

**BEFORE THE  
WORLD TRADE ORGANIZATION  
DISPUTE SETTLEMENT BODY**

*European Communities — Measures Prohibiting the  
Importation and Marketing of Seal Products*

(WT/DS400, WT/DS401)

**Written Submission of Non-Party Amici Curiae**

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ANIMAL RIGHTS ACTION NETWORK  
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WORLD SOCIETY FOR THE PROTECTION OF ANIMALS**

January 25, 2013

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Deborah J. Salem & Andrew N. Rowan, <i>The State of the Animals</i> (4th ed. 2007).	2
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<b>Short Title</b>	<b>Full Case Title and Citation</b>
<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
<i>Brazil – Retreaded Tyres</i>	Panel Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/R, adopted 17 December 2007, as modified by Appellate Body Report WT/DS332/AB/R
<i>Canada – Automotive</i>	Appellate Body Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , WT/DS139/AB/R, WT/DS142/AB/R at para. 78, adopted 19 June 2000
<i>China – Publications and Audiovisual Products</i>	Appellate Body Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , WT/DS363/AB/R, adopted 19 January 2010
<i>China – Publications and Audiovisual Products</i>	Panel Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , WT/DS363/R and Corr.1, adopted 19 January 2010, as modified by Appellate Body Report WT/DS363/AB/R
<i>Dominican Republic – Import and Sale of Cigarettes</i>	Appellate Body Report, <i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/AB/R, adopted 19 May 2005
<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
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<i>EC – Biotech</i>	Panel Report, <i>European Communities – Approval and Marketing of Biotech Products</i> , WT/DS291/R, WT/DS292/R, WT/DS293/R, 29 September 2006
<i>EC – Tariff Preferences</i>	Appellate Body Report, <i>European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries</i> , WT/DS246/AB/R, adopted 20 April 2004
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<i>India – Autos</i>	Panel Report, <i>India – Measures Affecting the Automotive Sector</i> , WT/DS146/R, circulated 21 December 2001
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**DISPUTES CITED IN THIS SUBMISSION**

<i>US – Cigarettes</i>	Appellate Body Report, <i>United States – Measures Affecting the Production and Sale of Clove Cigarettes</i> , WT/DS/406/AB/R, adopted 24 April 2012
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<i>US – COOL</i>	Appellate Body Report, <i>United States – Country of Origin Labeling (COOL) Requirements</i> , WT/DS/384/AB/R, adopted 23 July 2012, as modified by the Appellate Body Report
<i>US – COOL</i>	Panel Report, <i>United States – Country of Origin Labeling (COOL) Requirements</i> , WT/DS/384/R, adopted 23 July 2012, as modified by the Appellate Body Report
<i>US – Gambling</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R, adopted 20 April 2005
<i>US – Gambling</i>	Panel Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/R, adopted 20 April 2005, as modified by Appellate Body Report WT/DS285/AB/R
<i>US – Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS4/AB/R, adopted 20 May 1996
<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
<i>US – Tuna</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</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 the Appellate Body Report

## I. INTEREST OF AMICI CURIAE

1. This submission is on behalf of the following groups, collectively “Amici Curiae” (*Amici*): Anima, Animal Rights Action Network (ARAN), Animalia, Bont Voor Dieren, (BVD), Change for Animals Foundation (CFAF), Compassion in World Farming (CIWF), Djurens Rätt (Animal Rights Sweden), Eurogroup for Animals, Fondation Brigitte Bardot (FBB), Fondation Franz Weber (FFW), Four Paws, Global Action in the Interest of Animals (GAIA), The Humane Society of the United States (The HSUS) and Humane Society International (HSI), International Fund for Animal Welfare (IFAW), Lega Anti Vivisezione (LAV), Prijatelji životinja (Animal Friends Croatia), Respect for Animals, Royal Society for the Prevention of Cruelty to Animals (RSPCA), Svoboda zvířat, and the World Society for the Protection of Animals (WSPA).
2. With respect to *amicus curiae* briefs, a panel has the “discretionary authority either to accept and consider or to reject any information submitted to it ... or make some other appropriate disposition thereof.”<sup>1</sup> In *US – Tuna*, the Panel received an unsolicited amicus submission from Humane Society International and American University’s Washington College of Law.<sup>2</sup> The Panel invited the parties and third parties to provide views on the amicus submission, and reminded them of “the possibility of incorporating part or all of the information contained in the submission into their respective submissions and/or oral statements subject to the provisions of the DSU and the Panel’s Working Procedures.”<sup>3</sup> The U.S. requested the Panel to review the submission “in light of the relevant and useful information it contained which it believed could assist the Panel in understanding the issues in the dispute.”<sup>4</sup> The U.S. also “emphasized Humane Society International’s nearly three decade involvement in the issues surrounding this dispute.”<sup>5</sup> *The Panel found it had the authority to consider the information in the amicus brief, and it did so where relevant to the examination of particular claims.*<sup>6</sup>
3. As was the case in *US – Tuna*, *Amici* in this dispute have been closely involved in the sealing issue for over four decades in various capacities. Our groups have observed the commercial seal hunt in Canada first hand, witnessing sealer error and failure to comply with laws and regulations, the failure of authorities to enforce the existing regulations, and the practical impossibility of ensuring a humane death on a consistent basis due to factors outside of human control. Many of our organizations have veterinarians and marine biologists on staff, and regularly work with leading

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<sup>1</sup> See Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (adopted, 6 November 1998) at paras. 104 and 108 (hereinafter “*US – Shrimp*”). See also Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS293 (adopted, 29 September 2006) at para. 7.11.

<sup>2</sup> See Panel Report, *United States – Measures Concerning the Importation, Marketing, and Sale of Tuna and Tuna Products* (hereinafter “*US – Tuna*”), WT/DS381/R (adopted, 13 June 2012) at paras. 7.1 and 7.2.

<sup>3</sup> See *US – Tuna* at para. 7.2

<sup>4</sup> See *US – Tuna* at para. 7.3. The U.S. also referred to the amicus submission in its answers to questions. In particular, the U.S. used the amicus submission to support some of its arguments, including its review of consumer sentiment leading to the adoption of the U.S. Dolphin-Safe label. *Id.* at para. 7.3, fn. 166-167.

<sup>5</sup> See *US – Tuna* at para. 7.3, fn. 166.

<sup>6</sup> See *US – Tuna* at para. 7.9 (this issue was not taken up on appeal).

practitioners in the field. Our organizations have commissioned extensive research on the conservation, animal welfare, economic, ethical and public opinion aspects of commercial sealing and have testified before numerous government committees in Canada and internationally.

4. As leading animal protection organizations, representative of well over 3 million European constituents, *Amici* believe our perspective can add to that of the parties in a way that will be “pertinent and useful” to the Panel’s deliberations and recommendations in this dispute.<sup>7</sup> Specifically, we provide information herein relevant to the Panel’s consideration of issues such as the moral concerns of EU citizens regarding commercial seal hunting, and what scientific evidence supports the conclusion that the commercial seal hunt is inherently inhumane. Our experience as observers of the hunt for several decades also offers a first-hand perspective.
5. *Amici* support the positions taken in the European Commission’s (EC’s) submission. This brief is intended to complement the EC submission by offering additional details on certain factual issues, and by providing the perspective of entities that have been on the frontlines of this issue for nearly three decades. *Amici* respectfully request that you accept and consider this submission and draw upon our expertise and historical knowledge as necessary.

## II. EXECUTIVE SUMMARY

6. The commercial seal hunt in Canada exacts the highest death toll of marine mammals in the world. In some years, hundreds of thousands of seals, almost all of which are under three months of age, are killed in the span of a just a few days or weeks. The primary objective of the commercial seal hunt in Canada and Norway is seal fur, with seal oil developed as a by-product of the fur trade (the skins are removed from the carcass with a layer of blubber attached), which is then processed and traded on the global market.
7. There is a long history of public opposition to commercial seal hunting, dating back to the 1950s. The concern has centered on the scale/intensity of the killing, the long-term threat that commercial hunting poses to marine mammal populations, the rampant waste involved in the industry, and the avoidable suffering of these highly developed animals for a non-essential product. In response, numerous countries and trading blocs such as Mexico; the Customs Union of Russia, Belarus, and Kazakhstan; the European Union; and Chinese Taipei have enacted measures limiting or prohibiting trade in seal products and condemning the commercial seal hunt.
8. The Canadian government and commercial sealing industry have also tried to counter these moves and public opposition (which is widespread within Canada and globally) by revising its marine mammal regulations in an attempt to make its commercial seal hunt appear less inhumane. However, there are no sealing regulations today, in Canada or elsewhere, which prescribe a humane death for seals as would be expected in other commercial slaughter operations.

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<sup>7</sup> See Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R at para. 42 (adopted 7 June 2000) (“We are of the opinion that we have the legal authority under the DSU to accept and consider *amicus curiae* briefs in an appeal in which we find it pertinent and useful to do so.”)

9. Even if the laws were improved on paper, a number of factors would render them meaningless in practice. This is because the commercial seal hunt is inherently inhumane due to factors such as the remote, harsh environment in which the killing occurs, the scale and intensity of the killing, the inability of authorities to adequately monitor the hunt and enforce the law, and the unique physical adaptations of seals which call into question conventional thinking on humane slaughter.
10. The Canadian commercial seal hunt, for example, takes place far off of Canada's east coast, where high ocean swells, low visibility and temperatures, and extreme weather events are common. Unstable and moving ice floes add to the difficulty sealers face in effectively stunning, monitoring for unconsciousness, and then bleeding seals.
11. Accuracy in clubbing is compromised by the slippery, broken sea ice upon which sealers are operating, and the fact that the targets (seal pups) are mobile on the ice. When the ice is not solid enough to walk on, as is increasingly the case due to climate change, sealers resort to long-distance shooting from moving vessels. Accuracy in shooting is compromised not only by the unstable sealing vessels from which the sealers shoot, but also by the fact that seals are themselves moving on moving pans of ice on moving ocean. Further challenges to shooting accuracy include high winds, low visibility, and operator fatigue. While sealers are required to observe seals for "directed movement" after they shoot the animals, and shoot again if such movement is observed, this requirement ignores the fact that seals often display a "paralysis response" in situations of stress and pain. Thus, a sealer could observe a seal that has been shot and is lying motionless, and assume that the seal is unconscious and therefore not suffering. Yet there is every possibility in these situations that the seal is, in fact, conscious and simply "playing dead."
12. Ability to monitor for consciousness without delay (as is recommended by veterinary authorities) is severely compromised by the prevalence of long distance shooting, which leads to inevitable delays between stunning and monitoring, while sealers slowly and carefully manoeuvre their vessels through the sea ice to reach the wounded seals. Furthermore, climate change is causing sea ice cover to deteriorate in the sealing areas, leading to an increase in both shooting seals in open water and on sea ice that is not strong enough to support the weight of the sealer. In both cases, monitoring for consciousness is impossible prior to impaling the seal on a metal spike and hoisting onto the vessel (a process that causes demonstrable pain, fear, distress and suffering to seals that are wounded but still conscious).
13. Ability to bleed without delay following confirmation of unconsciousness is prevented in the common instances when sea ice is not strong enough to support the weight of the sealer or the seal is shot in open water. As noted above, in these instances, the wounded seal must be gaffed and dragged onto the vessel prior to monitoring and bleeding. Even when the sea ice is strong enough to support a sealer retrieving the seal, sealers are often unable to implement the bleeding process on the ice prior to moving the wounded animal onto the vessel (as is recommended by the Independent Veterinarians Working Group) because it would be unsafe to remain on the fragile ice for the duration of the bleeding process.
14. Unlike the killing of animals in a slaughterhouse, the commercial seal hunt occurs in remote areas where authorities are only able to monitor a miniscule fraction of the seal kills and often from a distance. In recent years, available information demonstrates that only 100 Canadian fisheries officers are policing over 1,000 commercial sealing

vessels engaged in a hunt for tens or hundreds of thousands of seals. While Canadian government representatives have reported that inspections totalled about 3,000 seals per year in 2006, 2007, and 2008, this amounts to less than 1.5% of seals killed in each of these years. Moreover, no data is provided on what these inspections consisted of, and fisheries officers rather than veterinarians performed the examinations.

15. Veterinary experts have concluded that there are numerous, insurmountable obstacles to humane slaughter at the commercial seal hunt (as detailed above), and these factors prevent sealers from killing seals humanely on an effective and consistent basis. The outcomes of these factors are high wounding rates; unacceptable delays between wounding, monitoring for unconsciousness, and exsanguination; high 'struck and lost' rates; and actions that cause pain to wounded, conscious seals such as live gaffing and dragging. Diminished sea ice due to climate change is exacerbating these conditions. This brief includes video evidence illustrating each of these factors.
16. Veterinarians are also concerned that the unique physical adaptations of seals, as deep diving marine mammals, may call into question conventional thinking on humane slaughter methods, including bleed out times.
17. The veterinarians' concerns about the animal welfare aspects of the commercial seal hunt are shared by many in the EU community. Indeed, in the lead up to the EU measures at issue here, millions of EU citizens voiced their strong opinion that they were opposed to the commercial seal hunt on animal welfare grounds and, because of this opposition, they supported a ban on trade in products from commercial seal hunts so that the EU market would not contribute to the demand for these products. The EU Parliament carefully considered these concerns as well as scientific evidence concerning the inherently inhumane characteristics of the hunt and determined that only a complete ban on trade in products of commercial seal hunting could respond to the moral demands of its constituents.
18. The measures provide for certain exemptions depending on the type and purpose of other types of seal hunts, such as those conducted by indigenous communities for subsistence purposes. As the EU explains in its first written submission, these exemptions reflect additional moral considerations that complement the overall objective of EU legislators to enact a seal regime responsive to the moral concerns of its citizens.
19. Contrary to the arguments of Canada and Norway, the EU measures do not violate any of the cited provisions of the World Trade Organization (WTO) Agreements. In particular:
  - The EU measures are consistent with Articles I:1 and III:4 of the General Agreement on Tariffs and Trade (GATT) because they are origin-neutral in design and application and do not discriminate among "like" seal products.
  - The EU measures do not fall within the scope of GATT Article XI:1;
  - Even if the EU measures are found to be inconsistent with GATT Articles I, III or XI, they are nevertheless justified under GATT Article XX(a) as necessary to protect public morals. There is a long history of profound moral concern in the EU and worldwide about the way animals, and seals specifically, are treated. Recent opinion polls in the EU show that European citizens

fundamentally oppose the commercial seal hunt and overwhelmingly support the EU measures.

The measures address the EU public's moral concern about the suffering involved in the commercial seal hunt and their belief that the EU market should not contribute to this trade. Evidence shows that the EU measures are contributing significantly to these objectives by decreasing demand for seal products, which has helped avoid the inhumane killing of tens if not hundreds of thousands of seals since the implementation of the EU measures. Canada has not yet proposed a reasonably available alternative that would achieve the same level of protection as the EU measure, and therefore, the EU measures are "necessary" to protect public morals under GATT Article XX(a).

The EU measures also satisfy the GATT Article XX chapeau as they are non-discriminatory and not a disguised restriction on trade.

- The EU measures are not technical regulations under the Technical Barriers to Trade (TBT) Agreement because they do not prescribe product characteristics, but rather in a closely circumscribed way specify which products can enter the market based on the type of hunt they are derived from.
- Even if the EU measures are found to be technical regulations, they do discriminate between imports from Canada and Norway and imports from other sources or the domestic like product in contravention of TBT Article 2.1.
- The EU measures are also not more trade restrictive than necessary to fulfil the EU's legitimate objectives under TBT Article 2.2. Because commercial seal hunting is inherently inhumane, anything less than a total ban on commercial seal products cannot achieve the level of protection desired by the EU. Canada's proposed certification/labelling scheme should be rejected for this reason.

20. In sum, the EU measures are consistent with the EU's obligations under the WTO Agreements, and *Amici* request the Panel to reject Canada and Norway's arguments to the contrary.

### III. EU MEASURES ON SEAL PRODUCTS TRADE AT ISSUE IN THIS DISPUTE

#### A. Legislative History

21. Although it had been simmering for years, given the millions of seals killed every decade to support the commercial trade in seal products, the public morality debate sparked by the inherent cruelty of the commercial seal hunt reached the European Parliament in 2006. As calls were made for an EU-wide measure that would go further than the 1983 Directive (83/129/EEC) prohibiting the import of products solely from newborn harp seals (whitecoats) and hooded seal pups (bluebacks)<sup>8</sup> into the EU,<sup>9</sup> EU

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<sup>8</sup> Whitecoat pups are those that have not yet started to shed their white lanugo (fetal hair) at about the age of twelve days. See European Food Safety Authority, *Animal Welfare Aspects of the Killing and Skinning of Seals* at p. 119-122 (2007) (hereinafter "EFSA Report (2007)"), available at: <http://www.efsa.europa.eu/en/scdocs/doc/610.pdf> Bluebacks cannot be taken before they moult their pelage which occurs around 16 months old. *Id.* at 25-122.

Member States were enacting their own measures. In 2006, Italy temporarily suspended its trade in sealskins and derived products,<sup>10</sup> and in 2007, the Belgian Parliament adopted a national ban on all seal and seal-derived products in the 27 EU Member States.<sup>11</sup> The Netherlands followed with their own ban on seal products trade,<sup>12</sup> and the German and Austrian Parliaments voted unanimously in favour of a motion to ban seal product trade.

22. As guardians of the Treaty of Rome, the European Commission must act if it sees internal trade being disrupted or unfair advantages to Member States from bans being implemented at the Member State level. With bans in place in Belgium and the Netherlands, Germany, Italy and Austria working towards their own legislation, the European Commission released a draft proposal in 2008 to prohibit the placing on the market of seal products in the EU.<sup>13</sup> The draft explained that:

The hunting of seals has led to expressions of serious concerns by members of the public, governments as well as the European Parliament sensitive to animal welfare considerations since there are indications that seals may not be killed and skinned without causing avoidable pain, distress and other forms of suffering. The European Food Safety Authority concluded, in its scientific opinion on the Animal Welfare aspects of the killing and skinning of seals, that it is possible to kill seals rapidly and effectively without causing them avoidable pain or distress, whilst also reporting that in practice, effective and humane killing does not always happen.<sup>14</sup>

23. Based on these considerations, as well as the fragmentation of the internal market due to varying regulations concerning seal products trade at the Member State level,<sup>15</sup> the Commission proposal outlined a general ban on seal products trade with derogations for products that could meet certain animal welfare criteria and products from indigenous hunts conducted for subsistence purposes.<sup>16</sup>

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<sup>9</sup> See Council Directive 83/129/EEC of 28 March 1983 concerning the importation into Member States of skins of certain seal pups and products derived therefrom, Official Journal L 091, 09/04/1983 at 0030 – 0031; amended by Council Directive 85/444/EEC of 27 September 1985 amending Council Directive 83/129/EEC concerning the importation into Member States of skins of certain seal pups and products derived therefrom, Official Journal L 259, 01/10/1985 at 0070 – 0070; indefinitely extended by Council Directive 89/370/EEC of 8 June 1989 amending Directive 83/129/EEC concerning the importation into Member States of skins of certain seal pups and products derived therefrom, Official Journal L 163, 14/06/1989 at 0037 {hereinafter 1983 Seal Pup Directive}. Copies of all Directives can be found here: [http://ec.europa.eu/environment/biodiversity/animal\\_welfare/seals/seal\\_hunting.htm](http://ec.europa.eu/environment/biodiversity/animal_welfare/seals/seal_hunting.htm)

<sup>10</sup> On 2 March 2006, a Ministerial Decree was submitted by Hon. Tremonti, Minister of Economy, Hon. Scajola, Minister of Industry, and commissioned by the Minister of the Economic Development, Hon. Urso. This Ministerial Decree temporarily banned the import of seal skins and derivatives.

<sup>11</sup> See [http://ec.europa.eu/enterprise/tbt/tbt\\_repository/BEL39\\_FR\\_1\\_2.pdf](http://ec.europa.eu/enterprise/tbt/tbt_repository/BEL39_FR_1_2.pdf)

<sup>12</sup> See Exhibit 1, Chronology of Public and Legislative Involvement concerning Commercial Seal Hunting.

<sup>13</sup> See Proposal for a Regulation of the European Parliament and of the Council concerning trade in seal products (COM 2008) 469 final, 23 July 2008 (hereinafter “Commission Proposal”), available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0469:FIN:EN:PDF>

<sup>14</sup> See Commission Proposal at Recital 3 (emphasis added).

<sup>15</sup> See Commission Proposal at Recitals 4, 5 and 10.

<sup>16</sup> See Commission Proposal at Recitals 5 and 10.

24. The European Parliament proposed several amendments to the Commission's proposal, having found it was insufficient to meet public concern about seal hunting and trade in seal products. The Parliament considered a number of scientific studies that demonstrated that commercial seal hunting is inherently inhumane. As a result, a scheme that allowed some commercial seal products to be sold in the EU would continue to propagate a trade that could not ever be humane on a consistent basis, and that would therefore run counter to the concerns of EU citizens.

Commercial seal hunts are inherently inhumane because humane killing methods cannot be effectively and consistently applied in the field environments in which they operate. Moreover, seal hunts occur in remote locations, and are conducted by thousands of individuals over large, inaccessible areas, making effective monitoring of seal hunting impossible. As such only a comprehensive ban without the derogation drafted by the Commission would meet citizens' demands to see an end to the trade in seal products.<sup>17</sup>

25. The Parliament and the Council did maintain the derogation for products from indigenous hunts and personal use, and included an additional derogation for products from small-scale hunts conducted for the purpose of marine resources management.
26. Thus, the ultimate language adopted by the European Parliament and Council in EC No. 1007/2009 shared the public moral policy objective of the Commission proposal, but sought an even stricter level of protection based on the inherent conditions of the commercial seal hunt that make humane killing and enforcement of humane methods impossible to achieve on a consistent basis.<sup>18</sup>

#### **B. Regulation (EC) No. 1007/2009 and Implementing Measure (EU) No. 737/2010**

27. On 16 September 2009, the European Parliament and the Council adopted Regulation (EC) No. 1007/2009 on trade in seal products (hereinafter the "EU Regulation"). The EU Regulation was published in the Official Journal on 31 October 2009, entering into force on 20 November 2009. The ban itself became applicable on 20 August 2010, following publication of 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 (hereinafter the "EU Implementing Measure").
28. The EU Regulation and EU Implementing Measure are the measures identified as the subject of this dispute by Canada and Norway in their respective panel requests.<sup>19</sup>

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<sup>17</sup> See European Parliament, Committee on the Internal Market and Consumer Protection, Session Document A6-0118/2009 at p. 22, available at: <http://www.europarl.europa.eu/sides/getDoc.do?language=EN&reference=A6-0118/2009>

<sup>18</sup> See *Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products*, Official Journal L 286/36 (16 September 2009) at para. 11 (hereinafter "EU Regulation"), available at [http://ec.europa.eu/food/animal/welfare/trade\\_seals\\_products.pdf](http://ec.europa.eu/food/animal/welfare/trade_seals_products.pdf)

<sup>19</sup> See *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/4 (14 February 2011) (Request for the Establishment of Panel by Canada); *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS401/5 (15 March 2011) (Request for the Establishment of Panel by Norway). Canada's panel request further states "For each of the measures referred to above, this request also covers any amendments, replacements, extensions, implementing measures or other related measures, administrative orders, directives, or customs guidelines including those

29. The EU Regulation operates as a general prohibition on the placing on the market (making available to third parties in exchange for payment) of all seal products from all countries (including the EU).<sup>20</sup> There is a derogation from the general prohibition for seal products resulting from hunts traditionally conducted by Inuit and other indigenous communities which contribute to their subsistence (“indigenous communities exemption”).<sup>21</sup> These conditions apply at the point of import into the customs territory of the Community for imported products.<sup>22</sup>
30. Two other limited derogations from the general prohibition exist: (1) the import of seal products is allowed if it is of an occasional nature for personal use, not commercial purposes; and (2) the placing of seal products on the market, on a non-profit basis, is permissible for by-products of seal hunting regulated by national law and conducted for marine resource management purposes (“MRM exemption”).<sup>23</sup>
31. The Implementing Measure provides additional detail and guidance on the operation of the EU Regulation (*e.g.*, it further defines “other indigenous communities” and “non-profit basis”).<sup>24</sup> It specifies the criteria that must be met by “recognised bodies” issuing attesting documents that will accompany any seal products entering the EU.<sup>25</sup>

#### IV. FACTUAL BACKGROUND

32. There are many sources that outline a comprehensive history of commercial seal hunting, so one is not included here.<sup>26</sup> This section will instead provide factual background and context necessary to support three points central to resolution of this dispute:
  - (1) Public opposition to the commercial seal hunt dates back to the 1950s, and led to the adoption of numerous national laws, measures, and resolutions condemning the commercial seal hunt and restricting the trade in seal products.
  - (2) Although sealing nations have repeatedly amended laws and regulations, there are no sealing laws, regulations or guidelines currently in place that

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issued by individual European Union Member States.” WT/DS400/4 (Canada’s Panel Request). Norway’s panel request also further indicates that it covers “Omissions to adopt adequate procedures for establishing that seal products conforming to the relevant conditions, set forth in exceptions to the EU seal regime, may be placed on the EU market;” and “Any other related measures adopted by the EU or its member States that provide guidance on, amend, supplement, replace, and/or implement the rules set forth in the Basic Regulation and Implementing Regulation, whether adopted pursuant to these regulations or otherwise.” WT/DS401/5 (Norway’s Panel Request).

<sup>20</sup> See EU Regulation at art. 2(3), art. 3(1).

<sup>21</sup> See EU Regulation at art. 3(1).

<sup>22</sup> See EU Regulation at art. 2(5), art. 3(1).

<sup>23</sup> See EU Regulation at art. 3(2)(a) and (b).

<sup>24</sup> See EU Implementing Measure at art. 2(1) and (2).

<sup>25</sup> See EU Implementing Measure at art. 6.

<sup>26</sup> For information on the background of commercial seal hunting, *see, inter alia*, Lavigne and Kovacs, *Harps and Hoods* (1988); Deborah J. Salem & Andrew N. Rowan, *The State of the Animals* (4th ed. 2007), p 95, attached as Exhibit 2.

prescribe a humane death for seals as humane slaughter guidelines would define it.

- (3) Leading veterinarians have found that both shooting and clubbing of seals during commercial seal hunting is “inherently inhumane” for a number of reasons, including the unique physiological adaptations of seals as deep diving marine mammals; the remote, harsh environment in which the killing occurs; and the speed at which the killing must occur because of economic and safety pressures. These factors result in high wounding rates; unacceptable delays between wounding, monitoring for unconsciousness, and bleeding; high ‘struck and loss’ rates and actions that cause pain to wounded, conscious seals such as live gaffing and dragging. Experts assert that diminished sea ice due to climate change is exacerbating these conditions.<sup>27</sup>

33. In Exhibit 3 to this brief, we attach a peer reviewed report authored and edited by leading veterinarians, entitled “*A Review of Animal Welfare Implications of the Canadian Commercial Seal Hunt.*” This report provides a review of existing veterinary science related to commercial seal hunting, and details why generally accepted principles of humane slaughter cannot be consistently or effectively applied at the Canadian commercial seal hunt. It contains many links to video clips that illustrate the points made throughout the report and in this brief.

**A. Commercial Seal Hunting has Prompted Public Opposition and Legislative Action for Over Half a Century.**

34. Animal protection organizations first started sending observers to the Canadian commercial seal hunt in the 1950s, which became a key impetus for Canada to start enacting sealing regulations in the 1960s that attempted to prohibit the skinning of live animals; define killing methods; limit killing weapons to a gaff, club or rifle, and ban hooking, skinning, bleeding or cutting of any seal unless there was absolute certainty the seal was dead (notably, many of these regulations were subsequently rescinded or replaced with less clear language).<sup>28</sup> By the late 1960s, there was mounting public opposition to Canada’s annual commercial seal slaughter,<sup>29</sup> and growing evidence of dwindling seal stocks prompted Canada to introduce a quota system and the United States to enact the Marine Mammal Protection Act (MMPA), which prohibited the import, export and marketing of all marine mammal products, including seal products.<sup>30</sup>

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<sup>27</sup> See Butterworth A., Richardson M., *A Review of Animal Welfare Implications of the Canadian Commercial Seal Hunt*, Mar. Policy (2012), <http://dx.doi.org/10.1016/j.marpol.2012.07.006> (hereinafter Butterworth and Richardson (2012)), attached as Exhibit 3.

<sup>28</sup> See Exhibit 1 for a chronology of public and legislative action related to commercial seal hunting and trade in seal products.

<sup>29</sup> See Exhibit 1 for a chronology of public and legislative action related to commercial seal hunting and trade in seal products. As an example, the International Fund for Animal Welfare (IFAW) was founded in 1969 for the purpose of ending the commercial hunting of harp seals in Canada.

<sup>30</sup> Marine Mammal Protection Act of 1972 (MMPA), Pub. L. No. 92–522, 86 Stat. 1027 (codified in 16 U.S.C.A. §§ 1361, 1362, 1371–83, 1383a–83b, 1384, 1386–89, 1401–07, 1411–18, 1421, 1421a–21f, 1421f–1, 1421g–21h, 1423, 1423a–23h).

35. Throughout the 1970s, Canada continued to revise its sealing regulations to require exsanguination and the striking of hooded seals with a hakapik after being shot.<sup>31</sup> These actions ran parallel to a burgeoning anti-sealing campaign by multiple animal protection groups that eventually led the European Union to ban the import of products of whitecoats (newborn harp seals less than twelve days old) and bluebacks (young hooded seals less than one year old) in 1983.<sup>32</sup>
36. The closure of the European market to these particular seal products resulted in the collapse of prices for seal products, and prompted Canada to set up the Royal Commission on Seals and the Sealing Industry in Canada to review all matters pertaining to seals in Canada, and make recommendations regarding the future of sealing in Canada.<sup>33</sup> Based on the information available at that time, the Commission explained that, while it is possible in theory for a sealer to render a seal unconscious with a blow to the head by a club, and then immediately exsanguinate the seal, “the difficulties arise from the actual conditions under which the seal hunt is conducted,” including the need for long-range shooting, shooting from moving boats, cold and slippery conditions, moving targets, and the pressure to work fast.<sup>34</sup>
37. The Royal Commission on Seals and the Sealing Industry report specified: “Clubbing is a physical act, and the clubber must strike every blow with precision to ensure humane clubbing. It is probably impossible to invariably achieve this precision, given the cold and slippery conditions on the ice, the long hours, the pressure to work fast, and the possibility of a moving target.”<sup>35</sup> The authors went on to state, “Many Canadian hunts take place, or have taken place, under conditions which make it impossible to obtain an acceptably high proportion of kills with head shots. ... The causes include long-range shooting, shooting from moving boats, and shooting at seals in the water.”<sup>36</sup>
38. The Royal Commission concluded that large scale hunts will involve some pain and suffering, and that the killing of whitecoats and bluebacks for commercial purposes should not be permitted due to “considerable opposition to the clubbing of seal pups.”<sup>37</sup> After reviewing the results of several public opinion polls, the Royal Commission noted that “there is a substantial segment of the public strongly opposed to continuance of the killing by clubbing of large numbers of harp and hooded seal pups for their fur,” based “primarily [on] the apparent cruelty of the killing.”<sup>38</sup> One year later, in 1987, Canada banned the commercial trade in whitecoats and bluebacks.

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<sup>31</sup> See Exhibit 1 for a chronology of public and legislative action related to commercial seal hunting and trade in seal products.

<sup>32</sup> See Exhibit 1 for a chronology of public and legislative action related to commercial seal hunting and trade in seal products. The ban was renewed in 1985 and made permanent in 1989.

<sup>33</sup> See Report of the Royal Commission, *Seals and Sealing in Canada*, Minister of Supply and Services Canada, Ottawa (1986) (hereinafter “Report of the Royal Commission”), available at: <http://epe.lac-bac.gc.ca/100/200/301/pco-bcp/commissions-ef/malouf1986-ef/malouf1986-eng.htm>.

<sup>34</sup> See Report of the Royal Commission at Vol. III, *Methods of Killing Seals*, p. 15.

<sup>35</sup> See Report of the Royal Commission at Vol. III, *Methods of Killing Seals*, p. 15.

<sup>36</sup> See Report of the Royal Commission at Vol. III, *Methods of Killing Seals*, p. 27-28.

<sup>37</sup> See Report of the Royal Commission at Vol. III, *Methods of Killing Seals*, p. 15 and Vol I., Chapter 4, *Summary of Findings* at 25.

<sup>38</sup> Report of the Royal Commission at Vol. II, *Public Opinion on Sealing*, p. 186.

39. Following the Canadian prohibition on trade in whitecoats and bluebacks, however, the commercial seal hunt continued for slightly older harp seal pups (who were shedding or had shed their white coats, a process that begins at just twelve days of age) and older hooded seals. Nearly all—98%—of harp seals killed in Canada in recent years have been less than three months old.<sup>39</sup>
40. In the mid-1990s, Canada raised the harp seal quota to 250,000, its highest level since 1971. In 1996, the Canadian government implemented a direct subsidy to sealers for seal meat, which caused the kill levels to increase dramatically (from 67,767 in 1995 to 242,906 in 1996). Animal protection organizations continued to monitor and film the hunt, showcasing consistent violations of Canada’s regulations that were intended to improve the conditions of the seal hunt.<sup>40</sup>
41. Over the next decade, with veterinary and video evidence of seals experiencing pain and suffering during the commercial seal hunt increasing, numerous countries began calling on Canada to end the commercial seal hunt and governments restricted trade in products of commercial seal hunts:<sup>41</sup>
- In 2003, the U.S. Senate introduced a Resolution calling for Canada to end the commercial seal hunt;
  - In 2004, Slovenia passed a law banning the import of pelts from harp and hooded seals, and Belgium adopted a legislative proposal to ban the trade in all seal products;
  - In 2005, the Austrian Parliament adopted a resolution condemning the Canadian commercial seal hunt and the Dutch Parliament initiated a legislative proposal to ban the trade in harp and hooded seals and seal products;
  - In 2006, Greenland instructed its public state company, Great Greenland, to temporarily suspend trade in seal pelts originating from Canada’s commercial seal hunt; Mexico banned the import and export of all marine mammals and products (including seals); Italy temporarily suspended the import of seal products; Croatia banned the import of seal products; the German Parliament voted unanimously to work toward a European ban on seal products trade and in support of a temporary ban in Germany until the EU-wide ban was adopted; the Council of Europe adopted Recommendation 1776 calling on Member States to “promote initiatives aimed at prohibiting the import and marketing of seal-derived products....” and the European Parliament adopted a Written Declaration calling upon the Commission to introduce an EU-wide ban on imports of seal products;
  - In 2007, Belgium and the Netherlands formally instituted bans on seal products trade;

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<sup>39</sup> See The Humane Society of the United States website:  
[http://www.humanesociety.org/issues/seal\\_hunt/2011\\_hunt/about.html](http://www.humanesociety.org/issues/seal_hunt/2011_hunt/about.html).

<sup>40</sup> See Exhibit 1 for a chronology of public and legislative action related to commercial seal hunting and trade in seal products.

<sup>41</sup> See Exhibit 1 for a chronology of public and legislative action related to commercial seal hunting and trade in seal products.

- In 2010, the EU measures at issue in this dispute fully entered into force;
  - In 2011, the Customs Union of Belarus, Kazakhstan and Russia instituted a trade ban on harp seal fur products;
  - In 2013, Chinese Taipei prohibited the sale of marine mammals and their related products.
42. At the same time as countries were banning or restricting trade in seal products, Canada continued to amend its regulations regarding seal hunting. In 2003, for example, the Canadian Marine Mammal Regulations (MMRs) were modified to include “introducing testing methods which will establish a clearer determination of death before bleeding and skinning. This is meant to ensure that all animals are checked for death after they are shot or clubbed, using a method recommended by veterinarians...”<sup>42</sup>
43. More recently, in March 2009, the Canadian Department of Fisheries and Oceans announced that amendments to the MMRs were being made with the stated objective of “maintaining Canada’s good standing internationally as a country that respects wildlife within its jurisdiction.”<sup>43</sup>
44. As will be explained below, leading veterinarians have evaluated these changes to sealing regulations over time and the impact they have had on the animals to assess whether public opposition is justified and whether the seals are meeting a humane death on an acceptably consistent basis. The results of these reviews show that: regulations currently in force do not prescribe a humane death for seals as internationally recognized humane slaughter guidelines would define it; cruelty exists on a large scale; and there are a number of *inherent* factors of commercial seal hunts that impede the ability of sealers to provide a humane death and make it practically *impossible* to secure the humane killing of seals.<sup>44</sup>

**B. There are No Sealing Regulations Currently in Place that Prescribe a Humane Death for Seals as Accepted Humane Slaughter Guidelines Would Define It.**

45. In a recent study evaluating the animal welfare aspects of commercial seal hunting, Butterworth and Richardson (2012) outline generally accepted principles of humane slaughter (many of which are endorsed by organizations and institutions like the American Veterinary Medical Association (AVMA), European Food and Safety Authority (EFSA), and World Organisation for Animal Health (OIE)):
- Minimizing distress experienced by the animal prior to and during stunning;
  - Rendering the animal unconscious (and therefore insensitive to pain) without delay and without the need to repeat the application of the stunning method;

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<sup>42</sup> See Canadian Department of Fisheries and Oceans (DFO), *Overview of the Atlantic Seal Hunt 2003-2005* at sections 1.1.2 and 7.1 (Dealing with amendments to MMRs), available at: <http://www.dfo-mpo.gc.ca/fm-gp/seal-phoque/reports-rapports/mgtplan-plangest2003/mgtplan-plangest2003-eng.htm>

<sup>43</sup> DFO, *Regulations amending the Marine Mammal Regulations* (March 2009) available at: <http://www.gazette.gc.ca/rp-pr/p2/2009/2009-03-04/html/sor-dors66-eng.html>

<sup>44</sup> See, e.g., Butterworth and Richardson (2012).

- Confirming unconsciousness without delay by monitoring for multiple indicators of consciousness;
- Delivering death without delay through an accepted euthanasia method; and,
- Ensuring unconsciousness persists until death occurs.<sup>45</sup>

46. In Canada, Greenland, Norway and Namibia—the countries where the largest seal hunts occur—sealing regulations<sup>46</sup> do not prescribe humane killing methods in line with these principles. For example, Canada’s regulations allow for the shooting of seals in open water, where all of the steps in this humane slaughter method are impossible to carry out.<sup>47</sup> Both Canada and Norway permit seals to be shot and clubbed near open water,<sup>48</sup> allowing for some wounded seals to escape beneath the surface of the water, making monitoring and bleeding impossible.

47. Sealing regulations do not require that the seal be rendered unconscious without causing avoidable pain, fear and distress to the animal, or that sealers render seals unconscious without the need to repeat application of the stunning method. The result is that seals are often repeatedly clubbed and shot (or a combination of both) to achieve unconsciousness.<sup>49</sup>

48. Canadian and Norwegian sealing regulations do not require sealers to immediately monitor for consciousness for an obvious reason. Both governments maintain that a high proportion of seals are shot at from vessels,<sup>50</sup> from distances estimated by Smith (2005) to average 40-50 meters in Canada<sup>51</sup> and by EFSA (2007) to average 30-70 meters in Norway.<sup>52</sup> In these prevalent situations, sealers are unable to carry out monitoring and bleeding without delay as would be required for the kills to be humane, because they have to manoeuvre their vessels through sea ice, into position to retrieve the seal, before these steps can occur.

49. Sea ice cover off Canada’s east coast is deteriorating because of climate change, and the trend is expected to continue.<sup>53</sup> The result is that the seals are now frequently located on small, unstable pans of sea ice, which will not support the weight of the sealer. In these instances, once the seal has been shot, it is impossible for the sealer to monitor for consciousness and bleed without delay and prior to impaling the seal on a metal hook and dragging the animal onto the vessel (gaffing).

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<sup>45</sup> Butterworth and Richardson (2012) at 5 (citations omitted).

<sup>46</sup> See *COWI Assessment of the Potential Impact of a Ban of Products Derived from Seal Species*, European Commission, DG Environment, at pp. 139, 141, 142 (April 2008) (hereinafter COWI (2008)) available at: [http://ec.europa.eu/environment/biodiversity/animal\\_welfare/seals/pdf/seals\\_report.pdf](http://ec.europa.eu/environment/biodiversity/animal_welfare/seals/pdf/seals_report.pdf).

<sup>47</sup> See generally Marine Mammal Regulations, SOR/1993-56 (Can.)

<sup>48</sup> See generally Marine Mammal Regulations, SOR/1993-56 (Can.) and EFSA Report (2007) at 30.

<sup>49</sup> See generally Marine Mammal Regulations, SOR/1993-56 (Can.) and EFSA Report (2007) at 30.

<sup>50</sup> See 2011-2015 Integrated Fisheries Management Plan for Atlantic Seals at 3.1, Overview, available at <http://www.dfo-mpo.gc.ca/fm-gp/seal-phoque/reports-rapports/mgtplan-planges20112015/mgtplan-planges20112015-eng.htm#c3.4>; see also EFSA Report (2007) at 29.

<sup>51</sup> See Smith (2005) at 9.

<sup>52</sup> See EFSA Report (2007) at 29.

<sup>53</sup> Côté F, Pigeon M., *Climate change and seal populations in Canada - Parliamentary information and research service* (2007), available at <http://www.sealsandsealing.ca/resources/ClimateChange07.pdf>.

50. Canadian and Norwegian sealing regulations do not require the sealer to remain with the seal to ensure unconsciousness persists through completion of the bleeding process.<sup>54</sup> Butterworth and Richardson (2012) state that in the case of Canada's Marine Mammal Regulations (MMRs) in particular, the omission of key components of the humane slaughter method (or overly broad requirements) allows sealers to:

[L]egally herd seals prior to stunning, ... repeatedly club or shoot seals to achieve unconsciousness, leave wounded seals to suffer extended periods of time, impale conscious seals on metal hooks and drag them across the ice, and cut open seals whilst they may be responsive to pain.<sup>55</sup>

51. The Canadian government asserts that the 2009 amendments to Canada's Marine Mammal Regulations incorporate the recommendations of the Independent Veterinarians Working Group (Smith (2005))<sup>56</sup> and EFSA (2007). Both Smith (2005) and EFSA (2007) acknowledge their recommendations suggest ways to make the killing *more* humane in the context of the challenging physical environment of the commercial seal hunt, but neither report suggests that these recommendations, if implemented, would make the killing *humane* as recognized veterinary authorities define it. For example, Smith (2005) states:

Members recognize that the seal hunt takes place under very difficult and challenging conditions .... The Group recognizes that part of contributing to improved animal welfare and reduced suffering is to produce recommendations that are realistic in the context of the hunt, so that sealers will accept and implement them. There needs to be a realistic balance between ideal procedure and methodology, and what is practical and achievable.<sup>57</sup>

52. EFSA (2007) states:

Unlike in an abattoir where the floor should be stable, even and not slippery, seals are killed on different substrates e.g. on land, in the water, on solid ice, loose pack ice, moving ice floes, in environmental conditions that may rapidly alter the position of both sealer and seal, and in weather conditions that may affect visibility ....<sup>58</sup>

and notes its mandate was to “assess the most appropriate killing methods which *reduce* unnecessary pain, distress and suffering.”<sup>59</sup>

53. In other words, neither report prescribes slaughter methods that are “humane” but rather “more humane” and “practical” in the context of commercial sealing.

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<sup>54</sup> See generally Marine Mammal Regulations, SOR/1993-56 (Can.) and EFSA Report (2007) at 30.

<sup>55</sup> Butterworth and Richardson (2012) at 5 (citations omitted).

<sup>56</sup> See Smith B., *Improving Humane Practice in the Canadian Harp Seal Hunt*, Report of the Independent Veterinarians Working Group (IVWG) on the Canadian Harp Seal Hunt, August 2005, available at: [http://www2.ccwhc.ca/publications/IVWG\\_Report\\_new\\_website.pdf](http://www2.ccwhc.ca/publications/IVWG_Report_new_website.pdf) (hereinafter “Smith (2005)”).

<sup>57</sup> See Smith (2005) at 7.

<sup>58</sup> EFSA Report (2007) at 88.

<sup>59</sup> See *Id.* at 3 (emphasis added).

54. Importantly, key recommendations in both reports were omitted from Canada's MMRs:

- One of the key recommendations in Smith (2005) was that “a seal should not be shot in the water, or in any circumstance when it is possible the carcass cannot be recovered.”<sup>60</sup> This recommendation, which would be applicable to a large majority of the seals killed in the commercial seal hunt, is omitted from the MMR.
- Smith (2005) also states that their recommended three step killing process of stunning, checking and bleeding “should follow each other in rapid succession,” that “bleeding should take place immediately after checking and prior to hooking or skinning the animal” and that “bleeding of a seal will ideally be done on the ice immediately following the checking process.”<sup>61</sup> These recommendations are also not reflected in the MMR.
- EFSA (2007) recommended, “[s]eals should be killed without causing avoidable pain, distress, fear and other forms of suffering.... Attempts should not be made to kill seals that ... do not pose a stable target or where the sealer may be unbalanced (e.g. in adverse weather conditions, moving substrates) as it can cause avoidable pain, distress, fear and other forms of suffering ... Seals should be bled-out ... preferably immediately, after they have been successfully stunned and checked to ensure they are irreversibly unconscious or dead ... Animals should not be moved, i.e. gaffed, hauled or moved from the position they have come to rest, until it has been confirmed that they are dead or irreversibly unconscious, or have been bled-out.”<sup>62</sup> None of these recommendations are reflected in the MMR.

55. To further illustrate this point, below is a written description as well as video evidence from the Butterworth and Richardson (2012) Report. This Report details common practices in Canada's commercial seal hunt that run contrary to veterinary recommendations (and in some cases, to Canada's MMRs themselves). These practices are due to a combination of issues, including inadequate laws, failure to enforce the laws, and external factors inherent to the seal hunt that make better and more humane practices impossible on a consistent basis.

- *Failures with the stunning (clubbing/shooting) process:*
  - Wounding seals with bullets and leaving them to suffer on the ice (a common practice in the harp seal hunt). Notably, EFSA (2007) states, “[s]hooting animals where the likelihood of reaching them quickly is reduced or questionable (e.g. on thin and loose pack ice, open deep water), poses an unknown risk of causing avoidable pain, distress and suffering .... The time between shooting and monitoring of the state of the shot animal should be short.”<sup>63</sup>

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<sup>60</sup> See Smith (2005) at 2.

<sup>61</sup> See Smith (2005) at 9.

<sup>62</sup> See EFSA Report (2007) at 94-95.

<sup>63</sup> See EFSA Report (2007) at 89.

- Clubbing seals repeatedly to achieve unconsciousness (a common practice in the harp seal hunt). Notably, the AVMA (2007) states that stunning must be achieved with one application.<sup>64</sup>
- Shooting seals in open water (a common practice in all commercial seal hunts) where the likelihood of an accurate stun is severely reduced and the risk of wounded animals escaping is very high. Smith (2005) states, “a seal should not be shot in the water, or in any circumstance when it is possible the carcass cannot be recovered.”<sup>65</sup>

Skull Injuries:

[Clip 4: March 2005, Gulf of St. Lawrence >>>>](#)

[Clip 5: March 2005, Gulf of St. Lawrence >>>>](#)

[Clip 6: March 2005, Gulf of St. Lawrence >>>>](#)

[Clip 7: March 2005, Gulf of St. Lawrence >>>>](#)

[Clip 8: March 2005, Gulf of St. Lawrence >>>>](#)

[Clip 9: March 2005, Gulf of St. Lawrence >>>>](#)

[Clip 10: March 2005, Gulf of St. Lawrence >>>>](#)

[Clip 11: April 2008, Newfoundland Front >>>>](#)

Shooting Impacts:

[Clip 1: April 2010, Newfoundland Front >>>>](#)

[Clip 2: April 2010, Newfoundland Front >>>>](#)

[Clip 3: April 2009, Gulf of St. Lawrence >>>>](#)

[Clip 4: April 2011, Northern Gulf of St. Lawrence >>>>](#)

[Clip 5: April 2008, Gulf of St. Lawrence >>>>](#)

[Clip 6: April 2008, Gulf of St. Lawrence >>>>](#)

[Clip 7: April 2010, Newfoundland Front >>>>](#)

[Clip 8: April 2008, Gulf of St. Lawrence >>>>](#)

[Clip 9: April 2007, Gulf of St. Lawrence >>>>](#)

[Clip 10: April 2011, Northern Gulf of St. Lawrence >>>>](#)

[Clip 11: April 2011, Northern Gulf of St. Lawrence >>>>](#)

[Clip 12: April 2011, Northern Gulf of St. Lawrence >>>>](#)

[Clip 13: April 2011, Northern Gulf of St. Lawrence >>>>](#)

[Clip 14: April 2011, Northern Gulf of St. Lawrence >>>>](#)

[Clip 15: April 2011, Newfoundland Front >>>>](#)

[Clip 16: April 2011, Newfoundland Front >>>>](#)

- *Struck and lost:*

- Shooting seals near open water, allowing wounded seals to escape beneath the surface of the water, where they may die slowly and are often not recovered (a common practice in the harp seal hunt). Notably, Smith (2005) states, “a seal should not be shot in the water, or in any circumstance when it is possible the carcass cannot be recovered.”<sup>66</sup>

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<sup>64</sup> See American Veterinary Medical Association Guidelines on Euthanasia, available at <https://www.avma.org/KB/Policies/Documents/euthanasia.pdf> [hereinafter, AVMA (2007)], at 17.

<sup>65</sup> See Smith (2005) at 2.

<sup>66</sup> See Smith (2005) at 2.

[Clip 1: April 2010, Newfoundland Front >>>>](#)  
[Clip 2: April 2011, Northern Gulf of St. Lawrence >>>>](#)  
[Clip 3: April 2011, Northern Gulf of St. Lawrence >>>>](#)  
[Clip 4: April 2011, Newfoundland Front >>>>](#)

- *Failure to monitor for unconsciousness:*
  - Canada's MMRs require monitoring for unconsciousness (although not immediate monitoring after stunning). Sealers have routinely failed to satisfy this requirement either because they are failing to check the seal at all, or are failing to properly monitor the seal for unconsciousness.<sup>67</sup>

[Clip 1: April 2010, Newfoundland Front >>>>](#)  
[Clip 2: April 2007, Gulf of St. Lawrence >>>>](#)  
[Clip 3: April 2010, Newfoundland Front >>>>](#)  
[Clip 4: April 2010, Newfoundland Front >>>>](#)  
[Clip 5: April 2010, Newfoundland Front >>>>](#)  
[Clip 6: April 2010, Newfoundland Front >>>>](#)  
[Clip 7: April 2010, Newfoundland Front >>>>](#)  
[Clip 8: March 2010, Gulf of St. Lawrence >>>>](#)  
[Clip 9: April 2011, Northern Gulf of St. Lawrence >>>>](#)  
[Clip 10: April 2011, Northern Gulf of St. Lawrence >>>>](#)  
[Clip 11: February 2011, Hay Island >>>>](#)

- *Gaffing and dragging prior to and during bleeding:*
  - Impaling conscious, wounded seals on metal hooks and dragging them across the ice (a common practice in the harp seal hunt). Notably, Smith (2005) states, "bleeding should take place immediately after checking and prior to hooking or skinning the animal."<sup>68</sup>
  - Throwing conscious, wounded seals across the ice or onto vessels (a common practice in the harp seal hunt).

[Clip 1: April 2010, Newfoundland Front >>>>](#)  
[Clip 2: April 2010, Newfoundland Front >>>>](#)  
[Clip 3: April 2010, Newfoundland Front >>>>](#)  
[Clip 4: March 2005, Gulf of St. Lawrence >>>>](#)  
[Clip 5: March 2005, Gulf of St. Lawrence >>>>](#)  
[Clip 6: April 2011, Northern Gulf of St. Lawrence >>>>](#)  
[Clip 7: April 2011, Northern Gulf of St. Lawrence >>>>](#)  
[Clip 8: April 2011, Northern Gulf of St. Lawrence >>>>](#)

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<sup>67</sup> See e.g., Butterworth and Richardson (2012) at p. 4, Section 3.1.7 ("In video evidence of three seal hunts (1998–2000), Burdon et al. found that 69% of seals observed killed were impaled with a gaff and dragged across the ice without a check for unconsciousness .... Daoust et al. also recorded instances of seals being hooked and then dragged with gaffs and hoisted aboard sealing vessels in video evidence from the 2001 seal hunt. Of 169 instances of seals being killed in video evidence from four seal hunts (2003–2007) by Butterworth et al. 61% were observed being gaffed. No blinking reflex test or cranial palpation was performed on 79% of the seals prior to gaffing, and 44% responded to stimuli after being gaffed.") (citations omitted).

<sup>68</sup> See Smith (2005) at 8.

[Clip 9: April 2011, Northern Gulf of St. Lawrence >>>>](#)  
[Clip 10: April 2011, Northern Gulf of St. Lawrence >>>>](#)  
[Clip 11: April 2011, Northern Gulf of St. Lawrence >>>>](#)  
[Clip 12: April 2011, Northern Gulf of St. Lawrence >>>>](#)  
[Clip 13: April 2011, Newfoundland Front >>>>](#)  
[Clip 14: April 2011, Newfoundland Front >>>>](#)

- *Lapse between impact and bleedout:*
  - Failing to immediately exsanguinate the seal.
  - Canadian MMRs only require bleeding prior to skinning, even though EFSA says bleeding should occur without delay.<sup>69</sup>

[Clip 1: April 2010, Newfoundland Front >>>>](#)  
[Clip 2: April 2010, Newfoundland Front >>>>](#)  
[Clip 3: April 2010, Newfoundland Front >>>>](#)  
[Clip 4: April 2010, Newfoundland Front >>>>](#)  
[Clip 5: April 2010, Newfoundland Front >>>>](#)  
[Clip 6: April 2011, Northern Gulf of St. Lawrence >>>>](#)  
[Clip 7: April 2010, Newfoundland Front >>>>](#)  
[Clip 8: April 2010, Newfoundland Front >>>>](#)  
[Clip 9: April 2011, Northern Gulf of St. Lawrence >>>>](#)

- *Failure to Bleed Out:*
  - “[M]ultiple veterinary recommendations on commercial sealing have identified bleeding out as a key part of the slaughter process in the commercial seal hunt. Despite these facts, exsanguination appears to be used relatively infrequently and often to be improperly applied.”<sup>70</sup>

[Clip 1: April 2010, Newfoundland Front >>>>](#)  
[Clip 2: April 2010, Newfoundland Front >>>>](#)  
[Clip 3: April 2010, Newfoundland Front >>>>](#)  
[Clip 4: April 2010, Newfoundland Front >>>>](#)  
[Clip 5: April 2010, Newfoundland Front >>>>](#)  
[Clip 6: April 2011, Northern Gulf of St. Lawrence >>>>](#)  
[Clip 7: April 2010, Newfoundland Front >>>>](#)  
[Clip 8: April 2010, Newfoundland Front >>>>](#)  
[Clip 9: April 2011, Northern Gulf of St. Lawrence >>>>](#)

56. These examples are representative of common practices at Canada’s commercial seal hunt. Butterworth and Richardson (2012) looked at three different studies that analysed activities at the commercial seal hunt in Canada between 1998 and 2007 (*i.e.*, Burdon et al. 2001 (1998-2000 video data), Daoust et al. 2002 (1999 and 2001 video data), and Butterworth et al. 2007 (2003-2007 video data)).<sup>71</sup> These studies reviewed video evidence spanning a time period in which Canada revised its MMRs twice. Despite

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<sup>69</sup> See EFSA Report (2007) at p. 49.

<sup>70</sup> See Butterworth and Richardson (2012) at 4 citing Burdon (2001) and Smith (2005).

<sup>71</sup> See Butterworth and Richardson (2012) at 5.

amendments to the regulations, there are similar findings across the studies that show a significant percentage of seals that were not checked for unconsciousness, suffered injuries to the face/jaw and required a second series of blows, were wounded and left to suffer, were wounded and allowed to escape, and were witnessed responding to pain following stunning.<sup>72</sup>

	<b>Burdon <i>et al.</i> (2001)</b>	<b>Daoust <i>et al.</i> (2002)</b>	<b>Butterworth <i>et al.</i> (2007)</b>
Did not palpate cranium or undertake blinking reflex test	79%	87%	67%
Time from being shot to first contact by sealer	-	Mean 45.2 (range 12-111) seconds	Mean 48.8±9.4 seconds
% of seals that required a second series of blows	40%	-	39%
Time to second series of blows	27 seconds	-	23.9±3.2 seconds
Damage to face/jaw	61%	-	59%
Bled out	6%	-	6%
Extent of cranial fractures	None (17%), minimal-moderate (25%), extensive (58%)	-	None (12%), minimal-moderate (29%), extensive (59%)

\* Only data from measures that are directly comparable are included<sup>73</sup>

57. In sum, Canada has repeatedly amended its sealing regulations, yet, in doing so, has failed to adopt key recommendations from leading veterinarian panels or prescribe a humane death for seals. Review of video evidence of the Canadian commercial seal hunt, spanning nearly one decade, demonstrates how this translates in a real-world environment. As explained below, however, even if all of the recommendations were adopted, the inherent conditions of commercial sealing would render it impossible to enforce such regulations on a consistent and effective basis.

58. Similar conclusions can be drawn about the Norwegian commercial seal hunt. *Amici* defer to the EU first written submission for further elaboration on this point.

**C. The Conclusion that Commercial Seal Hunting is Inherently Inhumane is Supported by Scientific Evidence.**

59. There are a number of studies that the Panel will consider in evaluating the scientific basis for the EU measures, and whether there is justification for the conclusion that commercial seal hunting is inherently inhumane. The following section will review those studies and help put their conclusions into context. Overwhelmingly, the

<sup>72</sup> See Butterworth and Richardson (2012) at 5.

<sup>73</sup> See Butterworth and Richardson (2012) at 5.

evidence shows that commercial seal hunting is inherently inhumane, and that no degree of regulation could ensure a consistent and effective application of humane slaughter methods in the field environment in which commercial seal hunting operates.

**1. *Considering the Context of its Terms of Reference, the 2007 EFSA Report Supports a Finding that Commercial Sealers Cannot Assure a Humane Death for Seals on a Consistent Basis.***

60. In assessing the scientific backdrop of commercial seal hunting, and whether there are ways to ensure a humane death for seals, the Panel in this dispute will look to various studies, including the 2007 EFSA Report, *Animal Welfare Aspects of Killing and Skinning Seals*. The EFSA Report is referenced in the EU Regulation itself in Recital 11.
61. It is important to understand the terms of reference for that study when considering its results. EFSA was commissioned to evaluate:
- (1) the animal welfare aspects of the methods currently being used, particularly non-traditional methods, for killing and skinning seals in respective range states, and
  - (2) in addition, to assess, on the basis of current scientific knowledge including other available information on different killing and skinning practices, the most appropriate/suitable killing methods for seals which reduce as much as possible unnecessary pain, distress and suffering.
62. The report focused on ways to make commercial sealing *less inhumane*. It did not evaluate whether the commercial seal hunt is or could ever be humane, or whether public concerns that commercial sealing is inherently inhumane are justified. In fact, while producing its report, EFSA intentionally omitted the “ethical aspects” of the commercial seal hunt from its calculus.<sup>74</sup>
63. The EU legislators, on the other hand, did—as was their prerogative—take into account the ethical aspects of commercial seal hunting and made a policy decision in choosing a level of protection appropriate to address the EU public’s moral concerns in light of the available scientific evidence.
64. The EFSA Report’s conclusions support a finding that commercial seal hunting cannot assure a humane death on a consistent basis:
- There is strong evidence that, in practice, effective killing does not always occur but the degree to which it does not happen has been difficult to assess, partly because of a lack of objective data and partly because of the genuine differences in interpretation of the available data.<sup>75</sup>
  - If seals are hit or shot but are not dead, they may be hit or shot again or may be moved or skinned whilst conscious, resulting in avoidable pain, distress, fear and other forms of suffering.<sup>76</sup>

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<sup>74</sup> See EFSA Report (2007), Approach, p. 12.

<sup>75</sup> See EFSA Report (2007) at point 4, p. 94 (emphasis added).

<sup>76</sup> See EFSA Report (2007) at point 5, p. 94 (emphasis added).

- Seals may be struck and lost with injuries that may cause avoidable pain, distress and suffering and that may affect their survival in the wild.<sup>77</sup>
- Monitoring each seal to ensure death or unconsciousness before bleeding-out is not always carried out effectively, and this will lead to seals feeling the skinning cuts before loss of consciousness and death due to bleeding-out.<sup>78</sup>

65. EFSA also concluded that “many seals can be, and are, killed rapidly and effectively without causing avoidable pain, distress, fear and other forms of suffering.”<sup>79</sup> However, this conclusion appears to be at odds with not only the aforementioned reference to the “lack of objective data”<sup>80</sup> but also the bulk of the scientific evidence examined within the EFSA Report. In addition, it is important to note that this conclusion focuses—consistently with EFSA’s mandate to suggest ways to reduce unnecessary pain, distress, and suffering—on avoidable suffering. It ignores the unavoidable suffering inherent in the commercial seal hunt that may properly be considered excessive in view of the level of protection selected by the EU legislators.

66. The EFSA Report also omitted detailed discussion and evaluation of the uncontrolled, extreme physical environments in which commercial seal hunts occur (such as high ocean swells and winds, low temperatures and visibility and unstable, slippery ice floes) and the speed at which the killing must occur (because of economic and safety pressures), which fundamentally call into question the effectiveness of conventional slaughter methods in the context of commercial sealing and the very ability of sealers to provide a humane death. Finally, given the location, physical environment, scale and intensity of the seal hunt, it is a practical impossibility for the authorities to adequately monitor the killing and thus enforce regulations. These conditions are the reasons veterinary experts conclude commercial sealing is inherently inhumane.

67. While there are measures that can be taken to improve sealing regulations on paper, as EFSA suggests, it is the inherent conditions of the hunt that render it impossible to effectively and consistently apply principles of humane slaughter in the field environment in which the seal hunt occurs. For this reason, it is critical that the Panel look to additional studies that have evaluated the precise conditions of the hunt, and whether it is possible to ensure humane slaughter on a consistent basis.

## ***2. Leading Veterinarians Conclude the Commercial Seal Hunt is Inherently Inhumane***

68. Canada’s commercial seal hunt has been studied by veterinary experts for more than five decades. Richardson (2007) states:

Many of the resulting reports have been used by the Canadian government and sealing industry to suggest that the seal hunt has been, is now or has the potential to be made acceptably humane. However, a careful review of

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<sup>77</sup> See EFSA Report (2007) at point 6, p. 94.

<sup>78</sup> See EFSA Report (2007) at point 4, p. 94 (emphasis added).

<sup>79</sup> See EFSA Report (2007) at point 3, p. 94.

<sup>80</sup> See EFSA Report (2007) at point 4, p. 94.

the reports reveals the opposite. *Rather than confirming humane killing at the commercial seal hunt, these reports clearly show a persistent and escalating level of unacceptable suffering.*<sup>81</sup>

69. Notably, veterinary studies on Canada's commercial seal hunt have not said that the seal hunt is humane. Instead, recommendations have been made on ways to make the killing less inhumane and the concerns identified have been significant enough to justify calls for continued attention to the industry<sup>82</sup>—as evidenced by Canada's repeated amendments to its MMRs.<sup>83</sup> Some of these recommendations have been incorporated into Canada's MMRs, while others have not. Regardless, recent veterinary studies and video evidence continue to reveal high levels of suffering at the commercial seal hunt<sup>84</sup> and the available evidence suggests that each year, thousands of harp seals die in a manner that is inconsistent with contemporary animal welfare standards.<sup>85</sup>
70. While Canada's commercial seal hunt is the most widely studied, veterinarians have also evaluated at the Namibian Cape fur seal hunt and have concluded—for similar reasons—that “the Namibian hunt is inherently inhumane and that science based guidelines for ‘humane slaughter’ will never be adequate to address the multifarious welfare concerns associated with this and other hunts that involve large-scale slaughter in crowded seal colonies.”<sup>86</sup>
71. Some veterinary reports have stressed the potential for Canada's commercial seal hunt to be made more humane, but have acknowledged that various factors limit this objective. For example, the Canadian government-appointed Royal Commission on Seals and the Sealing Industry (Malouf 1986) determined that it is possible in theory for a sealer to render a seal unconscious with a blow to the head by a club, and then immediately bleed out the seal. But, according to the authors, “the difficulties arise from the actual conditions under which the seal hunt is conducted.”<sup>87</sup> They note:
- “Clubbing is a physical act, and the clubber must strike every blow with precision to ensure humane clubbing. It is probably impossible to invariably achieve this precision, given the cold and slippery conditions on the ice, the

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<sup>81</sup> See Richardson M., *Inherently Inhumane: A half century of evidence proves Canada's commercial seal hunt cannot be made acceptably human* at 3 (August 2007), available at: [http://www.humanesociety.org/assets/pdfs/seals/inherentlyinhumane\\_richardson.pdf](http://www.humanesociety.org/assets/pdfs/seals/inherentlyinhumane_richardson.pdf) (emphasis added).

<sup>82</sup> See Dauost PY, A Crook, TK Bollinger, KG Campbell, J Wong, *Animal welfare and the harp seal hunt in Atlantic Canada*, Can. Vet. J. 43:687-694 (2002).

<sup>83</sup> See Butterworth and Richardson (2012) (indicating that “in the past half-century, veterinary experts have made multiple recommendations to improve welfare at the seal hunt (for example: Simpson, Roswell, Burdon et al., Daoust et al. and Smith.”) (citations omitted). The report says that some of the recommendations are reflected in Canada's regulations, but importantly, the studies “suggest the potential for suffering continues and is, because of the impacts of climate change, increasing.”)

<sup>84</sup> See Butterworth and Richardson (2012); Fink S., *Canada's Commercial Seal Slaughter 2009*, IFAW, at p. 39, available at: <http://www.ifaw.org/sites/default/files/2009%20seal%20sealing.pdf>

<sup>85</sup> See Lavigne, DM, *Canada's commercial seal hunt is not “acceptably humane,”* IFAW (2005) at p. 4, available at: <http://www.ifaw.org/united-states/node/6351>

<sup>86</sup> See Kirkman SP, Lavigne DM, *Assessing the hunting practices of Namibia's commercial seal hunt*, S. Afr. J. Sci. 106 (3/4), Art. #166 \*(2010) (hereinafter “Kirkman and Lavigne (2010)), available at: <http://www.ifaw.org/africa/resource-centre/assessing-hunting-practices-namibia%E2%80%99s-commercial-seal-hunt>

<sup>87</sup> See Royal Commission on Sealing, Vol. III, *Methods of Killing Seals*, at p. 15.

long hours, the pressure to work fast, and the possibility of a moving target.”<sup>88</sup>

- In the case of shooting, the Royal Commission on Seals and Sealing noted, “[m]any Canadian hunts take place, or have taken place, under conditions which make it impossible to obtain an acceptably high proportion of kills with head shots .... The causes include long-range shooting, shooting from moving boats, and shooting at seals in the water.”<sup>89</sup>
- The Commission also found that in regards to monitoring for unconsciousness, “[t]he testing of the blink reflex as a check on unconsciousness is probably often omitted.... It is easy to imagine that the sealers would neglect this check when they were tired or in a hurry, as they usually are, or even when they felt sure that a seal was dead and that no one was watching them.”<sup>90</sup>
- Moreover, the Royal Commission on Seals and the Sealing Industry reported on the inability of fisheries officers to adequately monitor the seal hunt. They noted, “the area that they must patrol is very extensive, the number of sealers is large, and sealing operations are multifaceted. For these reasons it is impossible to keep all parts of the seal hunt under close supervision at all times.”<sup>91</sup>

72. In a similar fashion, the Canadian government funded the Independent Veterinarians Working Group (Smith 2005) to provide a report on the humane aspects of commercial sealing. That report provided a number of recommendations to make sealing more humane. However, the report noted that:

Members recognize that the seal hunt takes place under very difficult and challenging conditions.... The Group recognizes that part of contributing to improved animal welfare and reduced suffering is to produce recommendations that are realistic in the context of the hunt, so that sealers will accept and implement them. There needs to be a realistic balance between ideal procedure and methodology, and what is practical and achievable.<sup>92</sup>

73. In recent years, leading veterinary experts have begun to evaluate commercial sealing methods in comparison to internationally recognized guidelines on humane slaughter. *In doing so, a number have concluded that true humane slaughter methods cannot be effectively and consistently applied in the field environment of Canada’s commercial seal hunt.* As a result, their reports have concluded that commercial sealing is inherently inhumane. For example:

- Richardson (2007) states:

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<sup>88</sup> See Royal Commission on Sealing, Vol. III, *Methods of Killing Seals*, at p. 16.

<sup>89</sup> See Royal Commission on Sealing, Vol. III, *Methods of Killing Seals*, at p. 27.

<sup>90</sup> See Royal Commission on Sealing, Vol. III, *Methods of Killing Seals*, at p. 16.

<sup>91</sup> See Royal Commission on Sealing, Vol. III, *Methods of Killing Seals*, at pp. 8-9.

<sup>92</sup> See Smith (2005) at 7.

While there may be incremental steps that could be taken to make Canada's commercial seal hunt slightly less inhumane, it cannot be made acceptably humane according to Canadian and international standards of humane slaughter. History and the best available science shows that Canada's commercial seal hunt is inherently inhumane.<sup>93</sup>

- Butterworth et al (2007) states:

[S]hooting seals from boats should be viewed as inherently inhumane since it is highly improbable that improvements in current practices could lead to internationally acceptable standards of welfare ... it is concluded that the commercial and practical pressures that the sealers are under make clubbing of seals inherently inhumane.... We compare the welfare standards of the seal hunt with the expectations in commercial slaughterhouses in both the EU and Canada. The likelihood of a single effective shot or strike in dispatching seal pups is well below the corresponding standards achieved for animals in slaughterhouses. Since the number of affected animals is large, and the levels of wounding are high, the hunting method should be considered unacceptable.<sup>94</sup>

- Kirkman and Lavigne (2010) state, “[w]hether best practices for humane slaughter can ever be implemented successfully in large-scale seal hunting operations, remains doubtful.”<sup>95</sup>
- Butterworth and Richardson (2012) state, “[b]oth shooting and clubbing seals in the context of commercial sealing should be viewed as inherently inhumane, and that the current methods seen in the commercial seal hunt of very large numbers of animals compares extremely unfavorably with the society and legal expectations for commercial slaughter conditions ....”<sup>96</sup>

74. Canada refers to the findings in a recent study by Professors Daoust and Caraguel (Daoust et al. (2012)),<sup>97</sup> which it claims support the finding that “the seal harvests resulted in animal welfare outcomes comparable to or better than those in other types of wild animal hunts and some domestic slaughters.”<sup>98</sup> However, the report reaches a number of unsupported conclusions. First, the report is based on observations made while sealers were aware of the presence of observers and why there were there. To this end, the report provides the following disclaimer:

This article does not purport to provide a full representative picture of the Canadian harp seal hunt, since the results of the observations reported

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<sup>93</sup> See Richardson (2007) at 3.

<sup>94</sup> See Butterworth A. et al. *Welfare Aspects of the Canadian Seal Hunt*, (August 31, 2007) at 3, 6 available at: [http://www.harpseals.org/politics\\_and\\_propaganda/welfareaspectsofcanadiansealhunt\\_butterworth.pdf](http://www.harpseals.org/politics_and_propaganda/welfareaspectsofcanadiansealhunt_butterworth.pdf).

<sup>95</sup> See Kirkman and Lavigne (2010) at 2.

<sup>96</sup> See Butterworth and Richardson (2012) at 10.

<sup>97</sup> See Daoust PY, Caraguel C, *The Canadian harp seal hunt: observations on the effectiveness of procedures to avoid poor animal welfare outcomes*, *Animal Welfare* 2012, 21:445-455, ISSN 0962-7286 (hereinafter “Daoust et al. (2012)”).

<sup>98</sup> See Canada FWS at paras. 598; 597-603.

here were subject to a number of logistical constraints and could have been confounded by many factors that were difficult to control, such as the knowledge and attitude of the crew onboard, weather conditions, the relative abundance of seals and thus the rapidity with which the hunt was conducted, and the presence of observers.<sup>99</sup>

75. Second, the report's conclusions about certain animal welfare outcomes run contrary to what the AVMA and other veterinary authorities would agree constitutes a positive outcome. For example, the report finds that the original impact point of the bullet could only be determined in 245 of the 280 seals observed, and that in 10% of these cases, the seal was shot in the neck.<sup>100</sup> The AVMA, by contrast, says that a bullet to the heart or neck does not render the animal unconscious immediately and does not meet the panel's definition of euthanasia.<sup>101</sup> Additionally, the report finds that 24 of the 280 seals observed killed were shot in open water,<sup>102</sup> despite the fact that the IVWG recommends that such practice be prohibited.

76. Not only can the conclusions of the Daoust report be called into question, but the following section outlines the various factors that render the commercial seal hunt inherently inhumane, such that a comparison to other types of hunts and slaughters is specious.

a. Conditions of the Commercial Seal Hunt that Render It Inherently Inhumane

77. The reasons veterinary experts have concluded that Canada's commercial seal hunt is inherently inhumane include:

- the physical environment of the seal hunt, which includes unstable and broken sea ice and extreme weather conditions'
- the speed at which the killing is conducted because of economic and safety pressures;
- the unique physiological adaptations of seals, which call into question conventional thinking on humane slaughter for these animals; and
- the inability/unwillingness of Canadian authorities to enforce the law.

*1) Physical Environment of the Seal Hunt*

78. Butterworth and Richardson (2012) explain that:

In theory, the killing environment in a slaughterhouse can be controlled. The animal to be euthanized can be immobilized, killing implements can be regulated and inspected, supervisors can be on hand to supervise the killing, and inspectors can observe the killing at any time. This is not the

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<sup>99</sup> See Daoust et al. (2012) at 454.

<sup>100</sup> See Daoust et al. (2012) at 450.

<sup>101</sup> See AVMA (2007) at 13-14.

<sup>102</sup> See Daoust et al. (2012) at 449.

case for the wilderness environment, and conditions in the field are far more challenging than those that are controlled. Hunters targeting wild terrestrial animals face challenges to delivering a humane death such as moving targets and the distance at which they must shoot, and sealers face an even broader range of challenges.<sup>103</sup>

79. Canada's commercial seal hunt occurs up to 170 miles off of Canada's east coast in the northwest Atlantic Ocean. In this environment, high ocean swells, gale force winds, dense fog and driving sleet and rain are all common elements. As noted by EFSA (2007), "[u]nlike in an abattoir where the floor should be stable, even and not slippery, seals are killed on different substrates, *e.g.*, on land, in the water, on solid ices, loose pack ice, moving ice floes, in environmental conditions that may rapidly alter the position of both sealer and seal, and in weather conditions that may affect visibility."<sup>104</sup>

i. Unstable and Broken Sea Ice (links to video)

80. Sealers work amidst increasingly broken and unstable ice floes, hopping from pan to pan over stretches of open water. This can create a barrier to humane killing in two ways:

(1) *Sealers are unlikely to be able to implement humane methods of stunning and slaughter.* Accurate and effective clubbing of seals and effective application of a blink reflex test while scrambling across broken, unsteady and slippery ice floes is impossible to achieve consistently.<sup>105</sup> According to Smith (2005), "the process for checking the corneal reflex is not simple, and can be very difficult to perform by a sealer on the ice."<sup>106</sup> Smith also states "[b]ecause of ice, sea and weather conditions there are greater challenges for hunters to carry out all three steps of stunning, checking by palpation of the skull, and bleeding."<sup>107</sup>

The process of exsanguination is equally difficult. Members of the IVWG argued that bleeding should not be mandated under the Regulations because "worker safety and the difficulties presented by the natural environment in which the hunt takes place were considerations that could make such a regulation difficult to apply, specifically in relation to hooking a seal."<sup>108</sup>

(2) *Sealers must resort to long-distance shooting of seals from moving vessels because the ice floes are not solid enough to walk on.* Smith (2005) estimates that the average distance for sealers shooting at seals from their vessels to be 40-50 meters.<sup>109</sup> Accurate shooting from these distances is challenging given the seals are moving, the boats are moving, and the ice is moving.<sup>110</sup>

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<sup>103</sup> See Butterworth and Richardson (2012) at 7.

<sup>104</sup> See EFSA Report (2007) at 123.

<sup>105</sup> See Royal Commission on Sealing, Vol. III, *Methods of Killing Seals*, at p. 16.

<sup>106</sup> See Smith (2005) at 14.

<sup>107</sup> See Smith (2005) at 9.

<sup>108</sup> See Smith (2005) at 9.

<sup>109</sup> See Smith (2005) at 9.

<sup>110</sup> See Butterworth and Richardson (2012) at 7.

Moreover, seal processing plants deduct an amount from the value of the sealskin for every bullet hole found, so sealers have a financial incentive not to shoot at a seal more than once.<sup>111</sup> Video evidence of the commercial seal hunt in recent years consistently shows long delays between when seals are shot and when boats are able to maneuver into position to retrieve the seal.<sup>112</sup> Sealers are also often unable to disembark onto the ice floes to retrieve the seals or perform a skull palpation or blink reflex test. In these cases, seals are stabbed with a metal boat hook, dragged across the ice floe, and hoisted aboard the sealing boat with no guarantee that they are unconscious.<sup>113</sup>

ii. Extreme Weather Conditions (links to video)

81. The Canadian seal hunt is conducted in remote areas where the weather is extreme and unpredictable “as a matter of course.”<sup>114</sup> According to a 2000 report by Maritime Search and Rescue, “[o]perating under any circumstances in the marine environment of Newfoundland and Labrador brings with it a higher than normal range of risks. Exposure to meteorological elements is perhaps most critical.”<sup>115</sup> The report noted that “operating in adverse weather conditions ... is often the norm,”<sup>116</sup> and claimed that fishermen were found to risk fishing in foul weather during short fishing seasons. The report went on to say that studies have shown that fishermen tend to take risks for economic gains and in doing so, push weather limits.<sup>117</sup>
82. Dense fog, freezing rain, extreme cold, high winds and ocean swells can all compromise the ability of any sealer to deliver a humane death to seals, creating obstacles to accuracy in both clubbing and shooting and ability of sealers to retrieve wounded animals.<sup>118</sup> Strong winds are the single largest contributor to shooting inaccuracy,<sup>119</sup> and high seas can impede the sealers’ ability to deliver an accurate head shot due to unstable footing.
83. Without accurate shooting, seals can be “struck and lost.” The Canadian government uses loss rates of 0.5 for adult seals and 0.05 for pups in its estimates of seals killed but

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<sup>111</sup> See Cizriot M, *Death on the Ice*, Dive International Publishing Ltd. (1998), relevant pages attached hereto as Exhibit 4.

<sup>112</sup> See Butterworth and Richardson (2012) at 6, Section 3.4.2.

<sup>113</sup> See Butterworth and Richardson (2012) at 4, Section 3.1.7.

<sup>114</sup> See Livernois, J, *The Economics of ending Canada’s commercial harp seal hunt*, MARINE POLICY, Vol. 34, Issue 1 (January 2010) at 53, relevant pages attached hereto as Exhibit 5; Butterworth and Richardson (2012) at 7.

<sup>115</sup> See Maritime Search and Rescue Newfoundland, *Fishing Vessel Safety Review*, Canada DFO, at 3 (2000), available at: <http://www.safetynet.mun.ca/pdfs/CFVSafetyReview.pdf>.

<sup>116</sup> *Id.* at 11.

<sup>117</sup> *Id.* at 11.

<sup>118</sup> See Butterworth et al. (2012) at 7.

<sup>119</sup> See e.g., Lonsdale (1995) states: “There are several environment/weather factors that can have effect on a bullet in flight. Although temperature, humidity, altitude and mirage can all have significant effect at longer ranges, wind can be a problem at even medium to close ranges. Wind...along with other weather factors is probably responsible for more missed shots than any other single factor.”

not recovered (“struck and lost”).<sup>120</sup> Using these rates, tens of thousands of animals may be “struck and lost” in recent years in the commercial seal hunt. These are wounded animals that escape beneath the surface of the water, where they often die slowly but are not recovered.<sup>121</sup> Dr. Charles Caraguel, a member of the Independent Veterinarians’ Working Group, testified before the House of Commons in October 2006, and stated “I went to the front in 2006 where they used the rifle, and I saw dirty stuff.”<sup>122</sup>

84. In November 2006, the North Atlantic Marine Mammal Commission held a workshop to discuss the problems of “struck and lost” in seal, walrus and whale hunting. In the report resulting from the workshop, the seals working group emphasized that “it was recognized that some struck and loss was likely inevitable, given the conditions of hunting.” One participant stated, “[w]eather conditions are a very important factor in affecting struck and lost .... Wind is no good for hunting, and calm water is best.”<sup>123</sup>

85. According to Burdon et al (2001):

Shots should only be fired by a certified marksman using legally required ammunition and weapons, to seals on the ice, from a distance and under conditions, which will enable an accurate head shot to be taken, whereby the projectile will enter the brain causing sufficient damage to render the animal either unconscious or dead.”<sup>124</sup>

86. According to Smith (2005):

[T]he gunner must be a competent and disciplined professional who is capable of placing a bullet accurately under difficult conditions. It is important that the gunner has the discipline to know when not to shoot, either because of lack of ability to ensure an accurate shot and risk leaving the seal in a conscious state, or because of the potential for not being able to retrieve the seal.<sup>125</sup>

## 2) *Speed at Which the Seal Hunt Must be Conducted*

87. The sealing season spans seven months from November to June. However, the bulk of the killing occurs over just a few days in late March (in the Gulf of St. Lawrence) and in mid-April (in the “front”). In some years, more than 140,000 seals have been killed in less than two days in the front. In 2005, 78% of the harp seals killed in the

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<sup>120</sup> See EFSA Report (2007) at 113.

<sup>121</sup> See NAMMCO, *Report of the NAMMCO Workshop to Address the Problems of “Struck and Lost” in Seal, Walrus and Whale Hunting*, 48, 59 (Copenhagen – 14-16 November 2006) (hereinafter NAMMCO (2006)), available at: <http://www.nammco.no/webcronize/images/Nammco/818.pdf>.

<sup>122</sup> See *Standing Committee on Fisheries and Oceans*, Canadian House of Commons, 39<sup>th</sup> Parliament, 1<sup>st</sup> Session (October 5, 2006), available at: <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=2390501&Language=E&Mode=1>.

<sup>123</sup> See NAMMCO (2006) at 48, 59.

<sup>124</sup> See Burdon, R.L., Gripper, J., Longair, J.A., Robinson, I. and Ruehlmann, D., 2001. Rapporteur: Fielder, J., *Veterinary Report - Canadian commercial seal hunt Prince Edward Island* at 12 (March 2001) (emphasis added) available at: [http://www.harpseals.org/about\\_the\\_hunt/ifaw\\_vet\\_report\\_2001.pdf](http://www.harpseals.org/about_the_hunt/ifaw_vet_report_2001.pdf).

<sup>125</sup> See IVWG (2005) at 8.

commercial seal hunt were slaughtered in just six days between the two regions.<sup>126</sup> In 2007, 89% of the longliner allocation off the Front was taken in 17 hours.<sup>127</sup> *This equates to 100,000 seals in 17 hours, or 98 seals per minute.*

88. The highly competitive nature of commercial sealing also compromises the ability of sealers to deliver a humane death. Both sealers and sealing industry representatives have acknowledged that the speed at which the hunt is conducted and a quota system that encourages a ‘gold rush’ mentality make it difficult for sealers to follow humane killing practices.<sup>128</sup>
89. Each region is assigned a total quota. Some sealing licenses prevent more than a particular number of seals from being killed on a given day, whereas others do not have such restrictions, leading to a rush to kill as many seals as possible before hunting will be closed down in that area.<sup>129</sup> According to the Canadian Department of Fisheries and Oceans, “the opening day of the seal hunt is the most lucrative for sealers.”<sup>130</sup>
90. A 2005 Report by the Transportation Safety Board of Canada noted that “risk-taking is common during the seal hunt” and that “despite warnings of the developing ice pressure, the Justin M [sealing vessel] remained in the ice pack in anticipation of the opening of the seal hunt.”<sup>131</sup> It noted that the risk-taking propensity of those participating in the seal hunt is influenced by the fact that the quota system results in an environment of intense competition whereby the first and fastest reap the greatest rewards. The report states that “the lack of appropriate standards and regulations—in an intensely competitive environment where the benefits are high and the risks appear to be low—results in fostering a culture of risk rather than a culture of safety.”<sup>132</sup>
91. Additional pressures exist that force sealers to depart early:
- *Risk of vessel damage* - The fishing vessels that participate in the hunt are, by regulation, less than 65 feet in length and not necessarily constructed for navigation in ice. This makes the seal hunt a “high risk activity” for which there is a heavy reliance on search and rescue operations.<sup>133</sup> The insurance deductible for vessels engaged in the commercial seal hunt is \$250,000,

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<sup>126</sup> See Richardson (2007) at 43 citing The Humane Society of the United States (2007) available at: [http://www.humanesociety.org/assets/pdfs/seals/inherentlyinhumane\\_richardson.pdf](http://www.humanesociety.org/assets/pdfs/seals/inherentlyinhumane_richardson.pdf).

<sup>127</sup> See Fisheries and Oceans Canada, Memorandum to the Minister, Allocation of harp seals for Front longliners that were unable to participate in the seal fishery due to ice. Document obtained through Access to Information. Dated 15 May 2007, attached hereto as Exhibit 6.

<sup>128</sup> See Fink, S., *Canada’s Commercial Seal Slaughter 2009*, International Fund for Animal Welfare at p. 39, available at: <http://www.ifaw.org/sites/default/files/2009%20seal%20sealing.pdf>.

<sup>129</sup> See Butterworth et al. (2012) at 8.

<sup>130</sup> See Butterworth et al. (2012) at 8.

<sup>131</sup> See Transportation Board of Canada, *Marine Investigation Report, Ice Damage and Subsequent Sinking, Fishing Vessel Justin M off the Magdalen Islands, Quebec* (20 March 2005) at 11, Marine Reports (2005) M05L0036, available at: <http://www.tsb.gc.ca/eng/rapports-reports/marine/2005/m0510036/m0510036.pdf> (hereinafter Marine Investigation Report (2005)).

<sup>132</sup> See Marine Investigation Report (2005) at 12.

<sup>133</sup> See Butterworth and Richardson (2012) at 8.

compared to only \$5,000 for vessels engaged in other fishing activities.<sup>134</sup> Not surprisingly, many vessels are not insured.<sup>135</sup> These conditions provide an incentive for sealers to “spend as little time as possible in this hazardous environment.”<sup>136</sup>

- *Operational costs* - Fuel for the vessels is expensive, and the more time spent at the seal hunt, the higher the cost. Moreover, the longer a vessel and crew remain at the seal hunt, the greater the costs for food and other maintenance items.
- *Other fishing seasons* - Government data shows almost all fishing vessels that participate in the commercial seal hunt are licensed for other fisheries (DFO 2006) and all professional sealers must also hold a commercial fishing license. Soon after the commercial seal hunt begins, a number of other fisheries also open, including crab, shrimp and lobster—the three most lucrative fisheries on Canada’s east coast. Notably, these are also the top three fisheries that sealing vessels are also licensed to participate in. This can also operate as an incentive for fishing vessel captains and their crews to spend as little time as possible at the commercial seal hunt, enabling them to engage in less risky and more lucrative fisheries. For example, in 2010, shellfish accounted for 84% of the landed value of Newfoundland’s fishery, while seals accounted for less than half of one percent (0.5%) of the landed value.<sup>137</sup>

### 3) *Unique Physiological Adaptation of Seals*

92. Seals are divers that can go to depths exceeding 400m while they hold their breath, reduce their heart and constrict blood vessels in the skin to conserve oxygenated blood.<sup>138</sup> Seals also have a high circulating blood volume and “a higher resting number of blood cells in a given volume of blood (hematocrit) than land mammals ... and blood and muscle oxygen stores in seals are among the highest reported for any mammal ....”<sup>139</sup>

93. These factors mean that seals “may have the capacity to withstand poor levels of oxygenation that would not routinely be survivable by terrestrial species.”<sup>140</sup> In addition, seals store up to one-fifth of their blood supply in their spleen. When seals experience head trauma, their spleens would contract, emptying the blood into the body and leading to a potentially “long refractory period”—where it “would take a long period of time for the tissues of the seal to die following immobilization by hakapik or clubbing.”<sup>141</sup> Veterinarians propose seals may not die as rapidly as a result

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<sup>134</sup> See Butterworth and Richardson (2012) at 9.

<sup>135</sup> Maritime Search and Rescue (2000) at 10 reported that, “While insurance databases are well guarded under confidentiality protocols, it is evident that there are many fishermen who fail to carry insurance, particularly in vessels not exceeding fifteen GRT.”

<sup>136</sup> Maritime Search and Rescue (2000) at 10.

<sup>137</sup> Maritime Search and Rescue (2000) at 10.

<sup>138</sup> See Butterworth and Richardson (2012) at 6.

<sup>139</sup> See Butterworth and Richardson (2012) at 6; see also EFSA Report (2007) at 47, 68-69.

<sup>140</sup> See Butterworth and Richardson (2012) at 6.

<sup>141</sup> See Butterworth and Richardson (2012) at 6.

of increased oxygen in the blood as other terrestrial animals.<sup>142</sup> Thus, because “seals are highly adapted mammals, any assumptions that ‘normal’ killing methods can be applied should be questioned until proven otherwise.”<sup>143</sup>

#### 4) *Inability/Unwillingness of Authorities to Enforce Regulations*

94. There are a number of factors that prevent adequate monitoring of the seal hunt and enforcement of regulations.
95. In 1986, the Royal Commission on Seals and the Sealing Industry recognized the difficulty fisheries officers faced in adequately monitoring the seal hunt. They noted, “the area that they must patrol is very extensive, the number of sealers is large, and sealing operations are multifaceted. For these reasons it is impossible to keep all parts of the seal hunt under close supervision at all times.”<sup>144</sup>
96. The same factors are present today. Canada’s commercial seal hunt operates over more than 400,000 square miles of ocean in the northwest Atlantic. Approximately 6,000 individual seal hunters operate from more than 1,000 sealing vessels less than 65 feet in length.<sup>145</sup> The vessels spread out over thousands of miles of ocean, as far as 170 miles offshore.
97. Canada states that it “deploys a team of Fishery Officers (FOs) on a full time basis on board an ice breaker dedicated to monitoring sealing activities for the duration of the main harp seal hunt in the Gulf of St. Lawrence and on the Newfoundland and Labrador Front. Other land-based FOs are stationed at Department of Fisheries and Oceans (DFO) regional offices near seal harvesting locations and these officers monitor seal harvest operations and are available for immediate deployment to areas of specific need.”<sup>146</sup>
98. Canada does not quantify the number of observers to vessels, however. In recent years, there have been over 1,000 sealing vessels that participate in the commercial seal hunt, and yet, only a few coast guard vessels are deployed to the region. DFO reports having a total of 100 Fisheries Officers for the entire commercial seal hunt, not all of whom are even at sea each day of the hunt.<sup>147</sup> This translates to about 1 fisheries officer per 10 sealing vessels. While enforcement agents can leave the coast guard vessels by helicopter or small speed boat, the vast area to be covered, the intensity and longevity of the hunt, and the sheer number of vessels involved presents serious obstacles to meaningful enforcement.

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<sup>142</sup> See Butterworth and Richardson (2012) at 6; see also EFSA Report (2007) at 47 (“Through their diving adaptation, seals can tolerate higher levels of lactic acid than terrestrial mammals (Zapol, 1987), and the sensitivity of their respiratory centres to carbon dioxide is reduced (Rial et al., 2000). Therefore, they do not undergo quick narcosis and loss of consciousness. They are presumably conscious until the onset of death, remaining in a diving reflex with a reduced heart rate without attempting to breathe and therefore not aspirating any water.”)

<sup>143</sup> See Butterworth and Richardson (2012) at 6.

<sup>144</sup> See Royal Commission on Seals, Vol. III, *Methods of Killing Seals* at 8-9.

<sup>145</sup> See Butterworth and Richardson (2012) at 9.

<sup>146</sup> See Canada FWS at para. 114.

<sup>147</sup> See DFO 2008 Seal Facts, <http://www.dfo-mpo.gc.ca/fm-gp/seal-phoque/reports-rapports/facts-faits/facts-faits2008-eng.htm>

99. In response to questions posed by members of the Internal Market and Consumer Protection Committee of the European Parliament, the Canadian government stated in January 2009, “Over the past three years, Fishery officers have examined more than three thousand seals annually....”<sup>148</sup> Notably, no records or data was provided in this response to verify such inspections ever took place, no reference has been made subsequently to such inspections having occurred, and no information was given on what these “examinations” would have consisted of. On the latter front, it is important to note that DFO inspectors are not veterinarians and their ability to provide qualified analyses of the physiological responses of seals to stunning and bleeding is highly questionable. Regardless, the 3,000 seals supposedly examined would have represented a mere 1.4% of seals killed in 2008, 1.3% of seals killed in 2007, and 0.8% of seals killed in 2006 (the years the Canadian government claims these inspections occurred).<sup>149</sup>

100. The Canadian government admits that many smaller vessels engaged in the commercial seal hunt in Newfoundland and Labrador are not registered, making it difficult for the Coast Guard to track them and for departmental enforcement monitoring:

A critical issue is the lack of mandatory registration of sealing vessels. Mandatory registration would lead to more efficient monitoring and control of vessels. In fisheries which do not require Vessel Monitoring Systems, unregistered vessels are more difficult to track, especially in such a widespread activity as the seal harvest. Knowing that a vessel was leaving port to participate in the harvest simplifies Coast Guard tracking and departmental enforcement monitoring. There is no current requirement to register a sealing vessel. Many sealing vessels are already registered through activity in other fisheries, but many smaller vessels are not, particularly in Newfoundland and Labrador.<sup>150</sup>

101. Smith (2005) described the inability of enforcement officers to monitor the seal hunt:

The Front currently accounts for two-thirds of the seals killed during the annual Canadian harp seal hunt. Because of its remoteness and difficult environmental conditions, it is generally considered not to be well observed or monitored .... DFO appears to lack sufficient dedicated capacity to monitor and enforce regulation of the hunt, especially at the Front.<sup>151</sup>

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<sup>148</sup> Department of Fisheries and Oceans Canada, *Answers provided to Internal Market and Consumer Protection Hearing on Trade in Seal Products* (21 January 2009) (Q&A with Gary Stenson of Canada’s DFO) <http://www.europarl.europa.eu/parlArchives/comArch/com6/hearingsSheet.do?language=EN&body=IMCO> attached as Exhibit 8.

<sup>149</sup> See Fink, S., *Seals and Sealing* 33 (2009), available at <http://www.scribd.com/doc/19781892/IFAW-Seals-and-Sealing-2009>. In 2006, 354,867 seals were killed in the commercial seal hunt, of which 3000 seal inspections would have amounted to 0.8%. In 2007, 224,745 seals were killed in the commercial seal hunt, of which 3000 seal inspections would have amounted to 1.3%. In 2008, 217,636 seals were killed in the commercial seal hunt, of which 3000 seal inspections would have amounted to 1.4%.

<sup>150</sup> See Canada’s 2010-2015 Integrated Fisheries Management Plan, registration of sealing vessels is not mandatory, <http://www.dfo-mpo.gc.ca/fm-gp/seal-phoque/reports-rapports/mgtplan-planges20112015/mgtplan-planges20112015-eng.htm> (Section 3.7.11 - Mandatory Vessel Registration).

<sup>151</sup> See Smith (2005) at 11, 12.

The authors also note that Coast Guard vessels are also often called away from monitoring and enforcement of the hunt to perform other duties, such as icebreaking for other vessels.<sup>152</sup>

102. There is also evidence that Fisheries Officers may be unwilling to enforce sealing regulations due to their ties to the sealing community. According to Smith (2005), Fisheries Officers “are often residents in small communities that have social and economic links to the seal hunt.”<sup>153</sup> The Group recommends, “DFO should consider bringing in officers from outside communities who are not faced with monitoring and potentially laying charges against friends and neighbours.”<sup>154</sup> However, the practical realities and expense of relocating many fisheries officers to remote locations during the months the seal hunt operates likely makes such an option nonviable.

103. Smith (2005) also found that there is also a conflict of interest in DFO being both an advocate for the seal hunt and its regulator. Since Fisheries Officers are employed by the Department of Fisheries and Oceans, they work in an environment that may not encourage rigorous application of the law in this matter. Moreover, the highest authority within the Department of Fisheries and Oceans is an elected official normally residing in a province engaged in seal hunting. His advisory group, the Standing Committee on Fisheries and Oceans, is comprised of other elected officials, also largely from provinces that participate in the seal hunt.<sup>155</sup>

104. Canada states that sealers who fail to comply with the MMRs are prosecuted.<sup>156</sup> The Canadian government claims that there are approximately 5,000-7,000 active commercial sealing licenses and 2,700 personal use sealing licenses,<sup>157</sup> and 1,000 sealing vessels. Given this, the number of prosecutions over the last several years seems disproportionately low, and of those, penalties have been modest (documentation in Exhibit 9):

2009: 21 convictions and punishment ranged from a \$100 fine for failing to properly bleed as required by license to \$1,000 and a one-season suspension for failing to palpate a seal’s cranium to confirm that it had been crushed (the only license suspension of the year).

2010: 10 convictions and punishment ranged from a \$250 fine for failing to bleed for one minute before skinning to \$750 for failing to use a fully operational Vessel Monitoring System as required by license. There were no license suspensions in 2010, but four individuals convicted of various infractions were prevented from sealing on the first day of the hunt.

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<sup>152</sup> See Smith (2005) at 12.

<sup>153</sup> See Smith (2005) at 12.

<sup>154</sup> See Smith (2005) at 12.

<sup>155</sup> See Smith (2005) at 13-14.

<sup>156</sup> See Canada FWS at para. 121.

<sup>157</sup> Department of Fisheries and Oceans (DFO). Frequently asked questions about Canada’s seal harvest. Who can hunt seals? How many licences were issued in 2011? Available at: <http://www.dfo-mpo.gc.ca/fm-gp/seal-phoque/faq2012-eng.htm#h>.

2011: one violation is noted for hunting during closed time with a penalty of \$200.

### 3. *Climate Change is Negatively Impacting Animal Welfare at the Seal Hunt*

105. Many of the environmental obstacles to humane slaughter outlined above are increasing because of climate change. As our planet warms, sea ice is declining and we are witnessing an increase in frequency of extreme climate events. These changes are affecting marine ecosystems, and there is strong evidence that many marine mammal species are already negatively impacted by climate change.<sup>158</sup> The IUCN Red List of Threatened Species, for example, notes that climate change poses a serious threat to harp seals.<sup>159</sup>

106. In 2010, the Canadian Department of Fisheries and Oceans also stated that the total ice cover in Atlantic Canada in 2010 was the lowest recorded, and that, “[e]xamination of the total extent of ice over the past 40 years indicates that there is a declining trend in accumulated ice, in both in the Gulf and the south-western Labrador Sea. Therefore there is an increased likelihood of increased mortality [for harp seals] in future years.”<sup>160</sup>

107. In addition to conservation concerns, the “diminishing sea ice and the increased number of extreme weather events are compromising animal welfare by changing the ways hunters interact with the seals.”<sup>161</sup> Sea ice off Canada’s east coast is expected to continue to diminish in area, concentration and thickness in the coming decades,<sup>162</sup> “and the related negative welfare impacts [on seals] are likely to be more frequently observed.”<sup>163</sup>

108. These impacts include: (1) increased rates of wounding; (2) higher number of open water shootings and higher rates of seals struck and lost; and (3) an increasing inability to perform bleeding out on the ice.<sup>164</sup> These factors are discussed at length in Butterworth et al. (2012), but will be summarized below.

#### a. Diminishing Ice Conditions Leading to Increased Wounding Rates

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<sup>158</sup> See *id.*; see also Johnston D., Friedlander A., Torres L., & Lavigne D., *Variation in Sea Ice Cover on the East Coast of Canada from 1969 to 2002: Climate Variability and Implications for Harp and Hooded Seals*, 29 *Climate Research* 209 (2005) (analyzing the effects of climate change on the breeding seasons of seals in eastern Canada), available at: <http://www.ottokinne.de/articles/cr2005/29/c029p209.pdf>.

<sup>159</sup> Kovacs K., *Pagophilus groenlandicus*, IUCN Red List of Threatened Species, [www.iucnredlist.org](http://www.iucnredlist.org).

<sup>160</sup> See Fisheries and Oceans Canada, Canadian Science Advisory Secretariat, *A Review of Ice Conditions and the Harp Seal Total Allowable Catch (TAC) for 2010*, 2 (2010), available at: [http://www.dfo-mpo.gc.ca/CSAS/Csas/Publications/ScR-RS/2010/2010\\_004\\_E.pdf](http://www.dfo-mpo.gc.ca/CSAS/Csas/Publications/ScR-RS/2010/2010_004_E.pdf).

<sup>161</sup> See Butterworth and Richardson (2012) at 9.

<sup>162</sup> Johnston DW, Bowers MT, Friedlaender AS, Lavigne DM, *The Effects of Climate Change on Harp Seals (Pagophilus groenlandicus)* (2012) *PLoS ONE* 7(1): e29158. doi:10.1371/journal.pone.0029158, available at: <http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0029158>.

<sup>163</sup> See Butterworth and Richardson (2012) at 9.

<sup>164</sup> See Butterworth and Richardson (2012) at 9.

109. In years with lower than average sea ice formation, sealers are increasingly unable to operate on the ice floes that make up the harp seal nursery. This, in turn, is creating an increased reliance on long distance shooting of seal pups from moving sealing vessels, and a reduced ability for sealers, when standing on small areas of unstable ice, to club with accuracy.<sup>165</sup>

110. Canada's sealing regulations only require sealers to monitor seals for unconsciousness following stunning "as soon as possible." This allows sealers to shoot animals and wound them, impale them on gaff hooks, drag them across the ice and hoist them onto sealing vessels—all prior to ensuring the animal is unconscious. As the sea ice deteriorates, reliance on long distance shooting as a primary stunning method is increasing. Smith (2005) notes that:

Checking by palpation of the skull is a manual process that requires the sealer to be in physical contact with the animal. The Group understands that at the Front, where seals are shot at distances of approximately 40-50 meters, there is often a delay in sealers being able to check for effective stunning.<sup>166</sup>

111. Captains of sealing vessels, most of which are not constructed to operate in sea ice,<sup>167</sup> must manoeuvre their boats slowly and cautiously in areas where sea ice is present. There is a clear delay from the time a seal has been struck with a bullet to the time when the sealing captain is able to cover the 40-50 metre distance to the seal to retrieve the animal.<sup>168</sup> As sea ice cover continues to decrease in the coming decades, reliance on long distance shooting as a means of stunning seals is likely continue to increase,<sup>169</sup> as will instances of seals left for long periods before testing for unconsciousness can occur.<sup>170</sup>

112. Wounding rates for seals that are clubbed, not shot, are also expected to rise due to increasingly slippery conditions and "fragile, broken ice floes that move quickly in the water and present an unstable platform to operate on."<sup>171</sup>

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<sup>165</sup> See Butterworth and Richardson (2012) at 9.

<sup>166</sup> See Smith (2005) at 9.

<sup>167</sup> See Transportation Safety Board, Marine Investigation Report, M08M0010 at 13 (March 28, 2008) available at: <http://www.tsb.gc.ca/eng/rappports-reports/marine/2008/m08m0010/m08m0010.asp>.

<sup>168</sup> See Butterworth and Richardson (2007), reporting that 82% of the seals they studied were not killed by the first shot, and that, "the mean duration from first shot to contact by the sealer was  $48.8 \pm 9.4$  seconds, indicating a considerable period of potentially poor welfare." In some cases, this is done using two vessels, resulting in even longer retrieval times and the increased risk that seals are often missed altogether by the second boat.

<sup>169</sup> See Butterworth and Richardson (2012) at 9.

<sup>170</sup> See Butterworth and Richardson (2012) at 9. In 2008, the National Post covered proposed changes to Canada's Marine Mammal Regulations. The story noted that during DFO consultations, sealers were in agreement with the new rules in principle, but had concerns that if not worded correctly, they could endanger human life. Canadian Sealers' Association President Frank Pinhorn, a veteran sealer, commented, "The sealers are concerned about the instances where the ice is thin and you can't get out on it. Then you got to retrieve your seal and check them in your boat. They got to be retrieved by the haka-pik or whatever. The alternative is to shoot the animal again. That is practiced in some instances." See National Post, *More Humane Seal Hunt Takes to the Ice* (March 10, 2008) available at: <http://www.canada.com/topics/news/story.html?id=2ce805e1-365e-42ef-a258-4f57f41e46c2>.

<sup>171</sup> See Butterworth and Richardson (2012) at 9.

b. Diminishing Ice Conditions Leading to More Open Water Shootings and Higher Struck and Lost Rates

113. Ensuring a humane death when seals are shot in open water where the carcass cannot be recovered is a practical impossibility.<sup>172</sup> In 2005, Smith recommended that, “a seal should not be shot in the water, or in any circumstance when it is possible the carcass cannot be recovered.” The Canadian MMRs do not prohibit the shooting of seals in open water (although this is prohibited in Norway), and, as a result, such shootings occur regularly as a matter of course.

114. “When taken in open water, loss rates for seals less than one year of age are five times higher, and for seals over one year of age ten times higher, than for seals taken on the ice.”<sup>173</sup> With smaller ice floes, the number of seals near open water increases, as does the number that are likely to be “struck and lost.”<sup>174</sup> In addition, for seals shot in the water or from unstable and small ice floes, sealers must retrieve the seal with a gaff without being able to first verify if the animal is unconscious.<sup>175</sup> Butterworth and Richardson (2012) note this practice—which is unavoidable when shooting in open water—is “profoundly inhumane.”<sup>176</sup>

115. As the ice cover decreases, seal pups are increasingly forced into the open water. The Government of Canada’s 2007 admission that “... [A] prohibition of shooting seals in the water ... could have a detrimental effect on the fishery when poor ice conditions prevail”<sup>177</sup> suggests that sealers shoot more seals in open water when there is reduced sea ice cover.

c. Diminishing Ice Conditions Increasing Inability to Perform Bleeding on the Ice

116. Veterinary authorities agree that animals should be bled out immediately following confirmation of unconsciousness.<sup>178</sup> Smith (2005) recommends that “[b]leeding of a seal will ideally be done on the ice immediately following the checking process.”<sup>179</sup> WASK (1995) and AVMA (2007) both recommend that the slaughterer remain with

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<sup>172</sup> See Butterworth and Richardson (2012) at 9.

<sup>173</sup> See Butterworth and Richardson (2012) at 9.

<sup>174</sup> See Butterworth and Richardson (2012) at 9.

<sup>175</sup> See Butterworth and Richardson (2012) at 9.

<sup>176</sup> See Butterworth and Richardson (2012) at 9.

<sup>177</sup> Parliament of Canada, *Government Response to the Fourth Report of the Standing Committee on Fisheries and Oceans*, Response to Recommendation 7, available at <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=3067100&Language=E&Mode=1&Parl=39&Ses=1>.

<sup>178</sup> See Butterworth and Richardson (2012) at 9; *The Welfare of Animals (Slaughter or Killing) Regulations*, 1995 No. 731, Regulations 9(d) & 14(c), Bleeding or Pithing of Animals, available at <http://legislation.data.gov.uk/uksi/1995/731/made/data.htm?wrap=true> [hereinafter, WASK (1995)]; Burdon et al (2001); EFSA Report (2007); and AVMA (2007) at 17.

<sup>179</sup> See Smith (2005) at 9.

the animal throughout the bleeding process to ensure re-stunning is possible if the animal regains consciousness.<sup>180</sup>

117. Canada's MMRs, as amended in 2009, do not contain these requirements. Instead, Section 29 of the Regulations stipulates that, "[n]o person shall skin a seal until the cranium has been crushed and at least one minute has elapsed after the two axillary arteries of the seal located beneath its front flippers have been severed to bleed the seal." Thus, bleeding can occur at any time after monitoring for unconsciousness, and after the animal has been impaled with a gaff hook and dragged across the ice and onto a vessel.

118. "Deteriorating sea ice conditions, and the inability of sealers to stand on thin and fragile ice pans, often makes it dangerous, difficult or impossible to bleed out seals on the ice, and especially to remain with the seals throughout the bleeding process to monitor for regaining of consciousness."<sup>181</sup>

119. In sum, decades of public opposition to the commercial seal hunt have led to numerous laws around the world restricting the trade in seal products, and to numerous iterations of sealing regulations in Canada and other sealing nations to make the commercial seal hunt "more humane." Despite these attempts, there are no sealing laws on the books today that prescribe a humane death for seals in accordance with generally accepted principles of humane slaughter. Not surprisingly, there is extensive evidence of widespread suffering associated with commercial seal hunting, some of which could be avoided if these principles were adopted. However, due to the inherent conditions of the commercial seal hunt—such as extreme weather, the scale and intensity of the hunt, and the physical and physiological adaptations of seals—no degree of regulation will allow for a humane death for seals on a consistent and effective basis. This conclusion is supported by numerous veterinarians who have studied the commercial seal hunt over time and have concluded that it is "inherently inhumane." Deteriorating ice conditions due to climate change are exacerbating these conditions, resulting in higher numbers of wounded seals, higher struck and loss rates, and an increased inability to perform tests for consciousness and immediate bleeding out.

## V. LEGAL ISSUES AND ANALYSIS

### A. Introduction

120. The key legal arguments<sup>182</sup> made by Canada and Norway involve provisions of GATT 1994 and the Technical Barriers to Trade (TBT) Agreement.<sup>183</sup> The primary—partly

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<sup>180</sup> See WASK (1995), Regulations 9(d) and 14(c); see also AVMA (2007),

<sup>181</sup> See Butterworth et al. (2012) at 9.

<sup>182</sup> *Amici* have only received access to Canada's first submission at this time and therefore these arguments are limited to responding to Canada's submission and drawing from statements made by Norway in public settings, such as through panel requests, at DSB meetings, and in the press. *Amici* address certain of the legal claims below where we can provide specific expertise or value to the Panel's consideration of the issues. For all other legal issues, we defer to the EU submission.

<sup>183</sup> See *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/4 (14 February 2011) (Request for the Establishment of Panel by Canada); *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS401/5 (15 March 2011) (Request for the Establishment of Panel by Norway).

overlapping—claims arise under GATT Articles I:1, III:4, XI:1; TBT Articles 2.1 and 2.2, 5 and 7.<sup>184</sup>

121. The complainants argue, in essence, that the EU measures are discriminatory and unnecessarily trade-restrictive and cannot be justified under GATT or the TBT Agreement.<sup>185</sup> As will be shown, none of these claims can be successful.

122. At the February 24, 2011 WTO Dispute Settlement Body meeting wherein Canada's request for a panel was first considered, Canada was reported as saying:

While Canada understood that the EU measures were a response to concerns of European citizens and consumers about the animal welfare aspects of the seal harvest, Canada said that trade restrictions could not be justified by relying on myths and misinformation. Canada said that seal harvest was lawful, sustainable, humane, strictly regulated and guided by rigorous animal welfare principles that were internationally recognised. Canada said that seal harvest helped to provide thousands of jobs in Canada's remote coastal and northern communities where few economic opportunities exist and that it was an important part of the Inuit way of life. Canada said that it had a lengthy engagement with the EU on this issue and shared this concern on multiple occasions at the WTO Committee on Technical Barriers to Trade (see minutes of the June 2010 TBT meeting where this issue was raised G/TBT/M/51). Canada said that these restrictions resulted in an extreme decline of Canadian exports, especially exports of raw seal fur skins which fell by 94% in 2009, compared to 2008. Canada asked for the restoration of full market access.<sup>186</sup>

123. *Amici* fully support the EU's position that its Regulation and Implementing Measure are consistent with WTO obligations, and that neither Canada nor Norway have provided "any meaningful explanation" as to why the EU measures are inconsistent with WTO rules.<sup>187</sup> In particular, *Amici* urge the Panel to find that the EU measures

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<sup>184</sup> *Id.* It should be noted that Norway's panel request identifies more claims under the TBT Agreement than the Canadian request (e.g., provisions under Articles 6, 8, 9). Norway's request also makes a claim under Article 4.2 of the Agreement on Agriculture. At the 25 March 2011 WTO DSB meeting, a single panel was established to consider both Canada and Norway's complaints.

<sup>185</sup> According to Canada "the effect of the trade ban, in combination with the implementing measure, is to restrict virtually all trade in seal products within the European Union, and in particular with respect to seal products of Canadian origin." See Canada Panel Request at 2. Norway stated "these measures had serious implications for its industry and added that this dispute was not just about seal products but about Norway's right to harvest in a sustainable manner from its living marine resources and to market the products of hunting and fishing. Norway stated that there were no justifiable grounds for the ban and added that seal populations were not threatened and the hunt was strictly controlled. Norway said it was considering what might be the appropriate next steps (see — WT/DS401)." See WTO, Dispute Settlement, Panel Requests (24 February 2011), available at: [http://www.wto.org/english/news\\_e/news11\\_e/dsb\\_24feb11\\_e.htm](http://www.wto.org/english/news_e/news11_e/dsb_24feb11_e.htm).

<sup>186</sup> See WTO, Dispute Settlement, Panel Requests (24 February 2011), available at: [http://www.wto.org/english/news\\_e/news11\\_e/dsb\\_24feb11\\_e.htm](http://www.wto.org/english/news_e/news11_e/dsb_24feb11_e.htm).

<sup>187</sup> See WTO 2011 News Items: Dispute Settlement, Panel Establishment (25 March 2011); available at: [http://www.wto.org/english/news\\_e/news11\\_e/dsb\\_21apr11\\_e.htm](http://www.wto.org/english/news_e/news11_e/dsb_21apr11_e.htm); WTO 2011 News Items: Dispute Settlement, Panel Requests (24 February 2011), available at: [http://www.wto.org/english/news\\_e/news11\\_e/dsb\\_24feb11\\_e.htm](http://www.wto.org/english/news_e/news11_e/dsb_24feb11_e.htm).

are not inconsistent with any of the cited provisions under GATT and the TBT Agreement, including:

- The EU measures are consistent with Articles I:1 and III:4 of the General Agreement on Tariffs and Trade (GATT) because they are origin-neutral in design and application and do not discriminate among “like” seal products;
- The EU measures do not fall within the scope of GATT Article XI:1;
- Even if the EU measures are found to be inconsistent with GATT Articles I, III or XI, they are nevertheless justified under GATT Article XX(a) as necessary to protect public morals. There is a long history of profound moral concern in the EU and worldwide about the way animals, and seals specifically, are treated. Recent opinion polls in the EU show that European citizens fundamentally oppose the commercial seal hunt, and overwhelmingly support the EU measures.

The measures address the EU public’s moral concern about the suffering involved in the commercial seal hunt, and their belief that the EU market should not contribute to this trade. Evidence shows that the EU measures are contributing significantly to these objectives by decreasing demand for seal products, which has helped avoid the inhumane killing of tens if not hundreds of thousands of seals since the implementation of the EU measures. Canada has not yet proposed a reasonably available alternative that would achieve the same level of protection as the EU measure, and therefore, the EU measures are “necessary” to protect public morals under GATT Article XX(a).

The EU measures also satisfy the GATT Article XX chapeau as they are non-discriminatory and not a disguised restriction on trade;

- The EU measures are not technical regulations under the Technical Barriers to Trade (TBT) Agreement because they do not prescribe product characteristics, but rather in a closely circumscribed way specify which products can enter the market based on the type of hunt they are derived from;
- Even if the EU measures are found to be technical regulations, they do discriminate between imports from Canada and Norway and imports from other sources or the domestic like product in contravention of TBT Article 2.1; and
- The EU measures are also not more trade restrictive than necessary to fulfil the EU’s legitimate objectives under TBT Article 2.2. Because commercial seal hunting is inherently inhumane, anything less than a total ban on commercial seal products cannot achieve the level of protection desired by the EU. Canada’s proposed certification/labelling scheme should be rejected for this reason.

#### **B. The EU Measures are Consistent with GATT Article III:4**

124. GATT Article III:4 provides:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no

less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

125. Canada argues that the EU measures violate the national treatment obligation of Article III:4 by treating Canadian products less favourably than the domestic like products.<sup>188</sup> Specifically, Canada states that the MRM exemption allows EU products to continue to be placed on the market, while it excludes the vast majority of Canadian products.<sup>189</sup> In its panel request, Norway similarly states that the EU measures violate GATT Article III:4 by discriminating between imported products and like products originating in the EU, and that the exceptions in particular result in discrimination.<sup>190</sup> As set out below, these claims are without merit.

126. To determine if there is a violation of Article III:4, three elements must be satisfied:

- (1) that the imported and domestic products at issue are ‘like products’;
- (2) that the measure at issue is a ‘law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use’; and
- (3) that the imported products are accorded ‘less favourable’ treatment than that accorded to like domestic products.<sup>191</sup>

127. While the EU measures do fall within the scope of Article III:4 in that they apply to and affect the internal sale of seal products, they do not afford less favourable treatment to imported products than to like domestic products and are therefore not inconsistent with GATT Article III:4.

### ***1. Like Products***

128. *Amici* defer to the EU submission for a detailed discussion of like product. *Amici* agree with the EU that the group of “like products” includes all seal products, both those which conform to the EU Regulation, and those which do not.

### ***2. The Measures Do Not Afford Less Favourable Treatment to Imported Like Products***

129. The Appellate Body has explained that a measure affords less favourable treatment to imported products than to domestic like products if it “modifies the conditions of competition in the relevant market to the detriment of imported products.”<sup>192</sup> The

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<sup>188</sup> See Canada FWS at para. 325.

<sup>189</sup> See Canada FWS at para. 325.

<sup>190</sup> See Norway Panel Request.

<sup>191</sup> See Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, at para. 133 (“*Korea – Beef*”).

<sup>192</sup> See Appellate Body Report, *Korea – Beef* at para. 137.

Appellate Body has also stated that less favourable treatment may exist where a measure gives the domestic like product a competitive advantage.<sup>193</sup> Of particular note is the fact that the Appellate Body has stated that the “essence of the non-discrimination provisions [which would include GATT Article III:4] is that like products should be treated equally, *irrespective of their origin.*”<sup>194</sup>

130. The EU measures do not distinguish between seal products from different countries. All commercial seal products, regardless of country of origin and including all EU Member States, are prohibited from being “placed on the market” (made available to third parties in exchange for payment).<sup>195</sup> The same equality in treatments applies to the exemptions, including the MRM exemption. All seal products from MRM hunts, regardless of country of origin and including all EU Member States, are permitted to be placed on the market on a non-profit basis. Thus, as between the EU and Canada and Norway, all products from these categories of hunts are treated equally. To the extent that products from Canada or Norway would qualify for the MRM exemption, they would be permitted on the EU market in the same manner as products originating in the EU. To the extent that there are no products or few products in Canada and Norway that could qualify for this exemption, at this time, this is not *per se* evidence of discrimination. What matters is that the exemption is available to *any* qualifying product, regardless of source. GATT Article III:4 remains undisturbed.

131. An important additional consideration confirms this finding here. The MRM exception by its own terms only applies to products from seals which are hunted for non-commercial reasons, namely marine resource management purposes. In addition, *sales* of such must be genuinely not-for-profit to be legal; only costs can be covered, but no profits. This means that any sale under the MRM exception is entirely non-commercial in nature and by definition does not represent “competition” of the kind GATT Article III:4 aims to address. There is not, nor could there be, any EU “industry” that would be protected by the MRM exception. The seals products from MRM hunts are pure by-products of already non-commercial activity. In other words, this is clearly not the kind of situation GATT Article III:4 aims to address in the first place. This is further underscored by the fact that not only are the numbers of seals killed under the—by definition occasional—MRM hunts small, but also that there have so far not been any sales under the MRM exception. Protectionism would look rather different.

132. In sum, the EU measures do not modify the conditions of competition in the EU market to the detriment of imported products, nor do they give a competitive advantage to domestic like products. The EU measures are consistent with Article III:4.

### **C. The EU Measures are Consistent with GATT Article I:1**

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<sup>193</sup> See Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005, at para. 93 (“*Dominican Republic – Cigarettes*”).

<sup>194</sup> See Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, at para. 190, (emphasis added).

<sup>195</sup> EU Regulation 1007/2009, art. 2(3), 3(1).

133. GATT Article I:1 is designed to prevent discrimination among like products “originating in or destined for different countries.”<sup>196</sup> “Article I:1 plainly imposes upon WTO Members the obligation to treat ‘like products ... equally, irrespective of their origin’.”<sup>197</sup>

134. GATT Article I:1 states in relevant part:

With respect to ... all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

135. Canada and Norway both argue that the EU measures violate the most favoured nation clause of Article I:1.<sup>198</sup> Canada in particular argues that the EU measures confer an advantage on products from Greenland that is not also accorded to Canada.<sup>199</sup> Canada’s arguments fail for reasons similar to those outlined above in the context of Article III:4.

136. First, the EU measures are origin neutral and their terms—including the indigenous communities exemption—apply equally to all sources. While some countries may have relevant indigenous populations engaging in seal hunting while others do not, and therefore may be able to continue to place their products on the market, the EU measures are not structured to favour or disadvantage countries based on this factor.<sup>200</sup> In other words, any product of any indigenous hunt in any country that meets the terms of the exemption is eligible to be placed on the market. This holds equally true for the Canadian Inuit as it does for the Inuit in Greenland. That Canada perceives that there may be more Inuit products in Greenland that are potentially eligible than those from Canada, at this time, is not evidence of discrimination.

137. Canada largely overlooks the fact that its own Inuit products are equally eligible to apply for the exemption as are products from Greenland. Instead, Canada focuses its argument on the fact that products from its commercial seal hunt are excluded from the market, while products from Greenland’s Inuit hunt are potentially permitted. In the

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<sup>196</sup> See Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, at para. 78.

<sup>197</sup> See Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, adopted 20 April 2004, at para. 89.

<sup>198</sup> See Canada Panel Request and Norway Panel Request.

<sup>199</sup> See Canada FWS at para. 294.

<sup>200</sup> Where different conditions prevail, there is room under the WTO Agreements for measures to be structured to take account of such conditions. See generally Howse, R. and Langille, J., *Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Permit Trade Restrictions Justified by Non-Instrumental Moral Values*, YALE JOURNAL OF INT’L LAW, available at: <http://www.yjil.org/print/volume-37-issue-2/permitting-pluralism-the-seal-products-dispute-and-why-the-wto-should-accept-trade-restrictions-justified-by-noninstrumental-moral-values>.

first instance, *Amici* are not aware of any products from Greenland that have yet qualified for the exemption.<sup>201</sup>

138. Second, Canada is asking the Panel to compare apples and oranges. The EU measures are designed to treat certain categories of products the same—regardless of origin—so long as they meet certain conditions. All commercial seal products are prohibited; all Inuit products are potentially permitted. The EU has the authority to draw these distinctions based on what it perceives as relevant policy objectives, such as the need to support subsistence living through the indigenous communities exemption. In doing so, the EU need only make sure that the distinctions are not discriminatory. Given that Canadian Inuit products and Greenlandic Inuit products have the same opportunities to qualify for the indigenous communities exemption, it cannot fairly be said that there is *de jure* or *de facto* discrimination.

139. For these reasons, all “like” seal products are treated equally and no advantage, favour, privilege or immunity is granted to one country that is not also immediately and unconditionally granted to the like product originating in any other country. Accordingly, the EU measures are consistent with GATT Article I:1.

#### **D. The EU Measures Do Not Fall Within the Scope of GATT Article XI:1**

140. Canada and Norway both argue that by restricting the importation of certain seal products, the EU measures violate GATT Article XI:1.<sup>202</sup>

141. GATT Article XI:1 provides:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

142. The EU measures in this dispute do not fit within the scope of Article XI. Instead, they are more properly analysed under Article III:4. As explained above, Article III:4 applies solely to products already “imported into” a Member state, while Article XI:1 prohibits quantitative restrictions “on the importation of” products. The *Ad Note* to Article III explains:

[A]ny internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in paragraph 1 which applies to an imported product and to the like domestic product and is collected or enforced at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III.<sup>203</sup>

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<sup>201</sup> As Canada rightly observes, none of the accreditations for certifying entities in Greenland have yet been issued. Again, note that protectionism, or rather favouritism, of the kind GATT Article I:1 is meant to address would look rather different.

<sup>202</sup> See Canada Panel Request and Norway Panel Request.

<sup>203</sup> GATT Article III:4, *Ad Article III* (emphasis added).

143. While the EU measures apply “at the time or point of import for imported products,” they do not regulate the *importation* of seal products as such but do regulate the placing of *imported* products on the market. In other words, the EU measures are not an import ban; they are a sales ban which, for imported products, is administered at the point of importation. As such, Article XI is not applicable to the case at hand.<sup>204</sup>

144. Although the Panel in *India – Autos* recognized that measures may in certain exceptional cases impact both the importation of certain products as such and the market conditions surrounding the products once imported (and thereby concurrently fall under Articles III:4 and XI),<sup>205</sup> the EU measures do not have the effect of restricting importation. The prohibition concerns the placing on the market of the seal products at the time or point of import.<sup>206</sup> Therefore, the Regulation does not actually prohibit the importation of seal products into the EU, but instead only prohibits the offering of seal products “to third parties, in exchange for payment.”<sup>207</sup> Imports of seal products as presents, for example, do not fall under the text of the prohibition.

145. Should the Panel reach a different conclusion with respect to Articles I, III or XI, the EU measures are still justified under GATT Article XX(a), as set out below.

**E. The EU Measures Can be Justified Under GATT Article XX (a) – Necessary to Protect Public Morals**

146. Although *Amici* believe the EU Regulation and Implementing Measure are consistent with GATT Articles I:1, III:4 and XI:1, and as such do not violate GATT, should the Panel find otherwise, the measures are nevertheless justified under GATT Article XX(a) because they are necessary to protect public morals.

147. The GATT Article XX chapeau and subsection (a) provide:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

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<sup>204</sup> The EU measures are unlike those in *US—Shrimp*, where the statutory provision was analyzed under Article XI, and not Article III:4, because the Panel found (and the US did not refute) that the regulation expressly banned the importation of specified products from non-certified countries, *See Panel Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R, adopted 15 May 1998 at paras. 7.15-7.16.

<sup>205</sup> *See Panel Report, India – Measures Affecting the Automotive Sector*, WT/DS146/R at paras. 7.224 and 7.296 (21 December 2001) (appeal withdrawn) (“...different aspects of a measure may affect the competitive opportunities of imports in different ways, making them fall within the scope either of Article III (where competitive opportunities on the domestic market are affected) or of Article XI (where the opportunities for importation itself, i.e. entering the market, are affected), or even that there may be, in perhaps exceptional circumstances, a potential for overlap between the two provisions...”).

<sup>206</sup> EU Regulation, art. 3(1).

<sup>207</sup> EU Regulation, art. 2(3).

(a) necessary to protect public morals ....<sup>208</sup>

148. There have been two prior WTO disputes dealing with the concept of public morals.<sup>209</sup> The first, *US – Gambling*, involved Article XIV(a) of the General Agreement on Trade and Services (GATS), which, similarly to GATT Article XX(a), allows for measures that are: “necessary to protect public morals or to maintain public order.” That dispute involved a claim against the U.S. regarding certain betting and gambling services. The U.S. defended itself on grounds that the measures were “necessary to protect public morals and public order” under GATS Article XIV(a).<sup>210</sup> In rendering its report, the Panel made several notable findings of relevance here:

- The content of the concept of public morals “can vary in time and space, depending on a range of factors including prevailing social, cultural, ethical, and religious values” for WTO Members.<sup>211</sup>
- “[T]he term ‘public morals’ denotes standards of right and wrong conduct maintained by or on behalf of a community or nation.”<sup>212</sup>
- “[T]he Appellate Body has stated on several occasions that Members, in applying similar societal concepts have the right to determine the level of protection they consider appropriate .... Members should be given some scope to define and apply for themselves the concepts of ‘public morals’ and ‘public order’ in their respective territories, according to their own systems and scales of values.”<sup>213</sup>

149. In the only dispute involving GATT Article XX(a) (*China – Audiovisuals*), the Panel adopted the same interpretation, and went on to state that “the protection of public morals ranks among the most important values or interests pursued by Members as a matter of public policy.”<sup>214</sup> *Amici* believe this interpretation of public morals is reasonable, and should apply in the instant dispute as well.

150. As explained below, overwhelming evidence supports a finding that:

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<sup>208</sup> This brief focuses on GATT Article XX(a), but in so doing, does not intend to preclude analysis or application of other GATT Article XX subsections.

<sup>209</sup> See *United States – Measures Affecting the Cross Border Supply of Gambling and Betting Services*, WT/DS285, adopted 10 November 2004 (*US-Gambling*); *China Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R, adopted 12 August 2009 (*China – Audiovisuals*). There is limited legislative history for GATT Article XX(a), or for exceptions involving public morals in trade policy more broadly. However, there is some documentation dating back to the first outline of the ITO Charter in 1945 that contains a U.S. proposal to include public morals as an exception to certain trade measures. See Charnovitz, S., *The Moral Exception in Trade Policy*, 38 VA. J. INT’L L. 689, 704 (1988) (discussing the legislative history of the public morals exception.); relevant pages attached hereto as Exhibit 10. The language was ultimately adopted and put into the GATT and final ITO Charter (the Havana Charter), although there is little else detailing what negotiators discussed in adopting this language. *Id.*

<sup>210</sup> See Panel Report, *US – Gambling*, WT/DS285 at para. 6.444 (not reviewed on appeal).

<sup>211</sup> See Panel Report, *US – Gambling*, WT/DS285 at para. 6.461 (not reviewed on appeal).

<sup>212</sup> See Panel Report, *US – Gambling*, WT/DS285 at para. 6.465 (not reviewed on appeal).

<sup>213</sup> See Panel Report, *US – Gambling*, WT/DS285 at para. 6.461 (not reviewed on appeal).

<sup>214</sup> See Panel Report, *China – Audiovisuals*, WT/DS363/R at para. 7.759, 7.817 (not reviewed on appeal).

- *The EU measures have a public morals purpose:* (1) there is a long history of the EU legislating in furtherance of animal welfare objectives that are grounded in moral and ethical concerns of the EU public; (2) the specific legislative history and language of the EU measures show that they were adopted to protect public morals of EU citizens; (3) the public morals objective of the EU measures is confirmed by recent public opinion polling demonstrating that the majority of people surveyed across the EU support the EU ban on seal products.<sup>215</sup>
- *The EU's public morals purpose fits squarely within the scope of GATT Article XX(a):* Members can determine the level of protection they consider appropriate, and can define for themselves the concept of public morals as it applies to their country and value system. Animal welfare is a well-entrenched public moral concern in the EU and in many other nations and states around the world, and the opposition to commercial sealing has been a significant concern for EU citizens for decades.
- *The EU measures are "necessary" to protect public morals:* Public concern about animal welfare and commercial seal hunting and trade in particular is well-entrenched in the EU and elsewhere, demonstrating the importance of this concern. The EU measures are designed to ensure that EU market demand does not provide an incentive for commercial seal hunting, and the closure of the EU market has saved thousands of seals from an inhumane death. This materially contributes to the measures' objectives. Although the measures are trade restrictive, there are no less trade-restrictive alternatives that would achieve the level of protection sought by the EU given that commercial seal hunting is inherently inhumane.

### ***1. The EU Measures at Issue Have a Public Morals Objective***

151. The first step in the analysis under GATT Article XX(a) is to identify the moral concern, and then consider the link between the measures at issue and the protection of such moral concern.<sup>216</sup> In other words, the question to be answered is whether the measure has a public morals objective that falls within the scope of GATT Article XX(a). If so, the second step becomes whether the measures "are necessary" to protect that policy objective.<sup>217</sup>

152. The moral issue in this dispute is the EU public's concern about the excessive pain and suffering endured by seals as a result of the inherently inhumane conditions of the commercial seal hunt, and its concern about the role of the EU in this trade and the consequent contribution to such pain and suffering, as well as its very confrontation with, and exposure to, the products of that needless suffering and pain.

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<sup>215</sup> This brief will focus on the public morals aspects of the prohibition element of the EU measures. *Amici* defer to the EU submission for further discussion of how the exemptions also fall within the EU's public morals objective.

<sup>216</sup> See Panel Report, *China – Audiovisuals*, WT/DS363/R at para. 7.750.

<sup>217</sup> See Panel Report, *US – Gambling*, WT/DS235/R at para. 6.474, 6.478 (order of analysis not questioned on appeal); Panel Report, *China – Audiovisuals*, WT/DS363/R at paras. 7.750, 7.781

153. As set out below, this concern is well-documented in EU policy, legislation, and through public opinion polls and fits squarely within the type of policy objectives GATT Article XX(a) is intended to cover. Moreover, the moral concern is reflected in the objective of the EU Measures, as evidenced by the extensive legislative history, as well as statements in the EU Regulation itself.

a. The Public Morals Purpose and Objective of the EU Measures is Deep-Rooted, Reflecting and Representing Fundamental and Long-Standing Moral Concerns of EU Citizens

154. The protection of animals is well-entrenched in the policy and legislation of the EU and its Members. The first animal protection law in the world was passed in England and Wales in 1822.<sup>218</sup>

155. As for the EU itself, there are over 30 different instruments aimed at improving animal welfare under the existing body of EU law which has been built up since the first regulation on improving slaughter was adopted in 1974.<sup>219</sup> In addition to applying and, where needed, implementing EU law in national law, all of the 27 EU Member States have also passed legislation addressing animal cruelty and suffering as well as setting minimum standards for animal welfare in other areas not covered by the *acquis*.<sup>220</sup>

156. Animal welfare is also recognized in Article 13 of the *Treaty on the Functioning of the European Union* (TFEU), as amended most recently by the Lisbon Treaty. Article 13 states that:

In formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.<sup>221</sup>

157. Animal welfare is also an objective reflected in numerous pieces of EU legislation, including: Council Directive 1099/2009 on the protection of animals at the time of killing;<sup>222</sup> Regulation (EC) No 1523/2007 banning the trade in cat and dog fur;<sup>223</sup>

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<sup>218</sup> See BBC Ethics Guide, *Animal Welfare Law in the UK*, courtesy of RSPCA, available at: [http://www.bbc.co.uk/ethics/animals/defending/legislation\\_1.shtml](http://www.bbc.co.uk/ethics/animals/defending/legislation_1.shtml) (“The United Kingdom was the first country in the world to implement laws protecting animals. In 1822 an Act to Prevent the Cruel and Improper Treatment of Cattle was passed by Parliament.”)

<sup>219</sup> See Wilkins, D. (ed.) *Animal welfare in Europe: European legislation and concerns*. London: (Kluwer International Law, 154-160 (1997), relevant pages attached hereto as Exhibit 11

<sup>220</sup> See e.g., Romania’s Animal Protection Law (Law 205), Czech Republic’s Law Against Cruelty to Animals (Law 246); Poland’s Animal Protection Act of 1997.

<sup>221</sup> See *The EU and Animal Welfare: Policy Objectives*, Europa, available at: [http://ec.europa.eu/food/animal/welfare/policy/index\\_en.htm](http://ec.europa.eu/food/animal/welfare/policy/index_en.htm).

<sup>222</sup> See Council Directive 1099/2009 on the Protection of Animals at the Time of Killing (OJ L 303, 18.11.2009, p. 1-30). This Directive replaced Council Directive 93/119/EC on the Protection of Animals at the Time of Slaughter or Killing OJ L 340 of 31.12.1993).

Cosmetics Regulation Directive 1223/2009;<sup>224</sup> Council Directive 98/58/EC of 20 July 1998 concerning the protection of animals kept for farming purposes; Regulation (EC) No. 882/2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules; and Regulation (EEC) 3254/91 prohibiting the use of leghold traps.<sup>225</sup>

158. On the policy level, the Communication from the Commission to the European Parliament and the Council on a Community Action Plan on the Protection and Welfare of Animals 2006-2010 also provides for “promot[ing] high animal welfare standards in the EU and at the international level ... ” and “[e]nsuring that animal keepers/handlers as well as the general public are more involved and informed on current standards of animal protection and welfare and fully appreciate their role in promoting animal protection and welfare.”<sup>226</sup> The most recent animal welfare action plan for 2012-2015 contains similar action items.<sup>227</sup>

159. Further, in reviewing the EU Sustainable Development Strategy, the Council of the European Union identified continuing to promote animal health and welfare standards in the EU and abroad as an action item.<sup>228</sup> The EU Animal Health Strategy of 2007-2013 also recognizes that animal health encompasses “the critical relationship between the health of animals and their welfare.”<sup>229</sup>

160. Animal welfare in the context of public morals is also recognized in judicial decisions of international courts. For example, in appeals proceedings before the European Court of Human Rights<sup>230</sup> in a case involving the 2004 UK Hunting Act, following a similar decision by the UK’s House of Lords, the Court found that:

[T]he measures served the legitimate aim of the [*sic*] “the protection of

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<sup>223</sup> See Regulation (EC) No 1523/2007 of the European Parliament and of the Council of 11 December 2007 banning the placing on the market and the import to, or export from, the Community of cat and dog fur, and products containing such fur (OJ L 343/1 of 27.12.2007).

<sup>224</sup> See Regulation (EC) No 1223/2009 of the European Parliament and of the Council 30 November 2009 on cosmetic products, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:342:0059:0209:en:PDF>.

<sup>225</sup> See Council Regulation (EEC) No 3254/91 of 4 November 1991 prohibiting the use of leghold traps in the Community and the introduction into the Community of pelts and manufactured goods of certain wild animal species originating in countries which catch them by means of leghold traps or trapping methods which do not meet international humane trapping standards, OJ L 308, 09/11/1991 P. 0001 – 0004.

<sup>226</sup> See *Communication from the Commission to the European Parliament and the Council on a Community Action Plan on the Protection and Welfare of Animals 2006-2010* {SEC(2006) 65}, COM/2006/0013 final.

<sup>227</sup> See *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/2 (15.2.2012), available at: [http://ec.europa.eu/food/animal/welfare/actionplan/docs/aw\\_strategy\\_19012012\\_en.pdf](http://ec.europa.eu/food/animal/welfare/actionplan/docs/aw_strategy_19012012_en.pdf).

<sup>228</sup> See *Review of the EU Sustainable Development Strategy*, Council of the European Union, 10117/06, 9 June 2006 at 15.

<sup>229</sup> See *A New Animal Health Strategy for the European Union (2007-2013) (Prevention is Better Than Cure)* at 8, available at: [http://ec.europa.eu/food/animal/diseases/strategy/docs/animal\\_health\\_strategy\\_en.pdf](http://ec.europa.eu/food/animal/diseases/strategy/docs/animal_health_strategy_en.pdf).

<sup>230</sup> “The European Court of Human Rights is an international court set up in 1959. It rules on individual or State applications alleging violations of the civil and political rights set out in the European Convention on Human Rights.” See [http://www.echr.coe.int/NR/rdonlyres/DF074FE4-96C2-4384-BFF6-404AAF5BC585/0/Brochure\\_en\\_bref\\_EN.pdf](http://www.echr.coe.int/NR/rdonlyres/DF074FE4-96C2-4384-BFF6-404AAF5BC585/0/Brochure_en_bref_EN.pdf).

... morals,” in the sense that they were designed to eliminate the hunting and killing of animals for sport in a manner which the legislature judged to cause suffering and to be morally and ethically objectionable. As to the question of the necessity and proportionality of the measures, the Court recalls that, by reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of those moral and ethical requirements as well as on the “necessity” of a “restriction” intended to meet them. Furthermore, a wider margin of appreciation must be accorded to State authorities in regulating a particular assembly the further that assembly moves from one of a political character to one of a purely social character. The Court notes that the legislative measures in question in the present case were very recently introduced after extensive debate by the democratically-elected representatives of the State on the social and ethical issues raised by the method of hunting in question. Having regard to the nature and limited scope of any interference with the rights guaranteed by Article 11, the Court finds that the measures may be regarded as falling within the margin of appreciation enjoyed by the State and as being proportionate to the legitimate aim served thereby.<sup>231</sup>

161. Moreover, animal welfare as a public concern is the basis for laws in numerous other countries worldwide, *including Canada*.<sup>232</sup> In 1987, Canada itself banned trade in whitecoat and blueback seals.<sup>233</sup> The Malouf Report by the Royal Commission on Seals and the Sealing Industry in Canada,<sup>234</sup> laid the groundwork for Canada’s ban on trade in whitecoat and blueback seals.<sup>235</sup> The Report explained that Canada’s “approach to seals and sealing has also evoked public interest in a number of other countries and given rise to actions which have had important impacts on Canadian international trade and, on occasion, threatened Canada’s image in other countries.”<sup>236</sup> It went on to say that a “renewal of large scale commercial hunting of seal pups would make sealing once again a matter of divisive public controversy.”<sup>237</sup> Following the report, Canada banned the *trade*<sup>238</sup> in whitecoats and bluebacks.<sup>239</sup> While the

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<sup>231</sup> *Friend v. UK* (Applications No. 16072/06 and 27809/08), ECHR (4th Session), 24 Nov 2009, para. 50, (upholding the UK’s ban of the hunting of certain wild mammals with dogs was where the regulation was introduced after “extensive debate” by the legislature and where the regulation is proportionate to its purported objectives) (emphasis added).

<sup>232</sup> See Exhibit 12, attached hereto, detailing a non-exhaustive list of other countries’ laws based on animal welfare concerns.

<sup>233</sup> See Section 27 of Canada’s MMRs (Prohibitions) (“No person other than a beneficiary shall sell, trade or barter a whitecoat or blueback.”)

<sup>234</sup> See *Report by the Royal Commission on Seals*, <http://epe.lac-bac.gc.ca/100/200/301/pco-bcp/commissions-ef/malouf1986-ef/malouf1986-eng.htm>.

<sup>235</sup> See *Her Majesty The Queen v. Ford Ward*, 2002 SCC 17 at para. 8 (October 31, 2002, available at: <http://scc.lexum.org/en/2002/2002scc17/2002scc17.html>).

<sup>236</sup> See *Report by the Royal Commission on Seals*, Vol. I at Foreward.

<sup>237</sup> See *id.*

<sup>238</sup> Canada chose to ban the trade, not the killing of these seals, since it is hard to distinguish bluebacks from other seals in the water. This means that a ban just on the killing may have still resulted in bluebacks being killed. However, a ban on the trade would curtail the commercial harvest of bluebacks and whitecoats altogether.

reasoning was not so much to spare seals and avoid their inhumane killing as to protect its fisheries markets, the Canadian trade ban had the dual purpose of responding to public concerns.

162. Other countries have also enacted laws on animal welfare and public morals grounds. For example, the United States banned the trade of dog and cat fur products on the basis that said products are “ethically and aesthetically abhorrent to United States citizens.”<sup>240</sup> Australia, New Zealand and Switzerland have adopted similar laws. In addition, Chinese Taipei banned the sale of dog meat on animal welfare grounds.<sup>241</sup> Many countries also have broad legislation protecting animal welfare.<sup>242</sup>

163. Notably, animal welfare has been a long-standing concern of the EU public in the precise context of commercial seal hunting. For example, the Commission banned the importation of skins of seal pups in 1983.<sup>243</sup> Reports prepared by the relevant European Parliament Committees in the lead up to the Seal Pup Directive revealed two primary objectives: conservation of seal populations and stopping the slaughtering of young harp and hooded seals in a “barbaric manner.”<sup>244</sup>

164. The Directive was considered temporary in nature while the Commission prepared a report on the conservation status of the two seal species concerned and on the development of markets for Inuit produced sealskins and other sealskins not affected by the Directive.<sup>245</sup> In March 1988 the Commission submitted the report to the Council. In October of 1988, prior to the vote on whether to extend the Directive, 324 Members of the European Parliament signed a written declaration calling on the

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<sup>239</sup> The ban became the subject of a Canadian Supreme Court case. *See Her Majesty the Queen v. Ford Ward*, 2002 SCC 17 at para. 20-24, available at: <http://scc.lexum.org/en/2002/2002scc17/2002scc17.html>. There, the court explained that public opposition to the seal hunt was threatening the viability of Canada’s seal fishery and fishery industry in general, and that a ban on the trade in these seals would protect Canadian markets for fish products abroad. Indeed, the EU ban on trade in bluebacks and whitecoats had gone into effect several years earlier, in 1983 (and renewed in 1985), and reportedly “destroyed the traditional markets for Canadian seal products and threatened to spread to other fish products, including canned fish.” *Id.* at para. 8,

<sup>240</sup> Dog and Cat Protection Act of 2000, 19 U.S.C. § 1308 (2000), available at [http://www.globallabourrights.org/admin/documents/files/WILD\\_Dog\\_Cat\\_Protection\\_Act.pdf](http://www.globallabourrights.org/admin/documents/files/WILD_Dog_Cat_Protection_Act.pdf); see Exhibit 12, attached hereto, detailing a non-exhaustive list of other countries’ laws based on animal welfare concerns.

<sup>241</sup> See Exhibit 12, attached hereto, detailing a non-exhaustive list of other countries’ laws based on animal welfare concerns.

<sup>242</sup> See, e.g., U.S. Animal Welfare Act, 7 USC 2131 - 2159, available at <http://www.animallaw.info/statutes/stusawa.htm>; Australia’s Prevention of Cruelty to Animal’s Act of 1977, available at <http://www.animallaw.info/nonus/statutes/staupreventionofcruelty1979NSW.htm>; Chinese Taipei’s Animal Protection Law, available at <http://www.animallaw.info/nonus/statutes/sttwapl1998.htm>; Japan’s Law No 105, October 1, 1973, concerning the Protection and Control of Animals, available at <http://www.animallaw.info/nonus/statutes/stjp1973law105.htm>.

<sup>243</sup> See 1983 Seal Pup Directive and subsequent amendments, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31983L0129:EN:HTML>.

<sup>244</sup> See e.g., Letter from Senator Royce Frith, Chairman, Canada/Europe Parliamentary Association, Canadian Senate, to Sir John Stewart-Clark, Chairman, Delegation of the European Parliament for Relations with the Parliament of Canada (c/o the Directorate General for Committees and Inter-Parliamentary Delegations, European Parliament), January 19, 1982, attached hereto as Exhibit 13.

<sup>245</sup> See 1983 Seal Pup Directive and subsequent amendments, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31983L0129:EN:HTML>.

Commission to renew the ban on skins of certain seal pups *indefinitely*.<sup>246</sup> According to the notice from the European Parliament Intergroup on Animal Welfare:

Never in the entire history of the European Parliament have so many Members supported a Rule 65 written declaration. 259 votes is needed for a Rule 65 declaration to become the official opinion of the European Parliament. The previous record stood at 303 for a written declaration concerning the right of EC citizens to stand for election anywhere in the Community. Even among the Rule 63 motions for resolution introduced by individual Members there has never been such an overwhelming vote.<sup>247</sup>

165. In 1989, the indefinite extension of the Directive was adopted through Council Directive 89/370/EEC of 8 June 1989. Thus, animal welfare considerations have long been part of the objectives for EU policy and legislation, including laws dealing specifically with trade in seal products. Indeed, this is not surprising given the long history of public concern over commercial seal hunting.

166. As outlined earlier in the Factual Background Section, and in Exhibit 1, documented public opposition to commercial seal hunting dates back to the 1950s. In the subsequent decades, concern over the cruelty of the seal hunt and its impact on seal populations drove numerous public protests about the seal hunt, campaigns against commercial seal hunting, and boycotts on Canadian seafood products. These concerns translated into political action, beginning in 1972 with the U.S. ban on marine mammal products, including seal products. Since then, numerous countries have adopted regulations concerning commercial seal hunting, and trade in seal products. These include Mexico, Croatia, Russia, Belgium, Netherlands, Russia, Kazakhstan, Belarus, Chinese Taipei, and the European Union (for a full listing, see Exhibit 15).

167. Other countries are moving towards legislation that would ban the trade in seal products on animal welfare grounds. For example, the Senate Commission in Switzerland is scheduled to vote on a June 2011 proposal of the National Council to ban seal product trade.<sup>248</sup> The bill is based largely on animal welfare concerns following an opinion poll conducted in Switzerland in 2011 that showed that 89% of respondents were critical of or outright reject the trade in seal products.<sup>249</sup>

b. The Legislative History of the EU Measures at Issue in this Dispute Supports the Public Morals Objective

168. As calls were made for an EU-wide measure that would go further than the 1983 Directive (83/129/EEC), prohibiting the import of products solely from newborn harp

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<sup>246</sup> See *Record Vote in European Parliament*, Intergroup on Animal Welfare (Brussels, 18 October 1988), attached here to as Exhibit 14.

<sup>247</sup> See *Record Vote in European Parliament*, Intergroup on Animal Welfare (Brussels, 18 October 1988) (emphasis added), attached here to as Exhibit 14.

<sup>248</sup> See *Curia Vista, Objets parlementaires*, [http://www.parlament.ch/f/suche/pages/geschaefte.aspx?gesch\\_id=20113635](http://www.parlament.ch/f/suche/pages/geschaefte.aspx?gesch_id=20113635).

<sup>249</sup> See Press Release of Fondation Franz Weber (28 March 2011) [http://www.ffw.ch/index.php?id=95&no\\_cache=1&L=1&tx\\_ttnews\[pS\]=1341213250&tx\\_ttnews\[pointer\]=9&tx\\_ttnews\[tt\\_news\]=134&tx\\_ttnews\[backPid\]=93&cHash=c25d2be686](http://www.ffw.ch/index.php?id=95&no_cache=1&L=1&tx_ttnews[pS]=1341213250&tx_ttnews[pointer]=9&tx_ttnews[tt_news]=134&tx_ttnews[backPid]=93&cHash=c25d2be686).

and hooded seal pups (whitecoats and bluebacks) into the EU, EU Member states were enacting their own measures. In 2006, Italy suspended its trade in sealskins and derived products, and the German Parliament voted unanimously in favour of a ban on seal product trade. In 2007, the Austrian Parliament voted unanimously in favour of a motion to ban seal product trade, and Belgium and the Netherlands enacted bans on seal products trade.<sup>250</sup>

169. The European Commission made a proposal in 2008 to prohibit the placing on the market of seal products in the EU.<sup>251</sup> The proposal explained that:

The hunting of seals has led to expressions of serious concerns by members of the public, governments as well as the European Parliament sensitive to animal welfare considerations since there are indications that seals may not be killed and skinned without causing avoidable pain, distress and other forms of suffering. The European Food Safety Authority concluded, in its scientific opinion on the Animal Welfare aspects of the killing and skinning of seals, that it is possible to kill seals rapidly and effectively without causing them avoidable pain or distress, whilst also reporting that in practice, effective and humane killing does not always happen.<sup>252</sup>

170. The Commission proposal outlined a general ban on seal products trade with derogations for products that could meet certain animal welfare criteria and products from indigenous hunts conducted for subsistence purposes.<sup>253</sup> The European Parliament agreed that a measure must be taken to address public concerns, but rejected the notion of, and hence the derogation for, purportedly humanely harvested seal products based on the observation, reflected in scientific literature that:

Commercial seal hunts are inherently inhumane because humane killing methods cannot be effectively and consistently applied in the field environments in which they operate. Moreover, seal hunts occur in remote locations, and are conducted by thousands of individuals over large, inaccessible areas, making effective monitoring of seal hunting impossible. As such only a comprehensive ban without the derogation drafted by the Commission would meet citizens' demands to see an end to the trade in seal products.<sup>254</sup>

171. The ultimate language adopted by the European Parliament and Council in EC No. 1007/2009 is thus fundamentally based on the public moral policy objective shared by all three main organs of the EU (Council, Parliament, Commission). In its design as a

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<sup>250</sup> See *supra* Section on Legislative History for more detail.

<sup>251</sup> See Proposal for a Regulation of the European Parliament and of the Council concerning trade in seal products (COM 2008) 469 final, 23 July 2008 (hereinafter "Commission Proposal"), available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0469:FIN:EN:PDF>.

<sup>252</sup> See Commission Proposal, (COM 2008) 469 final at Recital 3 (emphasis added), available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0469:FIN:EN:PDF>.

<sup>253</sup> See Commission Proposal, (COM 2008) 469 final at Recitals 5 and 10, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0469:FIN:EN:PDF>.

<sup>254</sup> See European Parliament, Session Document A6-0118/2009 at p. 22 (Word Version), available at: <http://www.europarl.europa.eu/sides/getDoc.do?language=EN&reference=A6-0118/2009> (emphasis added).

comprehensive sales ban, it reflects the recognition that the inherent conditions of the commercial seal hunt make the adherence to humane killing methods as well as their enforcement with any degree of efficiency and consistency impossible (or at least extremely difficult).<sup>255</sup>

172. There can be no doubt that the three EU organs thereby reflect the moral convictions of an overwhelming majority of EU citizens whom they represent democratically: the Parliament being directed elected; the Council being a body composed of the elected governments of the 27 Member States; and the Commission members being selected/confirmed by the former two.

173. In sum, the final EU Measures were adopted through transparent and open democratic process through institutions with Members elected by European citizens, and supported by large majorities in both Parliament and the EU Council.

c. The Plain Language of the EU Measures Supports a Public Morals Objective

174. In line with the legislative history of the measure, the EU Regulation specifies in the recitals that, among other things:

Recital (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.

Recital (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.... 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....

Recital (11) Although it might be possible to kill and skin seals in such a way as to avoid unnecessary pain, distress, fear or other forms of suffering, given the conditions in which seal hunting occurs, consistent verification and control of hunters' compliance with animal welfare requirements is not feasible in practice or, at least, is very difficult to achieve in an effective way, as concluded by the European Food Safety Authority on 6 December 2007.

Recital (12) It is also clear that other forms of harmonised rules, such as labelling requirements, would not achieve the same result....<sup>256</sup>

175. When read together with the legislative history, the purpose/objective of the EU Regulation can be summarized as follows:

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<sup>255</sup> See European Parliament, Session Document A6-0118/2009 at p. 22 (Word Version); available at: <http://www.europarl.europa.eu/sides/getDoc.do?language=EN&reference=A6-0118/2009>.

<sup>256</sup> See EU Regulation (EC) No. 1007/2009 at Recitals 4, 10, 11, and 12 (emphasis added).

(1) it endorses the fundamental rationale of, and thereby harmonises EU-wide, the earlier legislative initiatives by several EU Member States stemming from the broad-based public concern about the animal welfare aspects of commercial seal hunting, and the unwillingness of EU consumers to contribute to the seal products trade/demand for seal products; and

(2) it is the only measure sufficient to achieve the level of protection sought by EU legislators to protect such public concern, given the inherently inhumane characteristics of the commercial seal hunt and the inability of alternative measures to obtain the same results.

176. As pointed out in the EU's submission, this objective and purpose is consistent with the other elements of the EU measures, including the exemptions.

d. Public Opinion Polls Confirm the Purpose and Objective of the EU Measures

177. As seals are sentient beings capable of experiencing suffering,<sup>257</sup> and, indeed, suffering on a massive scale necessarily results from commercial seal hunting, people around the world have long opposed the commercial seal hunt on ethical grounds. The trade in seal fur products has drawn intense opposition by EU citizens in particular, leading to the imposition of the Regulation. The results of several opinion polls, pre-dating and post-dating the EU Regulation, demonstrate the will of EU citizens on this matter.

178. The moral concerns of the EU public are confirmed by opinion polls conducted in 2006 to 2008 prior to the enactment of the EU measures in the United Kingdom, Germany, the Netherlands, Portugal, Belgium, France, Slovenia, Austria, Sweden and the Czech Republic. All of these polls reflect widespread support for a ban on seal products trade.<sup>258</sup>

179. The Commission also conducted a consultation in 2008 prior to entry into force of the EU Regulation. The results of the consultation are not limited to EU respondents, but are telling of the shared concern over animal welfare given that 73,153 respondents from over 160 countries provided information:

- A majority of respondents (56.6%) state that wild animals should not be killed for human use.<sup>259</sup>
- "A majority of the respondents (63.7%) regard seal hunting to be different from making use of other natural resources. A clear majority of these (87.4%) state the reason to be that 'hunting seals to use for fur and other non-essential products is not justified'."<sup>260</sup>

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<sup>257</sup> See Lavigne, DM, and Lynn, WS, *Canada's Commercial Seal Hunt, Its More Than a Question of Humane Killing*, *Journal of Animal Ethics* 1 (1):1-5 (2011).

<sup>258</sup> See EU First Written Submission (FWS) at para. 192 and Exhibit EU-58.

<sup>259</sup> See *COWI Assessment of the Potential Impact of a Ban of Products Derived from Seal Species*, European Commission, DG Environment, at p. 125 (April 2008) (COWI Report (2008)).

<sup>260</sup> See *COWI Report (2008)*, at p. 125.

- “66.7% of the respondents state that all use of seal products is unacceptable.”<sup>261</sup>
- “The consultation shows that a very significant majority of the respondents want a ban on the placing on the market of seal product.”<sup>262</sup>

180. Notably, an opinion poll conducted in Canada in 2008 found that the majority of Canadians oppose Canada’s commercial seal hunt and support the right of WTO Members to restrict the importation of seal products.<sup>263</sup> That poll also found that the majority of Canadian citizens opposed Canada’s WTO challenge to the Belgium and Dutch bans on seal products, feel it is a waste of taxpayer dollars to promote and defend the seal hunt, and would like to see a phasing out of this industry.<sup>264</sup>

181. Importantly, a multi-country poll conducted by Ipsos MORI in the EU almost two years after the EU Regulation entered into force shows that the majority of people surveyed (on average, nearly three in four adults) across 11 EU countries support the EU ban on seal products.<sup>265</sup>

182. That poll also found that:

Over seven in ten adults (72%) across the 11 European countries surveyed say they support the EU’s ban on the sale of seal products in Europe. The overall ratio of support to opposition across the 11 countries is over 5:1. While the results vary from country to country, they clearly show that the majority of the general public in these European countries supports the EU ban.<sup>266</sup>

183. In sum, all of the foregoing evidence strongly supports a finding that the objective and purpose of the EU measures is to protect a well-entrenched public morals concern regarding commercial seal hunting and trade in seal products resulting from commercial hunts.

## 2. *The EU Measures Fit Squarely Within the Scope of GATT Article XX(a)*

<sup>261</sup> See *COWI Report (2008)*, at p. 126.

<sup>262</sup> See *COWI Report (2008)*, at p. 127 (emphasis added).

<sup>263</sup> See IFAW Technical Bulletin 2008-02 (11 July 2008) (detailing the results of a poll conducted by Environics Research in Canada regarding the commercial seal hunt) *available at*: [http://www.ifaw.org/sites/default/files/2008\\_Canadian%20public%20opinion%20on%20a%20european%20trade%20ban%20on%20seal%20products%20and%20the%20federal%20government%20support%20for%20canada%27s%20commercial%20seal%20hunt.pdf](http://www.ifaw.org/sites/default/files/2008_Canadian%20public%20opinion%20on%20a%20european%20trade%20ban%20on%20seal%20products%20and%20the%20federal%20government%20support%20for%20canada%27s%20commercial%20seal%20hunt.pdf).

<sup>264</sup> *Id.*

<sup>265</sup> For more details, see: [http://www.hsi.org/assets/pdfs/seals\\_europe\\_poll\\_ipsos\\_mori\\_14july2011.pdf](http://www.hsi.org/assets/pdfs/seals_europe_poll_ipsos_mori_14july2011.pdf), [http://www.hsi.org/world/europe/news/releases/2011/07/eu\\_poll\\_supports\\_ban\\_071411.html](http://www.hsi.org/world/europe/news/releases/2011/07/eu_poll_supports_ban_071411.html), attached hereto as Exhibit 16. The poll was commissioned by nine NGOs (HSI, IFAW, RSPCA, Eurogroup for Animals, WSPA, LAV, BVD, GAIA, and FFW). The countries included were: Belgium, France, Germany, Great Britain, Italy, Lithuania, Netherlands, Poland, Romania, Spain, Sweden.

<sup>266</sup> See *id.*

184. Once the public morals objective has been identified, the next step of the analysis is to determine whether such objective fits within the scope of policies GATT Article XX(a) is designed to address. Although WTO panels or the Appellate Body have so far not yet considered this question in the context of animal welfare, there can be no doubt that this objective falls within the scope of Article XX(a), not least because Members enjoy wide latitude to define the concept of public morals in accordance with their views, traditions, and convictions.
185. Indeed, the WTO Appellate Body has stated that Members have the right to “determine the level of protection they consider appropriate .... Members should be given some scope to define and apply for themselves the concepts of ‘public morals’ and ‘public order’ in their respective territories, according to their own systems and scales of values.”<sup>267</sup> For instance, the United States’ prohibition on gambling and betting services in *US — Gambling* was considered a measure to protect public morals because it addressed threats of “money laundering, organized crime, fraud and risks to children ... and health.”<sup>268</sup>
186. The Appellate Body in *China — Audiovisuals* followed the interpretation of “public morals” adopted in the *US — Gambling* in holding that China’s measures regulating the trade of reading materials and audiovisual products could fall within the scope of public morals.<sup>269</sup>
187. In the recent *US — Tuna* dispute, the Panel examined a measure with a primary purpose that included dolphin protection. The Panel stated that a measure aimed at protecting animal life or health need not be “directed exclusively to endangered or depleted species or populations, to be legitimate.”<sup>270</sup> It went on to say that because animal life and health is listed in TBT Article 2.2 in general terms, animal protection does not have to be tied to a “broader conservation objective” and therefore, Members can “pursue policies that aim at also protecting individual animals or species whose sustainability as a group is not threatened.”<sup>271</sup> Lastly, the Panel made the point that the U.S. legislation is not illegitimate simply because its focus is dolphins and not other species.<sup>272</sup> Although these observations were made in the context of “animal health” under Article 2.2 of the TBT Agreement, they nevertheless provide instructive illustration in the context of the EU measures at issue here that relate to animal welfare and protection. First, the ruling underscores the fact that the protection of animal health (and hence similarly animal welfare as such) is not an abstract exercise involving numbers, species or populations, but an approach that focuses on the individual animal. Second, it underlines that Members are free to focus their attention on those animals they care about, if they so choose. If this is true in the arguably more “objective” context of “animal health,” it applies *a fortiori* in the context of animal welfare within the concept of “public morals,” which in its application is by definition fundamentally rooted in a society’s subjective convictions and beliefs.

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<sup>267</sup> See Panel Report, *US — Gambling*, WT/DS/285/R at para. 6.6.461 (not reviewed on appeal).

<sup>268</sup> See Panel Report, *US — Gambling*, WT/DS/285/R at paras. 6.484-6.487.

<sup>269</sup> See Panel Report, *China — Audiovisuals*, WT/DS363/R at paras. 7.759, 7.911.

<sup>270</sup> See Panel Report, *US — Tuna*, WT/DS381/R at para. 7.437 (not an issue on appeal).

<sup>271</sup> See Panel Report, *US — Tuna*, WT/DS381/R at para. 7.437 (emphasis added) (not an issue on appeal).

<sup>272</sup> See Panel Report, *US — Tuna*, WT/DS381/R at para. 7.442 (not an issue on appeal).

188. Finally, while the exact reach of the concept of “public morals” may remain open to discussion, it is clear that animal welfare, or the human concern for it, is seen by many societies as forming part of general public morals; in fact, already within early discussions on the inclusion of “public morals” clauses in international treaties animal welfare figured prominently as an example frequently brought forward to illustrate what such clauses would encompass.<sup>273</sup>

189. As shown, the EU regards animal welfare as an important public moral concern; with the animal welfare aspects of commercial sealing/trade in commercial seal products in particular a significant concern for both the EU public and political institutions for decades. Given the latitude WTO Members have to define what constitutes “public morals” in their territories, and given the emphasis that the EU places on animal welfare as a matter of public morals, there is no reason to depart from the reasoning in *US – Gambling and China – Audiovisuals*. Thus, we urge the Panel to find that animal welfare as a public moral concern fits squarely within the scope of GATT Article XX(a).

### 3. *The Measures are “Necessary” to Protect Public Morals*

190. The last step in determining whether a measure satisfies the requirements of GATT Article XX(a) involves an examination of whether the measure is “necessary to protect public morals.”

191. Ever since *Korea – Beef*, the Appellate Body has held that an assessment of “necessity” in the context of GATT Article XX/GATS Article XIV involves a process of “weighing and balancing” a number of factors.<sup>274</sup> This balancing test is as follows:

First, there is an assessment of the relative importance of the interests or values being pursued.<sup>275</sup>

Second, there is an assessment of the contribution of the measure to the realization of the ends pursued, which could be compliance with a regulation or law. The greater the contribution, the more the measure is “necessary.”<sup>276</sup>

Third to be evaluated is the trade-restrictiveness, i.e., the restrictive effect of the measure on international commerce.<sup>277</sup>

Finally, if analysis of the above three factors ‘yields a preliminary conclusion’ that a measure is necessary, then the necessity of the measure must be ‘confirmed’ by comparing the measure with possible alternatives, in the light of the importance of the interests or values at stake.<sup>278</sup>

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<sup>273</sup> See Charnovitz, *The Moral Exception in Trade Policy*, 38 Virginia Journal of International Law 689, who finds ample traces in pre-GATT and post-GATT national legislation and treaties dealing with animal welfare.

<sup>274</sup> See Appellate Body Report, *US – Gambling*, WT/DS285/ABR at paras. 306-308.

<sup>275</sup> See Appellate Body Report, *US – Gambling*, WT/DS285/ABR at para. 307.

<sup>276</sup> See Appellate Body Report, *Korea – Beef*, WT/DS161/AB/R at para 163.

<sup>277</sup> See Appellate Body Report, *China – Audiovisuals*, WT/DS363/AB/R at para 300.

<sup>278</sup> See Appellate Body Report, *China – Audiovisuals*, WT/DS363/AB/R at para. 241 citing Appellate Body Report, *Brazil – Retreaded Tyres*, WT/DS332/AB/R at para. 178.

192. Thus, there will first be a weighing and balancing of relevant factors, the results of which will be confirmed by “comparing the measure with possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective.”<sup>279</sup> Each of these factors will be reviewed in turn below.

a. The Importance of the Interests or Values Furthered by the Measures

193. In *Korea – Beef*, the Appellate Body reasoned that a measure is more likely to be considered necessary based on how vital or important the objective of the measure is considered.<sup>280</sup> Public morals have been found to be “among the most important values or interests pursued by members as a matter of public policy.”<sup>281</sup> Indeed, the Panel in *China – Audiovisuals* stated that it was not “an accident that the exception relating to public morals is the first exception identified in the ten paragraphs of Article XX. We therefore concur that the protection of public morals is a highly important value or interest.”<sup>282</sup>

194. Not only does this case involve public morals, but it involves a moral concern that is shared by numerous countries and cultures, and one that the European public has placed considerable emphasis on protecting, as explained in detail above.<sup>283</sup>

195. For these reasons, the conclusions of the Appellate Body in *China – Audiovisuals* on this point should apply equally in this dispute.

b. Contribution of the Measures to the Realization of the Ends Pursued

196. To assess the contribution of a measure to a particular objective, the Appellate Body in *Korea – Beef* indicated that “the word ‘necessary’ is not limited to that which is ‘indispensable.’”<sup>284</sup> The Appellate Body in *Brazil – Tyres* went on to say that the more restrictive the effect on commerce, the more the measure needs to make a *material* contribution to the achievement of the objective.<sup>285</sup> The Appellate Body also explained that panels enjoy some latitude in determining how to analyse the contribution of the measures to the ends pursued, and this can be done on a quantitative or qualitative basis.<sup>286</sup>

197. The Appellate Body in *China – Audiovisuals* explained that the contribution of the measure to the ends pursued can be confirmed through data or evidence pertaining to the past or the present, and that “in examining the evidence put forward, a panel must always assess the actual contribution made by the measure to the objective

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<sup>279</sup> See Appellate Body Report, *China – Audiovisuals*, WT/DS363/AB/R at para. 241.

<sup>280</sup> See Appellate Body Report, *Korea – Beef*, WT/DS161/AB/R at para. 162.

<sup>281</sup> See Panel Report, *China – Audiovisuals*, WT/DS363/R at para. 7.817 (upheld by Appellate Body).

<sup>282</sup> See Panel Report, *China – Audiovisuals*, WT/DS363/R at para. 7.817 (upheld by Appellate Body).

<sup>283</sup> It bears mentioning that animal welfare and animal life and health are closely related subjects, and in the *Shrimp – Turtle* and *Brazil – Tyres* disputes, the objective of animal life and health was considered important. See, e.g., Panel Report, *Brazil – Tyres*, WT/DS332/R at para. 7.112 (not reviewed by Appellate Body).

<sup>284</sup> See Appellate Body Report, *Korea – Beef*, WT/DS161/AB/R at para. 161.

<sup>285</sup> See Appellate Body Report, *Brazil – Tyres*, WT/DS332/AB/R at para. 150.

<sup>286</sup> See Appellate Body Report, *Brazil – Tyres*, WT/DS332/AB/R at para. 146-147.

pursued.”<sup>287</sup> This is consistent with the reasoning in *Brazil — Tyres* where the Appellate Body “explained that a panel is not bound to find that a measure does not make a contribution to the objective pursued merely because such contribution is not ‘immediately observable’ or because, ‘[i]n the short-term, it may prove difficult to isolate the contribution [made by] one specific measure from those attributable to the other measures that are part of the same comprehensive policy.’”<sup>288</sup>

198. In this dispute, the objective of the EU measures is to address the moral concern of EU citizens that commercial seal hunting may be conducted in a way that causes excessive pain, distress or other types of suffering, as well as their opposition to contributing to the demand for, and trade in, seal products and to being confronted with the fruits of that immoral activity in their daily lives. The EU measures do not regulate hunting within the EU or outside of the EU, nor do they affect consumption of seal products outside of EU jurisdiction. Rather, the EU measures operate as a prohibition on commercial seal products being “placed on the market” in the EU.

199. By prohibiting the sale and marketing of commercial seal products in the EU, the EU measures directly and fully address the EU public’s concern about contributing to the trade in seal products and about being confronted with the products resulting from the inherently inhumane activity of commercial sealing.

200. The EU measures also have the effect of sparing thousands of seals from pain and suffering associated with the commercial seal hunt. The closure of the EU market to commercial seal products means that there are fewer customers and, therefore, fewer seals need to be killed, resulting in fewer seals killed in an inhumane way. In these ways, the measures directly and materially contribute to the measures’ objectives of addressing the public’s concern about seal hunting and their unwillingness for EU market demand to contribute to the trade.

201. Notably, a look at what happened after the EU’s 1983 Seal Pup Directive entered into force is useful in determining how the EU measures at issue here will contribute to the EU’s objective. The EU’s 1983 Seal Pup Directive, which banned the importation of whitecoats and bluebacks and products derived therefrom,<sup>289</sup> but contained an exception for Inuit products, was aimed both at conserving a collapsing seal population but also at the animal welfare aspects of killing seal pups. When the ban went into place, it resulted in the collapse of the market for sealskins and a significant drop in demand, as evidenced by plunging seal kills despite high quotas.<sup>290</sup>

202. Brian Roberts, Chairman of the Fur Institute in Canada, testified in 1999 before the Standing Committee on Fisheries and Oceans of the Canadian Parliament:

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<sup>287</sup> See Appellate Body Report, *China — Audiovisuals*, para. 252, citing Appellate Body Report, *Brazil — Retreaded Tyres*, WT/DS332/AB/R at para. 151

<sup>288</sup> See Appellate Body Report, *Brazil — Tyres*, WT/DS332/AB/R at para. 151.

<sup>289</sup> Council Directive 83/129/EEC of 28 March 1983, O.J. (L 091), 09/04/1983, pp. 30-31 (EC), as amended by Council Directive 89/370/EEC of 8 June 1989, O.J. (L 163), 14/06/1989 concerning the importation into the Member States of skins of certain seal pups and products derived there from.

<sup>290</sup> See *Overview of the Atlantic Seal Hunt 2006-2010*, § 3.5.1, Fisheries and Oceans Canada (Jul. 18, 2008), available at <http://www.dfo-mpo.gc.ca/fm-gp/seal-phoque/reports-rapports/mgtplan-plangest0610/mgtplan-plangest0610-eng.htm> (“From 1983 to 1995, the average annual harp seal hunt was 51,000 despite a TAC of 186,000 animals.”).

I'd like to remind you that in 1981 we had record seal prices. Seal prices had never been higher than they were in 1981. They were 10% off that in 1982, and in 1983 you couldn't give away seals, not just harp seals or hooded seals, but any seal product. Because of the European collapse—and 90% of our seals went to Europe at that time—there was a worldwide collapse. All seals were seen as whitecoats or endangered.<sup>291</sup>

203. This lasted for over a decade until 1995, when the market finally began to recover.<sup>292</sup>

While the Directive prohibited only the import of certain seal products, the effects of its implementation on the demand for seal products is significant to the current dispute since a drop in demand due to closure of the EU market to commercial seal products would “materially contribute” to the EU objective.

204. In fact, there is already evidence that the EU measure is having an intended effect. The EU's intention to regulate seal products was announced as early as 2006. The Commission's proposal was made public in 2008, and the Regulation went into effect in July of 2009. While this timing coincided with other external factors, such as financial problems in global markets and a decline in sea ice, it is nevertheless the case that prices for commercial seal products have markedly fallen.<sup>293</sup> Following the Canadian commercial seal hunt in 2011, the Canadian Press reported that as a result of the EU measures, seal pelt prices fell to between \$20 and \$30—“barely enough for seal hunters to cover the cost of fuel and insurance for their small boats.”<sup>294</sup> *Indeed, Canada states in its submission that a key contributing factor to a decrease in Canadian exports in recent years is the EU measures, which have led to a decrease in demand.*<sup>295</sup>

205. As Jim Winter, President of the Canadian Sealer's Association, told CTV News in March 2012, sealers simply do not have many markets. “If there is no market, no buyers, there's not much point in taking the seals .... Everybody's looking at it and

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<sup>291</sup> See Testimony of Brian Roberts, Chairman of the Fur Institute of Canada, Tuesday, May 4, 1999, before the Standing Committee on Fisheries and Oceans of the Canadian Parliament, *available at*: <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1039511&Language=E&Mode=1&Parl=36&Ses=1> (emphasis added).

<sup>292</sup> See *Overview of the Atlantic Seal Hunt 2006-2010*, § 3.5.1, Fisheries and Oceans Canada (Jul. 18, 2008), *available at* <http://www.dfo-mpo.gc.ca/fm-gp/seal-phoque/reports-rapports/mgtplan-plangest0610/mgtplan-plangest0610-eng.htm> (“After 1995, the market for sealskins improved...”).

<sup>293</sup> See, e.g., *COWI Study on the Implementing Measures for Trade in Seal Products, Stakeholder Briefing* at page 5 (November 6, 2009), *available at*: [http://ec.europa.eu/environment/biodiversity/animal\\_welfare/seals/pdf/stakeholder\\_briefing.pdf](http://ec.europa.eu/environment/biodiversity/animal_welfare/seals/pdf/stakeholder_briefing.pdf) (“Before the financial crises and the 'ban', the total number of seals caught for trading purposes by the main sealing countries was in the order of 600 thousands. The large markets (particularly Russia, and to a lesser extent China and the Far East) have been hard hit by the financial crisis and as a consequence the demand for seal skin has suffered. At the same time the current legislation has been under preparation and has created uncertainty about the EU market. Hence, trade numbers are down substantially since 2007 and so is the market price of raw skin (less than half).”)

<sup>294</sup> See *Commercial Seal Hunt off Canada's East Coast One of the Worst on Record*, The Canadian Press (June 14, 2011); *available at*: <http://www.thestar.com/news/canada/article/1008386--commercial-seal-hunt-off-canada-s-east-coast-one-of-the-worst-on-record>.

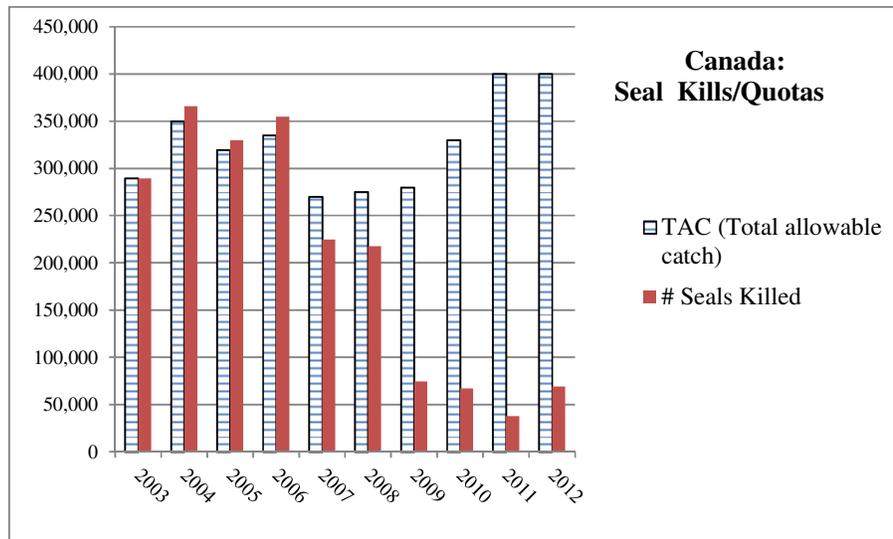
<sup>295</sup> See Canada FWS at para. 81 (emphasis added).

saying, ‘[w]ell I’m not going to go if I can’t make money’ because that’s what it boils down to.”<sup>296</sup>

206. Despite the closure of the EU market, and the absence of demand in 2012, the Provincial Government of Newfoundland and Labrador provided CDN \$3.6 million to Carino Processing Limited, a Norwegian-owned seal processor located in Newfoundland, to protect the viability of the seal hunt and “ensure hundreds of harvesters a secure income this year.”<sup>297</sup> Apparently, Carino faced difficulty securing financing from traditional sources.<sup>298</sup> The Government of Newfoundland and Labrador stated that the “initiative is in support of the [sealing] industry while ongoing challenges to the World Trade Organization and the European Court of Justice take place.” In other words, the EU measures materially contributed to the shrinkage of demand for and trade in seal products to an extent that Canada had to subsidize its sealing industry.

207. Additionally, since the announcement of the EU Regulation in 2008, and the entry into force of the EU measures in 2010, the actual number of seals killed in Canada has been significantly below the catch in previous years as well as below the total allowable catch (TAC) set by the Canadian Government. (See below chart; figures pertain to harp seals).<sup>299</sup> Prior to the EU Regulation going into effect, such a vast discrepancy was not present. This is further evidence that the EU Regulation is having the intended effect of lessening the number of seals killed inhumanely (as indicated, a significant and inescapable subset of those killed overall) and subsequently traded.

Table I – Canadian Seal Kills/Quotas (2003-2012)



<sup>296</sup> <http://www.ctv.ca/CTVNews/CanadaAM/20120305/seal-hunt-in-limbo-120305/>.

<sup>297</sup> See *Provincial Government Loan Boosts 2012 Seal Hunt*, Fisheries and Aquaculture Department News Release, Newfoundland and Labrador Government (April 5, 2012) available at: <http://www.releases.gov.nl.ca/releases/2012/fishaq/0405n05.htm>.

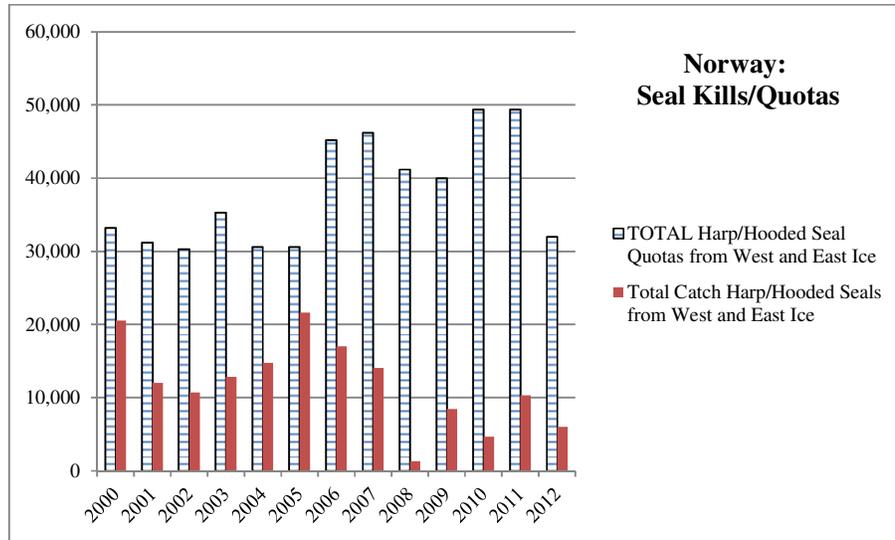
<sup>298</sup> See *Provincial Government Loan Boosts 2012 Seal Hunt*, Fisheries and Aquaculture Department News Release, Newfoundland and Labrador Government (April 5, 2012) available at: <http://www.releases.gov.nl.ca/releases/2012/fishaq/0405n05.htm> (emphasis added).

<sup>299</sup> Data are from a compilation of Canadian Government reports and correspondence with DFO seal hunt coordinators. Additional information can be provided upon request.

208. Moreover, prior to the announcement of the EU measures and the implementation of the bans in Belgium and Netherlands in 2007, the number of seals killed was either equal to—or in excess of—the TAC. Since then, the TAC has vastly exceeded the number of seals killed—by approximately 1.3 million seals. *While other factors may have contributed, the EU measures can arguably be said to have played a key role in saving tens if not hundreds of thousands of seals from an inhumane death.*

209. A similar pattern is evident in Norway.

Table II – Norwegian Seal Kills/Quotas (2000-2012)



210. The declines in Norway are not as steep, though this can be explained by the fact that the Norwegian government has been providing massive direct subsidies to sealers for years, even before the EU measures took effect. For example, in 2012 the Norwegian Government provided \$3,000,000 NOK (approximately 400,000 EUR) to sealing companies purchasing seal products from the Norwegian hunt. Another \$7,500,000 NOK (approximately 1,000,000 EUR) was provided to vessels participating in the 2012 Norwegian hunt on West Ice.<sup>300</sup> Indeed, without those subsidies, Norway’s hunt would be largely unprofitable.

211. The Canadian Government also subsidizes the commercial seal hunt, but in recent years it was through indirect subsidies for expenses such as Coast Guard assistance for sealing vessels, flights to locate seal herds and report coordinates to sealing vessels, product development and marketing, and international lobby and legal efforts to block and reverse trade prohibitions on seal products. In 2012, however, that changed when the Government of Newfoundland provided \$3.6 million (CAN) in financing to Carino Company Ltd, the largest processor of seal products in the world, to purchase seal skins from sealers so they could be stockpiled to meet “future demand.”<sup>301</sup> The result, as shown in the chart above, was an increase in the number of seals killed in 2012

<sup>300</sup> See <http://www.regjeringen.no/en/dep/fkd/aktuelt/nyheter/2012/stotteopplegg-for-selfangstnaringa-i-201.html?id=673274>.

<sup>301</sup> See *Provincial Government Loan Boosts 2012 Seal Hunt*, Fisheries and Aquaculture Department News Release, Newfoundland and Labrador Government (April 5, 2012) available at: <http://www.releases.gov.nl.ca/releases/2012/fishaq/0405n05.htm>.

(71,000) when compared with 2011 (38,000). Without these government subsidies the declines in seals killed would be even sharper—owing to the effectiveness of the EU measures.

212. The fact that there are limited exceptions for Inuit products and products from small scale hunts performed for marine resources management reasons does not alter the conclusion that the EU measures make an actual contribution to the EU's objectives.

c. Trade-Restrictive Effect of the Measures

213. As a comprehensive internal sales ban on commercial seal products which logically also covers imports of such products, the EU measures are, in that sense, trade restrictive. However, that effect is unavoidable and does not affect its legitimacy under GATT Article XX. In *Brazil-Tyres*, the Appellate Body explained that even in the context of an import ban (which is arguably more restrictive than the measures here), the measure could still be found to be “necessary on the basis of a demonstration that the import ban at issue is apt to produce a material contribution to the achievement of its objective.”<sup>302</sup>

d. Existence of Reasonably Available Alternatives

214. As shown, the first three factors of the necessity analysis yield a preliminary conclusion that the measure is “necessary.” The last step is to confirm this conclusion by “comparing the measure with possible alternatives, in the light of the importance of the interests or values at stake.”<sup>303</sup>

215. It is up to the complaining party to identify reasonably available alternative measures, at which point the responding party must demonstrate why the measure is “not reasonably available”/or why it would not achieve the desired level of protection.<sup>304</sup>

216. The Appellate Body has explained that the measure in question must be compared with possible alternatives, which may be less trade restrictive “while providing an equivalent contribution to the achievement of the objective.”<sup>305</sup> If an alternative measure is “reasonably available,” the burden will shift to the responding party. An alternative is not reasonably available if it is merely theoretical either because the defending country is not capable of applying it or it imposes an undue burden on the country due to its cost or complexity.<sup>306</sup> “[I]t is not enough for the complaining Member to merely list possible or hypothetical less trade restrictive alternatives; rather the complaining member must show that the alternative in question will, in the real world, provide an *equivalent* contribution to the defending Member's legitimate objective.<sup>307</sup> Any alternative method must also allow the defending country to achieve its desired level of protection and if a country can prove that the alternative is not

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<sup>302</sup> See Appellate Body Report, *Brazil – Tyres*, WT/DS332/AB/R at paras.151.

<sup>303</sup> See Appellate Body Report, *China-Audiovisuals*, WT/DS363/AB/R at para. 241 citing Appellate Body Report, *Brazil – Tyres*, WT/DS332/AB/R at para. 178.

<sup>304</sup> *Brazil – Tyres*, WT/DS332/AB/R at para. 156.

<sup>305</sup> See Appellate Body Report, *China – Audiovisuals*, WT/DS363/AB/Rat para. 242.

<sup>306</sup> See Appellate Body Report, *US – Gambling*, WT/DS285/AB/R at para 308.

<sup>307</sup> Howse and Langille, *Permitting Pluralism*, *supra* note201 at 58 citing Panel Report, *US – Cigarettes* at para. 7.423.

reasonably available and does not give the desired level of protection, the measure in question becomes “necessary”.<sup>308</sup>

217. Canada’s first written submission does not address alternatives under GATT Article XX, as it was submitted before the EU asserted the Article XX(a) defense. However, it is fair to assume that Canada’s proposed alternatives under Article 2.2 of the TBT Agreement will likely also form the basis of Canada’s proposal for purposes of GATT Article XX and we will thus respond to Canada’s proposal under TBT Article 2.2 in this section as well.

218. Canada argues that a reasonably available alternative to the EU measures is a certification scheme coupled with a labelling requirement.<sup>309</sup> According to Canada, the EU could adopt a scheme very similar to what the Commission had originally proposed, whereby a set of humane slaughter requirements would be outlined, and pending compliance with such requirements, commercial seal products could be certified as harvested in a humane manner.<sup>310</sup> The final product would then also have a label affixed informing the consumer that certain requirements were met during harvesting of the seal.<sup>311</sup>

219. Canada’s proposal is not “reasonably available” because it cannot achieve the level of protection the EU is seeking as they fail to take into account the inherent conditions of the hunt and the inability to ensure a humane kill on a consistent and effective basis. In other words, as will be explained below, this alternative falls far short of making an equivalent contribution as the EU measures to the EU objective. Hence, this alternative has already been rejected by the EU Parliament.<sup>312</sup>

220. A “humane” certification scheme will not suffice because, as shown, the conditions of the hunt are inherently inhumane, rendering the possibility of killing and skinning seals without excessive pain, distress or suffering on a consistent and effective basis futile. Indeed, this is precisely why this option was rejected by the EU Parliament.<sup>313</sup> \_ It is

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<sup>308</sup> See Appellate Body Report, *US – Gambling*, WT/DS285/AB/R at paras. 309-311. The defending country should also show that any alternative would impose an undue burden on it, not merely some administrative costs. *Id.* at 308.

<sup>309</sup> See Canada’s FWS at para. 556.

<sup>310</sup> See Canada’s FWS at para. 557.

<sup>311</sup> See Canada’s FWS at para. 557.

<sup>312</sup> See e.g., EC Regulation No. 1007/2009, Recital 12 (“It is also clear that other forms of harmonised rules, such as labelling requirements, would not achieve the same result. Additionally, requiring manufacturers, distributors or retailers to label products that derive wholly or partially from seals would impose a significant burden on those economic operators, and would also be disproportionately costly in cases where seal products represent only a minor part of the product concerned. Conversely, the measures contained in this Regulation will be easier to comply with, whilst also reassuring consumers.”)

<sup>313</sup> See European Parliament, Session Document A6-0118/2009 *regarding 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)), Committee on the Internal Market and Consumer Protection available at: <http://www.europarl.europa.eu/sides/getDoc.do?language=EN&reference=A6-0118/2009> (deleting all references to certification schemes in the Commission’s proposal).

See also EC Regulation No. 1007/2009, Recital 10 (“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.”); *Id.* at Recital 11 (“Although it might be possible to kill and skin seals in such a way as to avoid unnecessary pain,

notable that these conditions have been documented repeatedly by leading veterinarians, some of whom have most recently concluded that countries enacting trade bans on seal products are justified—at least to the extent that such measures are imposed because of the inherent conditions of the hunt and the absence of any reasonable alternatives.<sup>314</sup>

221. Assuming a certification scheme was put into place to allow for trade in commercial seal products under certain conditions, the only way it would be capable of addressing the public concern would be to have an independent observer certify each and every seal kill—a scenario that is entirely unrealistic in the context of the commercial seal hunt.<sup>315</sup>

222. The viability of a certification scheme rests upon its ability to be consistently applied and easily monitored. This is simply not the case for seals due to factors such as the inability of inspectors to be physically present in remote areas and the extremely small percentage of inspectors compared to sealers and sealing vessels. As pointed out above, only miniscule fractions of the seal hunt are being witnessed by Canada’s Fisheries Officers. This underlines why any measure other than a marketing ban is not reasonably available as it is impossible to differentiate in the field those seals that have been humanely and inhumanely killed.

223. Notably, for a seal kill to be certified as “humane,” a veterinary inspector would need to be in close proximity to the seal and thus able to directly observe as the animal is stunned, monitored for consciousness and bled out. Yet Smith (2005) confirms that much of the Canadian commercial seal hunt involves long distance shooting of seals (from 40-50 meters away, on average) from sealing vessels<sup>316</sup> while EFSA (2007) notes that in Norway, on some boats, in some seasons, rifles are used on almost 100 % of the seals targeted, and sealers shoot seals at distances of 30-70 meters.<sup>317</sup> It would clearly be unsafe for sealers to stand next to a seal on an ice pan as a sealer shoots at the animal from long distances. Regardless, due to the impacts of climate change, sea ice is deteriorating, making it likely that in many cases, the sea ice on which the seals are located will not be safe for a person to walk on.<sup>318</sup> Observing the killing from a vessel or even through high powered lenses would not provide sufficient information for the inspector to make an evaluation of the level of suffering endured by the seal. For example, as noted above, seals often display a “paralysis response” in situations of stress and pain.<sup>319</sup> Thus, an inspector could observe a seal that has been shot and is lying motionless, and assume that the seal is unconscious and therefore not suffering.

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distress, fear or other forms of suffering, given the conditions in which seal hunting occurs, consistent verification and control of hunters’ compliance with animal welfare requirements is not feasible in practice...”)

<sup>314</sup> See Butterworth and Richardson (2012) at 10.

<sup>315</sup> See, e.g., Lavigne, DM, and Fink, SL, *Why international standards for killing seals will not alleviate animal welfare concerns*, IFAW Publication, available at: [http://www.ifaw.org/Publications/Program\\_Publications/Seals/asset\\_upload\\_file931\\_52114.pdf](http://www.ifaw.org/Publications/Program_Publications/Seals/asset_upload_file931_52114.pdf).

<sup>316</sup> See Smith (2005) at 9.

<sup>317</sup> See EFSA Report (2007) at 29.

<sup>318</sup> See Butterworth and Richardson (2012) at 9-10.

<sup>319</sup> Lydersen C, Kovacs K., *Paralysis as a defence response to threatening stimuli in harp seals (Phoca groenlandica)*. Can. J. Zoo. (1995): 73 (3), 486-92, available at <http://www.nrcresearchpress.com/doi/pdf/10.1139/z95-055>.

Yet there is every possibility in these situations that the seal is, in fact, conscious and simply “playing dead.”<sup>320</sup> Notably, there have been a high percentage of instances filmed of seals appearing to be unconscious post stunning and then showing responses to pain as they are gaffed.<sup>321</sup>

224. Thus, something far less than verification of every seal kill would have to suffice, which would fail to provide the very assurances the EU Regulation is seeking to achieve and would fail to address the public concern because unverified products would remain on the market, propagating a trade EU citizens oppose and allowing countless seals to be killed in ways that significantly deviate from accepted principles of humane slaughter.

225. Importantly, even a perfect market access-*cum*-certification scheme where only seal products stemming from seals whose deaths were certified “humane” and 100% observed would be admitted would not achieve the protection of public morals as sought by the EU measures. This is because due to the objective circumstances of the seal hunt “on the ice,” explained in some detail above, it is impossible even for the most conscientious and perfectly observed sealer to guarantee humane killing. This means that when he pulls the trigger he will not be able to ensure with any degree of certainty that he will not cause inhumane suffering. In other words, for every certified humanely killed seal there would inescapably be several uncertified inhumanely killed seals whose products would not be permitted to enter the EU market but who nonetheless would have suffered an inhumane death because of the demand created by the market.

226. In fact, the proposed certification scheme could even lead to more seals being killed inhumanely than would be killed without any EU regulation of the commercial seal trade. Depending upon how many additional seals would be killed inhumanely (and therefore unable to be certified and put on the EU market) per seal killed humanely, the commercial seal hunt might cause sealers to kill many more seals than they otherwise would in order to net a sufficient number of certified humanely killed seals to satisfy EU market demand. The solution proposed by Canada is thus obviously not equivalent in terms of its “public morals” outcome, for it would still cause the EU public to still contribute to inhumane deaths (by sustaining commercial sealing which also leads to inhumane deaths) and be confronted in their daily lives with the fruits of this unavoidably inhumane activity.

227. Given that the certification scheme would inevitably fail to prevent numerous inhumane seal deaths, the addition of a labelling scheme is irrelevant, as the presence of any commercial seal products on the EU market—labelled or not—contravenes the EU objective.

228. In balancing all of these factors, it is clear that while they are somewhat trade restrictive, the EU measures pursue an objective of great importance and make a material contribution to that objective in a way that cannot be achieved by less trade restrictive alternatives. In sum, the EU measures satisfy the test under Article XX(a).

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<sup>320</sup> Daoust PY, Crook A, Trent K, Bollinger TK, Campbell KG, Wong J., *Animal welfare and the harp seal hunt in Atlantic Canada*. Can. Vet. J. (2002) 687-94, available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC339547>.

<sup>321</sup> See EFSA Report (2007) at 58.

They both fall within the scope of policies that Article XX(a) is intended to cover, and they meet the “necessity” test.

**F. The EU Measures are Consistent with the GATT Article XX Chapeau**

229. Once a measure satisfies the criteria of GATT Article XX(a), it must also meet the requirements of the Article XX chapeau, or introductory clause, in order to be justified. As described below, the EU measures meet each of the requirements outlined in the chapeau; namely, they are not designed nor applied in a manner which constitutes arbitrary or unjustifiable discrimination between countries where the same conditions prevail, and they are not a disguised restriction on international trade.

230. The GATT Article XX chapeau provides:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures ....

231. As the Appellate Body has explained, “[t]hrough these requirements, the chapeau serves to ensure that Members’ rights to avail themselves of exceptions are exercised in good faith to protect interests considered legitimate under Article XX, not as a means to circumvent one Member’s obligations towards other WTO Members.”<sup>322</sup> The chapeau fundamentally serves to prevent ‘abuse of the exceptions of [Article XX].’<sup>323</sup>

232. With this purpose in mind, the WTO has considered various factors in determining whether a measure is consistent with the Article XX chapeau, including: whether the measure is inflexible, rigid or unbending;<sup>324</sup> whether, where multilateral negotiations have been or are being pursued, such negotiations are conducted on a non-discriminatory basis;<sup>325</sup> and whether the measure is actually a disguise of protectionist intent/application.<sup>326</sup> Depending on the circumstances of each dispute, different factors may be considered more prominently than others.

***1. The EU Measures Do Not Constitute Arbitrary or Unjustifiable Discrimination***

233. A measure “will constitute arbitrary or unjustifiable discrimination if it is applied in a discriminatory manner ‘between countries where the same conditions prevail’, and when the reasons given for this discrimination bear no rational connection to the objective ... or would go against the objective.”<sup>327</sup> The EU measures do not

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<sup>322</sup> See Appellate Body Report, *Brazil – Tyres*, WT/DS332/AB/R at para. 215.

<sup>323</sup> See Appellate Body Report, *US – Standards for Reformulated and Conventional Gasoline*, WT/DS4/AB/R at p. 21 (“*US – Gasoline*”).

<sup>324</sup> See Appellate Body Report, *US – Shrimp/Turtle*, WT/DS58/AB/R at para. 177.

<sup>325</sup> See Appellate Body Report, *US – Shrimp/Turtle*, WT/DS58/AB/R at para. 167.

<sup>326</sup> See Panel Report, *EC – Asbestos*, WT/DS135/R at para. 8.228 (not an issue on appeal).

<sup>327</sup> See Appellate Body Report, *Brazil – Tyres*, WT/DS332/AB/R at para. 227.

discriminate on the basis of where products are coming from. As set out above, the EU measures prohibit all commercial seal products from being placed on the market, regardless of country of origin. The same is true for the derogations for seal products from Inuit hunts and small scale management hunts. This is rationally connected to the EU objective of protecting public morals.

234. This is different than past disputes where measures failed to meet the chapeau requirements. For example, in *Brazil – Tyres*, the Brazilian measures exempted MERCOSUR countries.<sup>328</sup> In *U.S. – Gasoline*, domestic refiners did not have to comply with the requirements that foreign refiners did.<sup>329</sup> The EU measures do not discriminate among sources in these ways or otherwise.

## 2. *The EU Measures Are Not a Disguised Restriction on Trade*

235. In *Brazil - Tyres*, the panel explained that a disguised restriction on trade means the measure, as applied, results in a restriction on “international trade” that is “disguised.”<sup>330</sup> In *US – Gasoline*, the Appellate Body found the measure was a “disguised restriction on international trade” because, *inter alia*, it favoured domestic refiners by not making them subject to the same requirements as foreign refiners.<sup>331</sup>

236. In this case, the EU measures apply equally to all seal products from commercial seal hunts, regardless of country of origin. The prohibitions that apply to imports apply equally to EU products. There is also nothing to suggest that the EU is hiding a protectionist motive; in fact, the EU’s motives are rather clearly non-commercial. The EU has publicly stated its concern over the animal welfare aspects of commercial seal hunting for over three decades. *See, e.g.*, Exhibit 1. In adopting the EU measures at issue, the EU undertook a transparent and open process. Moreover, the EU measures shut down the significant production of products made from seal fur (coats, gloves, boots, sporrans, etc.) that was taking place in the EU, seriously crippling the EU industry. Finally, there is no commercial seal hunt in the EU. There are only limited MRM hunts, and any products from those hunts that qualify for the MRM exemption can only be placed on the EU market on a non-profit basis. Notably, products from MRM hunts in any other country may also be eligible for the exemption. Thus, the EU measures damaged the EU seal product industry and provide no economic benefit to the EU, for there is no economic benefit in qualifying MRM hunts, let alone any economic benefit that is not also available to any other country, making a protectionist motive or even effect highly unlikely and illogical.<sup>332</sup>

237. Thus, all of these factors typically considered by WTO panels and the Appellate Body weigh heavily in favour of a finding that the EU measures at issue satisfy the requirements of the Article XX chapeau.

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<sup>328</sup> See Appellate Body Report, *Brazil – Tyres*, WT/DS332/AB/R at para. 227-228, 233.

<sup>329</sup> See Appellate Body Report, *US – Gasoline*, WT/DS4/AB/R at p. 26, 27.

<sup>330</sup> See Panel Report, *Brazil-Tyres*, WT/DS332/R at para. 7.315 (statement not challenged on appeal).

<sup>331</sup> See Appellate Body Report, *US – Gasoline*, WT/DS4/AB/R at p. 26 – 27.

<sup>332</sup> According to the COWI Impact Assessment, a ban on seal products trade would have a minor economic impact on EU Member States, since the sealing in Sweden and Finland is largely for “cultural and recreational roles” rather than trade, and the UK (Scotland) hunt is aimed at killing seals “in the vicinity of fishing, rather than for the use of their skin.” COWI Impact Assessment, p.29, *available at*: [http://ec.europa.eu/environment/biodiversity/animal\\_welfare/seals/pdf/seals\\_ia.pdf](http://ec.europa.eu/environment/biodiversity/animal_welfare/seals/pdf/seals_ia.pdf).

238. **Conclusion on GATT:** In sum, the EU measures are consistent with GATT Articles I:1 and III:4, and outside the scope of Article XI. Should the Panel find otherwise, however, they are still justified under GATT Article XX(a) and the GATT Article XX chapeau.

**G. The EU Measures are Consistent with the Technical Barriers to Trade Agreement (TBT)**

239. Canada and Norway both raise claims that the EU measures are inconsistent with various provisions of Articles 2 and 5 of the TBT Agreement.<sup>333</sup> Before analysing whether this is the case, it is first necessary to determine whether the EU measures are technical regulations. As explained below, the EU measures are not technical regulations, and therefore they are not inconsistent with the TBT Articles dealing with technical regulations (2.1, 2.2).

**1. The EU Measures Are Not Technical Regulations**

240. Annex 1.1 of the TBT Agreement defines a technical regulation as a:

Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

241. In prior disputes, the Appellate Body has explained that a document must meet three criteria in order to fall within the definition of a technical regulation:

- The document must apply to an identifiable product or group of products;
- The document must lay down one or more characteristics of the product; these product characteristics may be intrinsic, or they may be related to the product; and
- Compliance with the product characteristics must be mandatory.<sup>334</sup>

242. The Appellate Body in *US – Clove Cigarettes* explained that “technical regulations are measures that, by their very nature, establish distinctions between products

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<sup>333</sup> These provisions include Articles: 2.1, 2.2, 5.1.1, 5.1.2, 5.2.1, 5.2.2, 5.2.3, 5.4, 5.6, 5.8, 6.1, 6.2, 7.1, 7.4, 7.5, 8.1, 8.2, 9.2, 9.3. See *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/4 (14 February 2011) (Request for the Establishment of Panel by Canada); *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS401/5 (15 March 2011) (Request for the Establishment of Panel by Norway). Only Norway raised claims under Articles 5.8, 6.1, 6.2, 7.4, 7.5, 8.1, 8.2, 9.2, 9.3.

<sup>334</sup> See Appellate Body Report, *US – Tuna*, WT/DS381/AB/Rat para. 183; see also Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001 at paras. 66-70 (“EC-Asbestos”); Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002 at para. 176 (“EC-Sardines”).

according to their characteristics or their related processes or production methods.”<sup>335</sup> The EU measures at issue here do not fit within this definition and do not constitute technical regulations.

243. The EU measures prohibit the sale of seal products. They do not “lay down” product characteristics like “only seal products with grey fur can enter the market.” Indeed, that was the case in *US- Clove Cigarettes*, where the measure specified that cigarettes cannot contain certain flavours.<sup>336</sup> The EU measures do allow for the placing on the market of products from indigenous and resource management-based small-scale hunts, but these provisions deal with “who” is conducting the hunt (Inuit) and “why” a hunt is conducted (resource management), not with the characteristics of the products or their *related* processes or production methods. Accordingly, the EU measures are not technical regulations and are therefore not subject to the requirements of the TBT Agreement cited by Canada and Norway.

244. *Amici* defer to the EU submission for a more detailed discussion on this topic.

245. Assuming, *arguendo*, that the Panel finds one or both of the EU measures to be a technical regulation, they are not contrary to any of the articles of the TBT Agreement cited by Canada and Norway.<sup>337</sup>

## 2. *The EU Measures Are Not Inconsistent with Article 2.1 of the TBT Agreement*

246. Canada and Norway argue that the EU measures are not consistent with TBT Article 2.1 because they accord less favourable treatment to products of Canada and Norway than to like products of EU origin and third country origin.<sup>338</sup>

247. Article 2.1 of the TBT Agreement states, “[m]embers shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin.”

248. In three recent disputes, *US – Tuna*, *US – COOL*, and *US – Clove Cigarettes*, TBT Article 2.1 has been analysed by dispute panels and the Appellate Body. In all three disputes, the Appellate Body approached the analysis of less favourable treatment under TBT Article 2.1 by drawing largely on the jurisprudence developed under GATT, which contains the same language. Indeed, the same conclusions apply here, namely that: the EU measures are origin neutral; any distinctions are based on factors other than country of origin; and no competitive advantage is given to domestic like products or like products from other sources that is not also offered to Canada and Norway.

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<sup>335</sup> See Appellate Body Report, *US – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS/406/AB/R, 4 April 2012, at para. 169 (“*U.S. – Cigarettes*”).

<sup>336</sup> See Panel Report, *US – Cigarettes*, WT/DS/406/R at para. 7.32, 7.36 (not an issue on appeal).

<sup>337</sup> *Amici* will only address Articles 2.1, and 2.2 in this brief. *Amici* defer to the Commission’s brief for an analysis of the remaining claims under Article 5.

<sup>338</sup> See Canada Panel Request and Norway Panel Request.

249. The test outlined by the Appellate Body in *US – Tuna*, *US – COOL*, and *US – Cigarettes* did, however, further elaborate on how to assess less favourable treatment under Article 2.1 of the TBT Agreement. In particular, the Appellate Body explained that where a technical regulation is not *de jure* discriminatory, it is necessary to look at whether “there is a detrimental impact on competitive opportunities for the group of imported products vis-à-vis the group of domestic like products ....”<sup>339</sup> This factor alone, however, is not dispositive. The next step is to determine if the detrimental impact stems from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products.<sup>340</sup> In other words, imported and domestic like products can be treated or affected differently by a measure—even to the point where imported products as a group suffer some detrimental impact in comparison to local products—so long as the distinction is legitimate.

a. The EU Measures Do Not Violate the National Treatment Obligation of TBT Article 2.1

250. In the context of national treatment, products from Canada and Norway are not treated less favourably than like products of EU origin. Canada’s argument under TBT Article 2.1 is similar to its assertions under GATT Article I:1; namely, that the EU measures permit products from the EU to be placed on the market through the MRM exemption but effectively exclude 90-95% of Canadian products from the same market.<sup>341</sup> Canada’s arguments ignore the fact that the MRM exemption applies to small-scale hunts for MRM purposes in *all* countries. It is origin neutral, and indeed, seal products from MRM hunts in countries outside of the EU such as Norway, Iceland, and Canada itself may potentially qualify for the MRM exemption. Moreover, Canada provides no evidence that products from MRM hunts in Finland or Sweden will in fact be eligible for the exemption, or in what quantities. As Canada itself notes, no products have yet been certified under either exemption. Thus, Canada’s arguments are speculative at best. Canada could seek to take advantage of it in the same manner as countries in the EU or elsewhere. The fact that Canada deems itself ineligible for that exemption at this time does not result in a detrimental impact.

251. However, even if the EU measures are found to cause a detrimental impact on imported products, such measure would not violate Article 2.1 if the detrimental impact stems exclusively from a legitimate regulatory distinction.<sup>342</sup> The Appellate Body has explained that “Article 2.1 does not preclude any regulatory distinctions between products that are found to be like, as long as treatment accorded to the *group* of imported products is no less favourable than that accorded to the *group* of like domestic products.”<sup>343</sup>

252. Using this framework, Canada’s arguments fail. Canada’s claims rest on the premise that the Panel should compare commercial seal products from Canada to what it considers to be the “like” domestic product, *i.e.*, products from MRM hunts in the EU.

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<sup>339</sup> See Appellate Body Report, *US – Cigarettes*, WT/DS/406/AB/R at para. 182.

<sup>340</sup> See Appellate Body Report, *US – Cigarettes*, WT/DS/406/AB/R at para. 182.

<sup>341</sup> See Canada’s FWS at para. 375.

<sup>342</sup> See Appellate Body Report, *US – Cigarettes*, WT/DS/406/AB/R at paras. 181-182.

<sup>343</sup> See Appellate Body Report, *US – Cigarettes*, WT/DS/406/AB/R at para. 193 (original emphasis).

Such a comparison defies logic as there are stark differences in how EU citizens view these hunts, how they are conducted, and for what purpose.

253. For example, as the EU points out, the commercial seal hunt in Canada involves the killing of tens of thousands (and in past years, hundreds of thousands) of seals in the span of just a few days or weeks, largely on the basis of profit from inessential products such as fur.<sup>344</sup> By contrast, small scale hunts conducted on the basis of MRM purpose may only involve occasional hunting of animals numbering in the hundreds, not thousands, the by-products of which are traded on a non-profit basis so as to avoid being wasteful.

254. It is for precisely these differences that the EU justifies having an exemption for products from MRM hunts. The EU explains that “the MRM exception addresses the longstanding moral concerns of the EU public with respect to the presence on the EU market of sea products by permitting the placing of certain seal products on the EU market in view of the morally acceptable type and purpose behind the hunt in the case of the MRM exception (i.e., small-scale hunts for the purpose of managing marine resources.)”<sup>345</sup> According to the EU, the MRM exception makes it less likely that seals killed in the course of MRM hunts will be discarded or wasted, and in some respects, allowing their trade on a non-profit basis may prevent sealers from resorting to inhumane killing methods, such as shooting the seals in the water.<sup>346</sup> In the view of the EU, this is in line with the broader public morals objective of the EU Seal Regime.

255. Thus, while products from commercial hunts and products from MRM hunts are treated differently, this distinction arises from legitimate factors, such as the purpose and type of the hunt. As the EU points out in its brief in para. 325, Canada is trying to have the Panel compare products that are not similarly situated. When the appropriate sub-categories of products are compared, *e.g.*, all products of MRM hunts, there is no discrimination. Similarly, no discrimination exists among products that are situated differently, *e.g.*, products of MRM hunts versus products of commercial hunts.<sup>347</sup> Accordingly, Canada’s arguments with respect to the national treatment aspect of TBT Article 2.1 should be rejected.

b. The EU Measures Do Not Violate the “Most Favoured Nation”  
Obligation Under TBT Article 2.1

256. Canada argues that the EU measures result in a detrimental impact on Canadian seal products because they clear the way for virtually all Greenlandic seal products to be sold on the EU market since Greenlandic seal products are mostly from Inuit sources that can qualify for the indigenous communities exemption, without providing the same opportunities for commercial seal products from Canada.<sup>348</sup> Canada argues that by basing the indigenous communities exemption on ethnicity, the exemption is not based on a legitimate regulatory distinction.<sup>349</sup>

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<sup>344</sup> See EU FWS at paras. 326-335.

<sup>345</sup> See EU FWS at para. 317.

<sup>346</sup> See EU FWS at para. 316.

<sup>347</sup> See EU FWS at para. 325.

<sup>348</sup> See Canada FWS at paras. 323 and 394.

<sup>349</sup> See Canada FWS at para. 399.

257. Here again, the indigenous communities exemption is not *de jure* discriminatory as it is origin neutral, and available to products from any country that meet the requirements, *including Canadian Inuit communities*. It is also a longstanding distinction adopted by the EU in the context of the 1983 seal ban, but also by other countries such as the U.S. in the context of the MMPA, Russia, Belarus, and Kazakhstan in the context of the Customs Union ban on seal products, and most recently Chinese Taipei in its Wildlife Act amendment to prohibit the sale of marine mammals and related products. Similar indigenous exceptions for aboriginal subsistence whaling have been recognized by the International Whaling Commission (IWC) since its inception.<sup>350</sup>

258. The EU measures are also not *de facto* discriminatory as they do not result in a detrimental impact on Canada, nor are they based on an illegitimate distinction. Canada again seeks to have the Panel consider products that are situated differently as “like” products. It is in this way that Canada claims that its commercial seal products are at a disadvantage to the Inuit seal products from Greenland. However, this is an inappropriate comparison. The proper comparison is whether there is any distinction in the way in which Canadian Inuit products and Greenlandic Inuit products are treated. The answer to that inquiry is that there is no difference, as set out above.

259. Furthermore, as the EU points out, its rationale for adopting the indigenous communities exemption includes protection of communities that have a tradition of seal hunting for subsistence purposes.<sup>351</sup> The EU felt it would be in line with the broader moral objectives of the measures to exempt products from these types of hunts from the general ban, and to allow these communities to continue to trade in these products so long as such trade happens in the context of traditional, subsistence-focused hunting. Thus, it is not ethnicity that is the underlying purpose for the distinction, it is the protection of indigenous cultural heritage that the EU deemed to be an additional legitimate policy objective, and one that fits in with the overall purpose of the EU measures.

260. In sum, the EU measures do not result in *de jure* or *de facto* discrimination under Article 2.1 with respect to either the national treatment or most favoured nation requirements. The EU measures regulate even-handedly in a manner well-calibrated to their goal, and the exemptions are based on legitimate regulatory distinctions. For these reasons, the Panel should reject Canada’s arguments.

### 3. *The EU Measures Are Not Inconsistent with Article 2.2 of the TBT Agreement*

261. Article 2.2 of the TBT Agreement states:

Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create. Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices;

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<sup>350</sup> International Whaling Commission, *Aboriginal Subsistence Whaling*, available at <http://iwc.int/aboriginal>.

<sup>351</sup> See EU FWS at paras. 262-266.

protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology, or intended end-uses of products.

262. In prior disputes, the Appellate Body has set out the test under TBT Article 2.2 as first determining whether the measures at issue are based on a legitimate objective, then whether they are more trade restrictive than necessary to “fulfil” that objective.<sup>352</sup> This test is met here. Canada and Norway’s arguments that the EU measures have the effect of creating unnecessary obstacles to trade, lack a legitimate objective, and are more trade restrictive than necessary to fulfil a legitimate objective are without merit.<sup>353</sup> Canada’s proposed alternative measure is also not reasonably available, and would fail to provide an equivalent contribution to the EU’s objectives.

a. The EU Measures Pursue a Legitimate Objective

263. The EU measures are designed to address the EU public’s moral concern that seals often experience excessive suffering during the commercial seal hunt, and the EU public’s unwillingness to be complicit in the trade in commercial seal products and encounter its products in their market.

264. Importantly, the exemptions for products from MRM and indigenous hunts do not undermine the legitimacy of this objective. Indeed, as the EU points out, these exemptions are rationally connected to the overarching public morals purpose of the EU measures.<sup>354</sup> The indigenous communities exemption permits trade in products from hunts conducted by communities engaged in a long tradition of hunting for primarily subsistence purposes. The MRM exemption permits exchange of seal products from small-scale hunts on a non-profit basis to avoid waste and incentivize the fisherman to avoid inhumane killing methods.<sup>355</sup>

265. Article 2.2 lists a number of non-exclusive objectives, such as prevention of deceptive practices and the protection of animal life and health. Arguably, the measures in the instant dispute could fall within one or both of those categories, but it is also important to note that the list in Article 2.2 list is only illustrative. The Panel in *EC – Sardines* explained that Article 2.2 lists “examples of objectives which are considered legitimate under the TBT Agreement. As indicated by the phrase ‘inter alia,’ this list is illustrative and allows for the possibility that other objectives, which are not explicitly mentioned, may very well be legitimate under the TBT Agreement.”<sup>356</sup>

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<sup>352</sup> *E.g.*, Appellate Body Report, *United States – Certain Country of Origin Labelling Requirements*, WT/DS384/AB/R, at paras. 372-374, adopted 23 July 2012 (“US - COOL”).

<sup>353</sup> *See* Request for the Establishment of Panel by Canada, *EC - Seals*, WT/DS400/4 (14 February 2011); Request for the Establishment of Panel by Norway, *EC – Seals* WT/DS401/5 (15 March 2011).

<sup>354</sup> *See* EU FWS at para. 38.

<sup>355</sup> *See* EU FWS at paras. 40-41.

<sup>356</sup> *See* Panel Report *EC – Sardines*, at para. 7.118 (upheld by the Appellate Body at para. 286.); *see also* Appellate Body Report, *US – COOL*, WT/DS/384/AB/R at para. 370 (“The use of the words ‘inter alia’ in Article 2.2 introducing that list, however, signifies that the list of legitimate objectives is not a closed one.”).

266. There can be little argument that the protection of public morals, a primary objective of the EU measures, should be considered a “legitimate objective” under TBT Article 2.2. Although not explicitly listed in Article 2.2, the Appellate Body in *US – COOL* noted that objectives listed in provisions of other covered agreements may guide or usefully inform the determination of what other objectives are legitimate.<sup>357</sup> Given that the protection of public morals is listed as the first justification under GATT Article XX, this should be probative of the fact that the protection of public morals is a legitimate objective under the TBT Agreement as well.

267. In *US – COOL*, the Panel also rightly took into account the fact that a considerable amount of WTO Members also maintained COOL regimes in determining that the U.S. objective of providing consumer information on origin is a legitimate objective within the meaning of Article 2.2.<sup>358</sup> The same reasoning applies here. A number of other countries (Mexico, Croatia, Russia, Belarus, Kazakhstan, Taiwan) maintain prohibitions on seal products trade. And unlike the *US – COOL* dispute, in which the Appellate Body explained that the probative value of such evidence may be limited where significant differences exist between countries’ regulations,<sup>359</sup> the EU measures are similar to other countries’ prohibitions on trade in seal products in that they are all partially or wholly based on concerns about animal suffering associated with commercial seal hunting.

268. For all of the foregoing reasons, the EU measures pursue a legitimate objective for purposes of Article 2.2.

b. The EU Measures Are Not More Trade-Restrictive Than Necessary to Fulfil the EU’s Legitimate Objective, Taking Account of Risks of Non-Fulfilment

269. Once a finding of legitimacy is made, the next inquiry is whether the measures are more trade restrictive than necessary to fulfil a legitimate objective. Here, the EU measures are not more trade restrictive than necessary to fulfil the EU objectives. Available alternatives, such as the combination certification/labelling scheme proposed by Canada, are not sufficient to achieve the level of protection sought by the EU to protect the public moral concerns of its citizens regarding commercial seal hunting and contributing to the trade in seal products.

270. In *US – Tuna* and *US – COOL*, the Appellate Body explained that the fulfilment of legitimate objectives involves an inquiry into the degree of contribution that the regulation makes toward achievement of the legitimate objectives, making clear that the regulation need not reach some minimum threshold of fulfilment in order to be found compliant with Article 2.2.<sup>360</sup> It is for the complainant to make a prima facie case that the challenged measure is more trade restrictive than necessary, likely by presenting an alternative less-trade restrictive measure that makes an equivalent

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<sup>357</sup> See Appellate Body Report, *US – COOL*, WT/DS/384/AB/R at para. 372.

<sup>358</sup> See Panel Report *US – COOL*, WT/DS/384/R at para. 7.650 (upheld by the Appellate Body at para. 448).

<sup>359</sup> See Appellate Body Report, *US – COOL*, WT/DS384/AB/R at para. 448.

<sup>360</sup> See Appellate Body Report, *US – COOL*, WT/DS384/AB/R at para. 461.

contribution to the objective and is reasonably available. The burden then shifts to the respondent.<sup>361</sup>

271. Using this rubric in the *US – Tuna* dispute,<sup>362</sup> the Appellate Body found that the proposed alternative failed to provide the same level of fulfilment of objectives. There, the Appellate Body ruled that Mexico’s solution of permitting the usage in the US market of an additional “dolphin-safe” label under standards allowing setting on dolphins—the method specifically targeted and disallowed in the measure at issue—did not provide the same level of fulfilment of US objectives.<sup>363</sup>

272. The same analysis applies to the instant dispute, as anything less than a ban on commercial seal products could only result in fulfilment to a lesser extent of the EU’s legitimate objectives. As the Panel found in *US – Clove Cigarettes*, “if an alternative means of achieving the objective ... would involve greater risks of ‘non-fulfilment,’ this may not be a legitimate alternative.”<sup>364</sup> As shown, the EU measures are contributing significantly to the EU’s objective. Trade in seal products is considerably weaker than prior to the EU measures, and Canada itself admits this is due in large part to the EU measures. A certification/labelling scheme would still allow commercial seal products to be placed on the EU market without any assurances that the products were in fact harvested humanely (not only because the commercial seal hunt is inherently inhumane, but because it would be a logistic impossibility to have observers witness every seal kill in order to certify it as eligible to enter the EU market). Even assuming, *arguendo*, that the certification/labelling scheme could be perfected so as to assure that only products from humanely killed seals were placed on the EU market and labelled as such, it would still fail to achieve the EU’s targeted level of protection; for even the most conscientious and perfectly supervised sealer would invariably cause a significant number of inhumane seal deaths as by-products of his humane efforts, because of the inherent circumstances of the hunt. Thus, Canada’s proposed alternative would continue to perpetuate the very trade to which EU citizens do not want to contribute based on their moral convictions. To the extent Canada’s alternative could have some very limited contribution to the EU objective, it would be far less than what is achieved by the EU measures.

273. In assessing the risks of non-fulfilment, Article 2.2 instructs that relevant considerations include available science. *Amici* have provided extensive factual information, based on reports by leading veterinarians, that commercial seal hunting is inherently inhumane and that no degree of regulation can address the external factors inherent in commercial seal hunting (like extreme weather and moving ice floes).<sup>365</sup>

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<sup>361</sup> See Appellate Body Report, *US – COOL*, WT/DS384/AB/R at 379; see also Appellate Body Report, *US-Tuna*, WT/DS381/AB/R at para. 322.

<sup>362</sup> The Appellate Body attempted to undertake this analysis in the *US – COOL* dispute, but was stymied by the panel’s lack of findings regarding the extent to which the regulation at issue and the proposed alternatives fulfilled the US’s stated objectives. See generally Appellate Body Report, *US – COOL*, WT/DS384/AB/R at para. 479-91.

<sup>363</sup> See Appellate Body Report, *US – Tuna*, WT/DS381/AB/R at para. 330.

<sup>364</sup> See Panel Report *US – Cigarettes*, WT/DS406/R at para. 7.424, 7.428 (finding that Indonesia failed to advance viable alternatives under TBT Article 2.2, and that the U.S. measure is consistent with TBT Article 2.2) (not explicitly reviewed by the Appellate Body).

<sup>365</sup> Notably, Members are not obligated to follow the majority scientific opinion. See Appellate Body Report, *EC – Asbestos*, WT/DS135/AB/R para. 178.

This is evidenced by the fact that Canada has repeatedly stated its hunt is humane, but has then had to modify its regulations on numerous occasions to make the hunt “more humane.” This could go on indefinitely, because even if the laws on the books reflected the strongest provisions possible, they would still fall short in practice due to the inherent conditions of the hunt. Accordingly, the EU measures can also be justified on scientific grounds.

274. As a result, the only way to truly address the public concern about commercial seal hunting is to preclude commercial seal products from being placed on the EU market. The EU measures are thus not more trade restrictive than necessary to fulfil a legitimate objective. As such, the Panel should find that the EU measures do not run afoul of Article 2.2, and Canada’s proposed alternative should be rejected.

## **VI. CONCLUSION**

275. For the reasons stated herein, the EU’s seal regime is in conformity with its obligations under the GATT and the TBT Agreement. *Amici* urge the Panel to reject the claims advanced by Canada and Norway, and find that the EU measures at issue comply with the relevant provisions of the WTO Agreements.