315.
[78] See above, para. 32.

81. Measured against the benchmark of the *actual* contribution of the EU Seal Regime to seal welfare, a measure conditioning access on animal welfare requirements would make a greater contribution than the actual regime by promoting good animal welfare practice and discouraging poor practice.

ii. It is possible to lay down animal welfare standards and apply in a manner that consistently exceeds the level of animal welfare protection achieved by the EU Seal Regime

82. Norway has shown that it is possible to lay down and effectively enforce animal welfare requirements for hunting seals.[79] Further, the Norwegian hunt achieves animal welfare standards that are considerably *higher* than the standards achieved for products allowed market access under the EU Seal Regime. Since the EU persists in its erroneous portrayal of the Norwegian hunt, Norway wishes again to correct aspects of the skewed and misleading picture given by the EU of the Norwegian hunt.

(1) NOAH provides a selective and inaccurate picture of the Norwegian seal hunt

83. The EU relies heavily on material prepared by NOAH[80] in attempting to controvert information provided by Norway's experts, and to cast doubt on the level of animal welfare protection achieved on the Norwegian seal hunt.[81]

84. NOAH's presentation is misleading, since it selectively quotes from reports of sealing inspectors over the last 25 years in order to paint a picture of seal hunting in Norway that does not correspond to the reality. A more objective review of the inspector reports shows that, while the Norwegian hunt does not always achieve a standard of perfection, it nonetheless achieves a very high level of animal welfare protection.

85. For instance, the EU says that "only 13" inspector reports have been filed in the last five years,[82] suggesting a gap in the inspection record. However, the inspection record is complete: there is one report for each of the 13 sealing voyages that has taken place since 2008.

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[79] Norway's FWS, paras. 793-911; Norway's first OS, paras. 140-202; and Norway's SWS, para. 284.
[80] NOAH Reports, Exhibits EU-43 and EU-107.
[81] EU's SWS, paras. 57-67.
[82] EU's SWS, para. 64.

86. The EU seeks to suggest that animal welfare problems are endemic. However, of the 13 reports filed since 2008, 11 do not report any violations, with a total of 30,340 animals hunted.[83] Of the two reports where violations were reported, appropriate action followed. In one case, action at an administrative level was taken with the skipper. In the second case, involving the Kvitungen vessel in 2009, the matter was referred to the police, who secured criminal convictions.[84] The EU seeks to suggest that the conduct of the captain and crew of Kvitungen in 2009 may be generalized to all seal hunts, and highlights that the captain claimed that "the incriminated conducts were usual in sealing expeditions".[85] However, a statement from a convicted defendant seeking to excuse his own conduct is not credible evidence of general conduct on the Norwegian hunt.

87. The EU argues that NOAH's review suggests an unacceptably high struck-and-lost rate on the Kvitungen in 2009 – around 68 seals out of a total of 3,140 caught, or less than 2.2%.[86] It bears repeating that these figures relate to a voyage that led to criminal convictions. The exceptional character of these figures is also illustrated by comparison with the figures collected by Mr Danielsson during the 2011 and 2012 voyages of the Havsel record, with rates of 0.29 and 0.15% respectively.[87] Even the Kvitungen 2009 rates bear no comparison at all to struck-and-lost rates on IC hunts. In Greenland, for example, struck and lost rates across the country are between 21 and 26%, rising to 50% in spring and early summer.[88] On that basis, between 35 to 44 *thousand* seals are struck and lost each year to produce goods that qualify for market access to the EU.[89]

(2) Evidence from the EU regarding the Norwegian hunt does not show there are inherent obstacles to acceptable animal welfare outcomes

88. The EU persists in arguing that "the killing process prescribed by … Norway's regulations cannot be regarded as humane".[90] This argument is based on an animal welfare

[83] 2008-2011 figures from Statistics Norway (see Exhibit NOR-158). 2012 figures from Directorate of Fisheries.
[84] EU's FWS, para 188.
[85] EU's SWS, para. 65.
[86] NOAH Report, Exhibit EU-43, Appendix K. See EU's SWS, paras. 59, 61, 64, 65.
[87] Expert Statement of Mr Jan Vikars Danielsson (13 March 2013) ("Danielsson Second Statement"), Exhibit NOR-128, para. 43 and Annex.
[88] European Food Safety Authority ("EFSA"), Panel on Animal Health and Welfare, *Scientific Opinion on Animal Welfare Aspects of the Killing and Skinning of Seals*, The EFSA Journal (2007) 610, pp. 1-122 (6 December 2007) ("2007 EFSA Scientific Opinion"), Exhibit JE-22, p. 66.
[89] Norway's response to Panel question No. 73, para. 408.
[90] EU's SWS, para. 112.

standard that bears no resemblance to the animal welfare standards applied for seal products that may be marketed in the EU. Indeed, for seal products that can be marketed in the EU, there are *no* animal welfare requirements, meaning any negative animal welfare outcome is acceptable.

89. Even applying a *much higher standard* than the one achieved by the EU Seal Regime, this assertion is also wrong on the facts, because Norway has shown that the standards applied under the Norwegian regulations achieve a high level of animal welfare protection. Norway has previously shown that: shooting and the hakapik are effective and reliable stun/kill methods;[91] accuracy in shooting is not compromised by environmental factors such as cold, wind or ocean movement;[92] and the administration of the hakapik is "safer and more practical", from an animal welfare point of view, than pausing the killing process to monitor unconsciousness.[93]

90. The EU argues that an exception provided in Norway's regulations to the generally applicable rule that all three steps be carried out on the ice is unacceptable from an animal welfare point of view. Norway does not share this view, otherwise the exception would have been removed when it was reviewed in 2010. The rules reviewed in 2010 prioritize animal welfare and require that seals not be brought on board the vessel before being bled out unless they are "undoubtedly dead" and hence incapable of suffering. The government ultimately found that the practices that led to the Kvitungen prosecution, and, subsequently, to the review, reflected the attitude on that vessel, and not a problem with the rules themselves or their application on other vessels.

[91] See Dr Knudsen and Mr Danielsson's remarks in Norway's OS, paras. 157-160, 176-192; Expert Statement of Professor Siri Kristine Knudsen (25 March 2013) ("Knudsen Second Statement"), Exhibit NOR-162, paras. 33-54, 56-62; AVMA, *Guidelines on Euthanasia* (June 2007), available at https://www.avma.org/KB/Policies/Documents/euthanasia.pdf (last checked 14 October 2012), Exhibit NOR-91; AVMA, *Guidelines for the Euthanasia of Animals: 2013 Edition*, available at https://www.avma.org/KB/Policies/Documents/euthanasia.pdf (last checked 12 March 2013), Exhibit NOR-133, pp. 36, 83-84; 2007 EFSA Scientific Opinion, Exhibit JE-22, pp. 43, 88; Expert Statement of Professor Siri Kristine Knudsen (6 November 2012) ("Knudsen Statement"), Exhibit NOR-5, para. 50; Norway's responses to Panel questions Nos. 60, para. 339, 69, paras. 371-376, and 70, para. 380; Danielsson Second Statement, Exhibit NOR-128, paras. 4-29.

[92] See 2007 EFSA Scientific Opinion, Exhibit JE-22, p. 44; Danielsson Second Statement, Exhibit NOR-128, paras. 4-29; Mr Danielsson's remarks in Norway's first OS, paras. 177-192; Norway's responses to Panel questions No. 70, para. 380, and 69, paras. 371-376; Norway's SWS, para. 298 and Norma wind drift calculations, Exhibit NOR-164.

[93] Knudsen Second Statement, Exhibit NOR-162, para. 70. See also Knudsen Statement, Exhibit NOR-5, para. 23; Mr Danielsson's remarks in Norway's first OS, paras. 171-172.

91. In any event, in adopting an alternative measure, the EU is not obliged to adopt each and every aspect of the Norwegian regulatory framework.

(3) Inspectors maintain objective oversight of hunting and play a valuable role in ensuring compliance with animal welfare standards

92. Norway also rejects the EU's attack on the independence and credibility of Mr Danielsson. The EU maintains that, because Mr Danielsson "participated in the hunts as a government employee", he "cannot be regarded as ... independent". Mr Danielsson has, for at least nine seasons served as an inspector of the Norwegian hunt and is, today, on a sealing vessel serving for a further season. He has seen first-hand how the Norwegian hunt is conducted. He is a veterinarian with wide experience, including in supervising slaughter of farmed animals. As a public officer, Mr Danielsson is bound by the rules of Norway's Civil Service Act and Ethical Guidelines for the Public Service, which require professional independence and objectivity, backed by the possibility of sanctions.[94] The fact that he is a public servant is no basis to doubt his testimony.

93. The role of inspectors on Norway's hunt is one component of a system through which Norway achieves high standards of animal welfare protection. The presence of an inspector ensures that hunters know that compliance with the hunting regulations is being monitored, and it encourages compliant behaviour. The EU acknowledges that, when sealers are aware of being observed, "this awareness is likely to affect [their] behaviour".[95] This is the same logic that the EU and many other countries employ in requiring inspectors at slaughterhouses and in placing observers on fishing vessels.[96]

94. The EU says that inspectors cannot keep an "adequate" overview.[97] The inspector's overview is, however, more than adequate in light of the circumstances: the hunt is conducted by a small team, with two marksmen, usually working one at a time, with one jumper responsible for applying the hakapik and bleeding the animal on the ice. An inspector can

[94] Norway's Public Service Act (English translation), available at http://www.ub.uio.no/ujur/ulovdata/lov-19830304-003-eng.pdf (last checked 27 April 2013); Norway's Ethical Guidelines for the Public Service (English translation), available at http://www.regjeringen.no/upload/kilde/mod/bro/2005/0001/ddd/pdfv/281750-etiske_retningslinjer_engelsk_revidert.pdf (last checked 27 April 2013).
[95] EU's SWS, para. 45.
[96] For instance, the NAFO observer scheme describes in Norway's SWS, para. 299. Norway notes that Norway's expert, Anne Moustgaard, is currently serving as an observer on a fishing vessel.
[97] EU's SWS, para. 57 (referring to NOAH Report, Exhibit EU-43, pp. 3-4).

have a perfectly good overview of this activity. Moreover, his presence on board is a constant factor encouraging compliant behaviour.

95. The standards that the EU appears to expect of Norway's hunt do not reflect the market access requirements of the EU Seal Regime. Under the measure, market access is not predicated on seal-by-seal inspection. Indeed, there is *no requirement* for any inspection of even a *fraction* of the seals hunted under the IC and SRM requirements. Animal-by-animal inspection is also not required in any other situation in the EU. Under EU animal welfare legislation, inspection of killing in slaughterhouses need only be occasional.[98] In contrast, the system of inspection and oversight during the Norwegian seal hunt is very strict indeed.

96. For SRM hunting within the EU, besides having no inspection requirement, the EU does not permit third-party observation, because it would be "impractical".[99] (Norway finds it strange, therefore, that the EU criticizes Norway for the absence of rules allowing for NGO observers to be placed on private Norwegian sealing vessels, particularly when, until the WTO's public hearing earlier this year, no request to observe had ever been received.)

V. CONCLUDING REMARKS

97. In closing, Norway would like to thank the Panel for this opportunity to present its oral arguments. We look forward to responding to any questions that the Panel might have.

[98] Norway's SWS, para. 291. See also *Council Regulation (EC) No 1099/2009 on the protection of animals at the time of killing* (Council of the European Union, *Regulation (EC) No 1099/2009 on the protection of animals at the time of killing*, Official Journal of the European Union L 303/1 (24 September 2009) ("Regulation 1099/2009"), Exhibit NOR-117, Article 5. See also Knudsen Second Statement, Exhibit NOR-162, paras. 92-98; and Expert Statement of Mr Jan Vikars Danielsson (26 March 2013) ("Danielsson Third Statement"), Exhibit NOR-163, paras. 24-27.

[99] EU's response to Panel question No. 61, para. 198.