BEFORE THE
WORLD TRADE ORGANIZATION
DISPUTE SETTLEMENT BODY

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

(WT/DS400, WT/DS401, WT/DS369)

Written Submission of Non-Party Amici Curiae

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DISPUTES CITED IN THIS SUBMISSION	
Short Title	**Full Case Title and Citation**
Brazil – Retreaded Tyres	Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007
China – Publications and Audiovisual Products	Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, adopted 19 January 2010
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EC – Asbestos	Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001
EC – Asbestos	Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R and Add.1, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS135/AB/R
EC – Biotech	Panel Report, *European Communities – Approval and Marketing of Biotech Products,* WT/DS291/R, WT/DS292/R, WT/DS293/R, 29 September 2006
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US – Gambling	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005
US – Gambling	Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, adopted 20 April 2005, as modified by Appellate Body Report WT/DS285/AB/R
US – Gasoline	Appellate Body Report, *US – Standards for Reformulated and Conventional Gasoline,* WT/DS4/AB/R, adopted 20 May 1996
US – Section 211 Appropriations Act	Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, adopted 2 January 2002
U.S. – Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998
U.S. – Tuna II	Appellate Body Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012
U.S. – Tuna II	Panel Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, adopted 13 June 2012, as modified by the Appellate Body Report

I. INTRODUCTION

1. The discretion of a WTO panel to accept and consider unsolicited *amicus* briefs from non-governmental persons is well established. There is no particular procedure for *amicus curiae* submissions in this appeal, so we have submitted this brief electronically, via an email with the brief and exhibits attached, sent to Ms. Valerie Hughes, the Director of the Legal Affairs Division of the World Trade Organization (WTO).
2. *Amicus* briefs should not rehash or repeat the arguments of the parties. We have carefully considered the First Written Submission of the European Union (EU), and while the arguments we make in this brief are supportive of the general position of the EU in this dispute, they are additive to the arguments that the EU has made in its First Written Submission.
3. All three authors of this brief are jurists of Canadian nationality, and are conversant with Canadian constitutional, administrative, and aboriginal law, which is relevant to certain aspects of the context in which this dispute occurs. Accordingly, we address ourselves primarily (although not exclusively) to the claims and arguments of Canada, not Norway.

II. THE AUTHORS

a. Professor Robert Howse

4. Robert Howse is the Lloyd C. Nelson Professor of International Law and Co-Director of the Institute of International Law and Justice at New York University Law School (NYU). He has taught the law of the WTO at NYU, the University of Michigan, Harvard Law School, the University of Toronto, Tsing Hua University, the University of Paris I (Pantheon-Sorbonne), Tel Aviv University, and the Academy of European Law, European University Institute, Florence. He has taught for a decade as a member of the

faculty of the World Trade Institute, Berne. He is an advisor and participant in the American Law Institute project on the Principles of WTO Law. His objectives are research and scholarship that addresses major systemic issues in the world trading system from a jurisprudential perspective, with institutional structure and legitimacy being a key preoccupation. His treatise on international trade law, co-authored with Michael J. Trebilcock and now Antonia Eliason, is used as a textbook in many of the leading universities of the world – the London School of Economics, Harvard University, Columbia University, the European University Institute, Stanford University, Tokyo University, and many others in North America, Europe, Latin America, and Asia. A central systemic issue that is addressed in many of his scholarly writings is the relationship between WTO law and domestic regulations. In addition, Professor Howse has taught and published extensively on Canadian constitutional law and administrative law.

5. Professor Howse does not have any material or personal interest in the disposition of this appeal. He has advised on a pro bono basis two Non-Governmental Organizations concerned with this dispute, the International Fund For Animal Welfare Canada (IFAW) and People for Ethical Treatment of Animals USA (PETA). Professor Howse has not received any financial or other compensation from these organizations, and the views in this brief are solely those of the authors and should not be taken to represent the positions of any other organization, nor has any other organization in any way instructed the authors concerning the content of this brief.

6. Professor Howse's family origins are in Newfoundland, Canada and his maternal grandfather, Captain Jesse Winsor, was actively involved in the seal hunt as the captain of sealing vessels.

b. Joanna Langille

7. Joanna Langille is a consultant on international trade and investment law issues for the Toronto law firm Appleton & Associates and the Managing Editor of the *University of Toronto Law Journal*. She is currently a doctoral candidate at the University of Toronto Faculty of Law. Her academic and professional work has focused on international trade law, with a particular emphasis on theoretical and philosophical approaches to understanding the WTO. She has published several articles on international trade law, including an article co-authored with Professor Howse on aspects of this dispute, which was published in the Yale Journal of International Law.
8. Ms. Langille has held positions at the World Trade Organization (Trade Policy Review Division), the International Centre for Trade and Sustainable Development (ICTSD), and Oxford University's Global Economic Governance Programme. She has also worked as a law clerk at the Ontario Court of Appeal, where she assisted appellate judges with cases regarding Canadian constitutional and aboriginal law. A native of Nova Scotia, Canada, Ms. Langille was educated at the University of Toronto (B.A.), Balliol College, Oxford (M.Phil International Relations), and New York University Law School (J.D.). She is a member of the Law Society of Upper Canada (Ontario).
9. Ms. Langille does not have any material or personal interest in the disposition of this dispute. Her interest in filing this amicus brief is solely that of a legal scholar with a particular focus on theoretical and philosophical approaches to the international trade

regime. She has not received any financial compensation or any other incentive or inducement from any person or organization in connection with the preparation of this brief.

c. Katie Sykes

10. Katie Sykes is a lecturer in international trade law at the Schulich School of Law at Dalhousie University in Nova Scotia, Canada, where she is also a doctoral student. Her research focuses on interlinkages between international trade law and non-trade international norms – human rights, protection of the environment, and animal welfare – in the regulation of the global food system. She has particular interest and expertise in animal welfare issues in both Canadian and international law, including how animal welfare interacts with international trade disciplines. She has published several articles on animal welfare law and was awarded the Society of International Economic Law essay prize for 2012 for a scholarly essay on issues in this dispute.
11. Ms. Sykes was educated at the University of Toronto (J.D.), Harvard Law School (LLM) and the Schulich School of law (LLM). She served as a law clerk to Mr. Justice LeBel of the Supreme Court of Canada and has extensive familiarity with Canadian law generally, including Canadian constitutional, animal welfare, aboriginal, and fisheries law. She is a member of the Nova Scotia Barristers' Society.
12. Ms. Sykes does not have any material or personal interest in the disposition of this dispute. Her interest in filing this amicus brief is solely that of a legal scholar with a particular focus on the emerging recognition of animal welfare protection as an important principle recognized in legal systems, including international law and international trade law. She has not received any financial compensation or any other incentive or

inducement from any person or organization in connection with the preparation of this brief.

III. SUMMARY OF THE SUBMISSIONS IN THIS BRIEF

13. The preliminary submissions in this brief are aimed at correcting the misleading and incomplete manner in which Canada has characterized the objectives of the measures at issue in this dispute,[1] (referred to together as the "EU Seals Regime"); the economic and environmental context of the Canadian commercial seal hunt; and the legal principles relevant to differential treatment of indigenous peoples in Canada and elsewhere.

14. The EU Seals Regime serves more than one objective. It aims at the expression of moral opprobrium at animal cruelty and at prohibiting the complicity of EU consumers on EU territory with activities that attract such opprobrium. It also seeks to protect the life and health of seals.

15. Insofar as the first objective is concerned, the EU Seals Regime falls outside the scope of the TBT Agreement, because the subject-matter of the TBT Agreement is risk regulation aimed instrumentally at protecting certain kinds of material interests. The expressive and non-instrumental aspect of the Seals Regime therefore falls outside its purview.

16. Furthermore, the *amici* submit that the instrumental, animal welfare orientation of the Seals Regime is compliant with the requirements of the TBT Agreement.

17. If the Panel were to find that this second, instrumental aspect of the Seals Regime does not conform to the TBT Agreement, the *amici* submit that the measure is nevertheless be WTO-legal because those aspects of the measure that relate to a purpose not covered by the TBT Agreement – that is, the expression of moral opprobrium – are consistent with

[1] Regulation (EC) No. 1007/2009 of the European Parliament and of the Council, of 16 September 2009 on trade in seal products and 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.

WTO law and, in particular, do not violate the GATT. The inclusion of a public morals exception in GATT Article XX indicates that morally based regulation is within the scope of the GATT rather than the TBT Agreement.

18. We further submit that Canada has failed to make a *prima facie* case that any of the Articles of GATT or the TBT Agreement that it invokes have been violated by the EU Seals Regime. Canada's claims amount to speculations as to how EU officials might in the future exercise their discretion under certain provisions of the Seals Regime, and particularly how they might interpret and apply provisions that deal with the indigenous and marine management exceptions. The speculations, which Canada itself admits are based on "limited evidence,"[2] fall demonstrably short of what is required to mount an "as such" challenge to a law, regulation, or norm.
19. Canada has failed to establish, even on a *prima facie* basis, the essential elements of a violation under Article I, III, or XI of the GATT, and wrongly interprets the scope and coverage of Article I and XI of the GATT.
20. We further submit that, even if the EU Seals Regime were to violate some operative provision of the GATT, Article XX(a) would apply to justify the EU requirement as orientated to expression of moral opprobrium at cruelty, and Article XX(b) would apply to justify the requirement as oriented instrumentally to the protection of the lives and health of seals.
21. Canada has also failed to establish the essential elements of a violation of Article 2.1 of the TBT Agreement, for the same reasons that it has not established a *prima facie* case under Article I or Article III:4 of the GATT.

[2] Canada's First Written Submission, para. 337.

22. With respect to Article 2.2 of the TBT Agreement, the protection of animal welfare is a legitimate regulatory objective. Canada has not met its burden of showing that a labeling or certification scheme is an available alternative that would meet the goals of the EU.

IV. PRELIMINARY CONSIDERATIONS: CANADA MISSTATES THE ECONOMIC AND ENVIRONMENTAL CONTEXT AND IMPLICATIONS OF THE CANADIAN COMMERCIAL SEAL HUNT AS WELL AS THE SITUATION OF INDIGENOUS PEOPLES

23. The EU Seals Regime is inspired by deeply held convictions about the ethical obligations that apply in the relationship between humans and particular animals. It has two connected but distinct purposes. First, it expresses moral opprobrium at the continuing existence of a declining industry propped up by state aid, which subjects intelligent and sensitive animals to gratuitous cruelty for the purpose of commercial exploitation of their skins, flesh, and body parts to produce non-essential, frivolous products. Secondly, it aims at improving animal welfare through protecting seals against inhumane treatment.

24. In keeping with its purposes, the EU Seals Regime permits the killing of seals where consistent with legitimate and significant interests and values, since in such instances (i) the moral opprobrium against unwarranted cruelty for commercial exploitation is not engaged and (ii) the instrumental goal of protecting animal welfare is counterbalanced by other important moral concerns. The values or purposes in question include the sustainable management of marine resources and respect for the right of indigenous peoples to self-determination, as well as pragmatic considerations and simple common sense. The totality of these various policy considerations is reflected in the design of the Seals Regime and in the carefully tailored exceptions to the EU's ban on placing seal products on the market.

25. Much of this brief focuses on the first of those objectives: the expressive purpose of the Seals Regime in manifesting moral opprobrium. Arguments in support of the Seals Regime in terms of this objective are implicit in the EU's written submission. The arguments of the *amici* add to and support those of the EU by elaborating how the expressive moral purpose of the measure shapes the entire legal analysis.

26. Canada would have it that neither of the above objectives is the real purpose of the Seals Regime, but merely a pretext for a regulatory programme whose true but surreptitious *raison d'être* is to protect the domestic European and Greenland sealing industries.[3] In reality, the protection of the very small domestic sealing industry in Europe is far from being a goal that would attract enough public support or inspire enough political will to drive policy in the EU. And far from being advantaged or protected by the EU Seals Regime, the Greenland industry, according to Greenland's Minister for Fisheries, Hunting and Agriculture, has been severely detrimentally affected by the ban and the ensuing decrease in sales of seal skins.[4]

27. It is the government of Canada that actually does face – and actually makes policy decisions in response to – considerable political pressures to protect its domestic sealing industry from the normal operation of market forces.

28. It is politically expedient for the Canadian government to support the sealing industry because that industry provides some substitute income for fishermen who lost their traditional livelihoods when the Canadian cod fishery collapsed in the early 1990s – an environmental catastrophe that fishing communities are understandably inclined to blame on government mismanagement.

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[3] Canada's First Written Submission, paras. 1 and 3.

[4] European Bureau for Conservation and Development, *The Impact of the EU Seal Ban on the Inuit Population in Greenland* (February 7, 2012), p. 3, available at http://ebcd.org/pdf/en/166-Report.pdf.

29. Canada's challenge to the Seals Regime is itself part a suite of government policies and support measures propping up an industry that would not be viable without such intervention. In 1996, the fading Canadian sealing industry was revitalized by government subsidies that financed the purchase of seal meat to be used as food in the fox-farming industry.[5] Canada's description of the recovery of the industry as a response to re-emerging demand[6] neglects to mention this injection of government assistance at a critical point. Direct subsidies were discontinued in 2000, but the industry continues to receive substantial, expensive government assistance in other forms.

30. Significantly, the Canadian government provides dedicated Coast Guard icebreaker support at an estimated cost of CAD $4.7 million per year.[7] The Canadian government and the government of Newfoundland and Labrador together spend at least CAD $200,000 per year on marketing campaigns on behalf of the sealing industry in an ongoing struggle to create markets for seal products.[8] In 2012, when it appeared likely that the seal hunt would not proceed due to lack of demand, the government of Newfoundland and Labrador announced that it would provide CAD $3.6 million in loans to a processing plant to buy up unwanted seal skins and stockpile them for future sale in

[5] Canadian Institute for Business and the Environment, *The Economics of the Canadian Sealing Industry* (2001) (attached hereto as Exhibit 1), p. 10; John Livernois, *The Economics of Ending Canada's Commercial Harp Seal Hunt* (2009) (attached hereto as Exhibit 2), p. 5. Seal meat has a strong, unpalatable taste and there is little demand for it for human consumption. Canada's assertion that it is "eaten regularly by residents of Canada's east coast" suggests unfamiliarity with the eating habits of residents of Canada's east coast.
[6] Canada's First Written Submission, para. 35.
[7] Livernois (Exhibit 2), p. 16. The estimated cost of $4.7 million is based on the Auditor General of Canada's analysis of Canadian Coast Guard operations and is expressed in 2008 dollars.
[8] Livernois (Exhibit 2), p. 14.

case demand resurged in the future.[9] There is a long prior history of provision of government loans to the sealing industry, and defaults on repayment by the recipients.[10]

31. The economic importance of the sealing industry two hundred years ago, as described in Canada's written submission,[11] contrasts starkly with its inability to sustain itself without state support today. The Canadian sealing industry today is politically consequential, but it is economically unsustainable.

32. It is not just that the industry is marginal in terms of its general contribution to the economy; the benefits it provides to individuals are also unpredictable and often negligible. To claim that individual sealers are "highly dependent on the income" from sealing,[12] as Canada does, is to stretch the facts. The steep input costs (for requirements such as fuel, ammunition and insurance) for participating in the hunt in a harsh and dangerous environment – even without taking into account those costs that are borne by the government, like icebreaker support – offset the value received by sealers for their catch to the point that net earnings can be vanishingly low. For example, net earnings were estimated at as low as CAD $11 per sealer for the 2008 season.[13]

33. The economic marginality of the industry is not attributable to EU action, as Canada claims,[14] but is the predictable result of the way the seal fishery has been managed. Seals are treated as a common property resource, subject only to the limitation that a maximum aggregate number (the Total Allowable Catch or TAC) can be "harvested" in each hunting season. This creates an incentive to be the first to get to the seals and take as

[9] Humane Society International, *HSI Commends Taiwan for Historic Ban on Trade in Marine Mammal Products*, January 8, 2013, available at http://www.hsi.org/world/canada/news/releases/2013/01/taiwan_seal_product_ban_010813.html.
[10] Canadian Institute for Business and the Environment (Exhibit 1), p. 9.
[11] Canada's First Written Submission, paras. 26-31.
[12] Canada's First Written Submission, para. 30.
[13] Livernois (Exhibit 2), p. 13.
[14] Canada's First Written Submission, paras. 34 and 36.

many as possible out of the maximum allowed, ahead of others (the "Race to Hunt"). As the University of Guelph economist John Livernois points out, under this kind of management regime economic theory predicts that the economic surplus from participating in the hunt will approach zero:

> Property rights for seal pelts are established by being the first to harvest them. It is well known that this leads to the so-called 'tragedy of the commons' in which harvesting effort is excessive, the population can be driven to low levels, and economic surplus (rent) for harvesters is driven to zero.[15]

34. There is no plausible economic justification for the government to prop up the Canadian sealing industry with millions of dollars in public money.

35. Nor does state bankrolling of the hunt make sense in terms of managing marine biodiversity, notwithstanding the government's allusions to the questionable idea that killing seals will help the decimated cod stocks to recover.

36. In 2012, the Senate Standing Committee on Fisheries and Oceans ("Committee") recommended proceeding with a grey seal "targeted removal program" in southern Gulf of Saint Lawrence,[16] in the face of scientific advice that found that there was not enough evidence to draw any conclusions about the effect such a cull would have on cod stocks.

37. Biologist Dr. Jeffrey Hutchings advised the Committee that four preconditions – none of which now obtains – would have to be met for a cull to be "defensible," including the adoption by the government of appropriate recovery plans for cod (which are not now in

[15] Livernois (Exhibit 2), p. 5.
[16] Government of Canada, *The Sustainable Management of Grey Seal Populations: A Path Toward the Recovery of Cod and Other Groundfish Stocks,* Report of the Standing Senate Committee on Fisheries and Oceans, October 2012 (attached to Canada's First Written Submission as Exhibit CDA-19), p. 19.

place) and acknowledgement that the extinction risks faced by fish in the area were in fact "produced by human-induced overfishing and predicated by political expediency"[17] – not caused by seals. Dr. Hutchings advised that science could not predict the effect of a cull on fish stocks, and a decision to proceed with the seal cull would not be based on scientific evidence "but would have to be based on something else."[18]

38. The Committee decided that the cull should go ahead anyway, stating its belief that "scientific uncertainty should not be stopping DFO from taking action."[19] That decision was indeed based on "something else": the political expediency of being *seen* to do something about the disappearance of the cod (albeit in the absence of evidence that the action would be at all helpful) and deflecting responsibility for the non-recovery of cod stocks away from the government's failure to adopt an effective fisheries management plan.

39. It is of course Canada's prerogative as a sovereign nation (subject to its international legal obligations) to adhere to an economically and environmentally irrational policy of artificially sustaining the sealing industry, and to spend public money on that policy. It is incongruous, however, that it now attempts to use the WTO, an institution whose purposes include, *inter alia*, promoting "optimal use of the world's resources"[20] and the reduction of protectionist market distortions by means of international cooperation, to force the EU to open its markets to products regarded as morally repugnant both in the EU and internationally, and so to perpetuate Canada's policy of keeping a moribund, state-dependent industry on life support.

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[17] Government of Canada (Exhibit CDA-19), p. 13.
[18] Government of Canada (Exhibit CDA-19), p. 12.
[19] Government of Canada (Exhibit CDA-19), p. 13.
[20] *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994), Preamble.

40. Canada belittles the animal welfare objectives of the Seals Regime as no more than "apparent concerns expressed by some EU citizens."[21] Yet the Seals Regime was passed by an overwhelming vote in European Parliament. In addition, Canadians have themselves expressed significant concerns with the seal hunt. Polls that show that a majority of Canadians oppose the hunt,[22] further suggesting that Canada is simply acting to confer rents on a concentrated special interest group. Ethically grounded opposition to seal hunting is not just the "apparent" preoccupation of a few, but is real and pervasive, not only in Europe but internationally.

41. In Europe there is "a significant body of opinion that holds the seal in particular favour, wishing to accord it a high protective status."[23] This public sentiment was manifested in the popularity of the European Community's ban on importing whitecoat and blueback pelts, which was described by a senior European official as "the only EC directive which appeared to have *universal support* among the European public."[24] The new EU Seals Regime also enjoys widespread popular support.[25]

42. The British biologist and writer Colin Tudge has identified the protection of animal welfare as a core European ideal, one that informs the European "version of civilisation," the measure of whose worth is to be found in "our treatment of those who are vulnerable, and cannot fight back if we treat them badly: vulnerable people, and all non-human

[21] Canada's First Written Submission, para. 6.
[22] For example, a 2010 poll conducted by Environics Research Group for IFAW found that 65% of Canadians agreed that the seal hunt is inhumane, and 57% felt that the EU ban on seal products is a step in the right direction. IFAW, *Nationwide poll shows Canadians continue to oppose seal hunt* (July 1, 2010), available at http://www.ifaw.org/canada/node/22521.
[23] Donald McGillivray, *Seal Conservation Legislation in the UK – Past, Present, Future*, 10 International Journal of Marine and Coastal Law 19 (1998) (attached hereto as Exhibit 3), p. 48.
[24] "EC to lift ban on seal skin imports," *The Sunday Telegraph*, 21 November 1993, p. 2, cited in McGillivray (Exhibit 3), p. 48 (emphasis added).
[25] An opinion poll in 11 European countries conducted by Ipsos MORI in 2011 found that 72% of adults supported the EU ban on seal products. Humane Society International, *New Poll Shows Most Europeans Say "NO" to Cruelty from Canada* (July 14, 2011), available at http://www.hsi.org/world/europe/news/releases/2011/07/eu_poll_supports_ban_071411.html.

species." Tudge expresses a widely shared belief of European citizens when he says that the strength of European law protecting animals "to a significant extent … measures the worth of the European ideal."[26]

43. Against this general background of a deeply held commitment to animal welfare, the protection of seals and the opposition to seal hunting have a special priority due to the specific characteristics of these animals and the circumstances in which they are hunted. Seals are intelligent, charismatic, and ecologically sensitive marine mammals. Products from seals, such as furs, dietary supplements, and seal penises used for aphrodisiacs, are non-necessary (leaving aside special situations like the traditional consumption of seal meat by indigenous peoples). This means that the moral calculus regarding seal hunting is not the same as it is for animals raised for food, which is a more important objective than making luxury clothing or dubious erotic aids. Furthermore, seal hunting takes place in remote locations under harsh environmental conditions, so that as a practical matter it is all but impossible to ensure that the animals are killed in a controlled and humane way.

44. The same special concerns regarding seals and sealing are shared beyond Europe and are reflected in the decisions of a steadily increasing number of countries to ban commerce in seal products. In 2011, Russia, Belarus, and Kazakhstan adopted a ban similar to the EU Seals Regime, and most recently Taiwan banned all trade in marine mammals except for products of indigenous hunts.[27] A spokesperson for a Taiwanese animal protection group

[26] Colin Tudge, "Conclusion – Animal Welfare and the Ideal of Europe" in Council of Europe, ed., *Ethical Eye: Animal Welfare* (Belgium: Council of Europe Publishing: 2006) 255 (attached hereto as Exhibit 4), p. 255.
[27] Humane Society International, *HSI Commends Taiwan for Historic Ban on Trade in Marine Mammal Products*, January 8, 2013, available at http://www.hsi.org/world/canada/news/releases/2013/01/taiwan_seal_product_ban_010813.html.

noted that the Taiwanese "do not want to trade in products of cruelty that the rest of the world has rejected."[28]

V. THE TBT AGREEMENT DOES NOT APPLY TO THE EU SEALS REGIME AS AN EXPRESSION OF MORAL OPPROBRIUM

45. Both Canada and Norway argue that the Technical Barriers to Trade Agreement (TBT Agreement) applies to the Seals Regime, and that the EU has violated a variety of TBT provisions.[29]

46. The Appellate Body has characterized the issue of whether the TBT applies to a particular measure as a "threshold issue" that must be addressed before any violations of the TBT can be considered.[30] The preliminary question is whether the measure under consideration is a "technical regulation," as defined Annex 1.1 of the TBT Agreement.

47. A single measure (in this case the EU Seals Regime) may be aimed at more than one objective or purpose; indeed, the same measure may be necessary to achieve two or more different objectives. The scrutiny of a measure's relationship to one objective may fall under a certain WTO Agreement, while its relationship to other objectives may be a matter for the disciplines of different WTO Agreements. Thus in the *EC – Biotech* case, the panel found that, even if a measure failed scrutiny under the SPS Agreement in relation to those of its purposes covered thereby, to the extent that the measure, or aspects of it, were aimed at *other* purposes *outside* the coverage of the SPS Agreement, it would nevertheless be WTO-consistent if the relevant non-SPS provisions (applicable to

[28] Humane Society International, *HSI Commends Taiwan for Historic Ban on Trade in Marine Mammal Products*, January 8, 2013, available at http://www.hsi.org/world/canada/news/releases/2013/01/taiwan_seal_product_ban_010813.html.
[29] Canada's First Written Submission, paras. 348-733; Norway's First Written Submission, paras. 473-516.
[30] Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002 (hereinafter Appellate Body Report, *EC – Sardines*), para. 175.

measures with the relevant kinds of non-SPS purposes) were not violated.[31] In other words, if by virtue of one purpose a measure falls outside the TBT Agreement and is otherwise WTO-compliant, the measure is found to be WTO-compliant, notwithstanding that it might also have another purpose that is within the purview of the TBT Agreement.

48. The term "technical regulation" is defined in Annex 1.1 of the TBT Agreement as follows:

> *Technical Regulation*
>
> 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.

49. An inquiry into whether a particular measure comes under this definition typically starts with the three-pronged test for identifying a technical regulation set out by the Appellate Body in the *EC – Asbestos* case. For the TBT Agreement to apply, the regulation in question must: (1) apply to an identifiable product or group of products; (2) lay down one or more characteristics of the product; and (3) make compliance with the product characteristics mandatory.[32]

50. The instant case presents a new issue, which requires the Panel not merely to apply the *Asbestos* criteria mechanically, but to interpret the definitional language of Annex 1.1 in

[31] Panel Report, *European Communities – Approval and Marketing of Biotech Products,* WT/DS291/R, WT/DS292/R, WT/DS293/R, adopted 29 September 2006, paras. 7.166-7.171.
[32] Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001 (hereinafter Appellate Body Report, *EC – Asbestos*), paras. 67-70.

light of the context of the whole agreement and its overall object and purpose.[33] The question is whether the TBT Agreement applies to measures insofar as they are oriented toward an expression of moral opprobrium at conduct deemed inhumane by a particular community – or, to put it another way, to the extent that measures seek to achieve non-instrumental moral goals. This issue has not yet been addressed by the WTO case law. We submit that the answer must be that it does not apply to such a purpose.

51. There are several reasons why the TBT Agreement does not apply to the aspects of regulatory measures motivated by non-instrumental moral concerns.[34]

52. First, the very use of the term "technical" to describe the kinds of measures covered by the TBT Agreement implies that morally-motivated measures are not the type of measures that the TBT Agreement was intended to address. While the term "technical regulation" is a term defined in the TBT, it has not been recognized as a special term within the meaning of Article 31(4) of the *Vienna Convention on the Law of Treaties.* Therefore, the term "technical regulation" must be analyzed in light of its ordinary meaning. In other words, the definition of "technical regulation" in the TBT Agreement presupposes the ordinary meaning of the term "technical" rather than supplanting it.

53. The word "technical" traces its Greek roots to the concept of *technē*, and is defined in the Merriam-Webster Dictionary as "having special and usual practical knowledge especially of a mechanical or a scientific subject" or "marked by or characteristic of specialization." This definition suggests that technical refers to an instrumental aim, not a moral expression or valuation. Measures aimed at expressing moral opprobrium or maintaining

[33] *Vienna Convention on the Law of Treaties*, (1969) 1155 UNTS 331, Art. 31(1).
[34] This is without prejudice to the other aspects of the measure that are motivated by instrumental concerns regarding animal health and welfare.

a code of intrinsic ethical or spiritual beliefs not subject to means/ends analysis do not fall comfortably within the ordinary meaning of a technical regulation.

54. Second, unlike the GATT, the list of "legitimate objectives" in Article 2.2 of the TBT Agreement does not include the protection of public morals. While the list of objectives in the TBT Agreement is non-exhaustive, the choice to not to expressly include public morals suggests that technical regulations are a narrower category than the regulations covered by the GATT. This is especially notable given that the list of legitimate objectives in Article 2.2 of the TBT Agreement otherwise follows in many respects the objectives stated in the various paragraphs of GATT Article XX. The decision to include in the illustrative list many of the other Article XX objectives but not that of protection of public morals cannot be a mere omission. It clearly suggests that the drafters of the TBT Agreement did not, as a general matter, expect that moral regulations would be appropriate for scrutiny as technical regulations.

55. Third, the very nature of the provisions of the TBT Agreement indicates that it does not apply to measures oriented to the expression of moral opprobrium, to the extent that they are so oriented. For example, Article 2.2 imposes a least restrictive means test, prohibiting "unnecessary obstacles to international trade." This commitment requires Members to adopt only "necessary" measures: those that are least trade restrictive, taking into account the risks of non-fulfillment of the Member's objective. In other words, the issue is whether there is a plausible alternative measure that would meet the Member's purpose while simultaneously placing fewer restrictions on trade. This suggests a test that is oriented to an instrumental balancing, weighing the risks of a particular harm against any possible obstacles to trade created by a measure. Such a risk assessment calculus is

not applicable to expressions of moral opprobrium, where the aim is not to reduce risks of harm but to express condemnation of a particular social practice. In short, measures aimed at moral opprobrium are not amenable to the type of balancing that must occur under the TBT Agreement.

56. For example, Israel currently justifies its ban on nonkosher meat on the basis of religious reasons; all meat imports are assessed by the Council of the Chief Rabbinate in Israel to determine whether they are kosher or not. Likewise, India justifies import restrictions on bovine products on the basis of widely-held religious beliefs. These types of rationales are not susceptible to the means/ends rationality that characterizes risk assessment.

VI. CANADA'S CLAIMS FAIL THE ESSENTIAL CONDITIONS FOR AN "AS SUCH" CHALLENGE

57. It is well established that a complaining Member may state its claim that the responding Member has violated a provision of the covered agreements in one of two ways. First of all, a Member may allege that a law, regulation or other norm (such as a statement of administrative guidance that is generally followed even if not binding) *does not permit* of an interpretation or application consistent with WTO law. In this case, the claim is that a law, regulation, or other norm violates "as such" a provision of a covered agreement. Secondly, a Member may allege that particular instances of application of a law, regulation, or other "norm" violate WTO law (even if the law, regulation, or other "norm" could, on its face, be applied in a WTO-compliant manner).[35]

58. In an "as such" challenge, the complaining Member bears the burden of proof in showing that the plain language of the law, regulation, or other norm permits of no discretion or interpretive latitude that would allow it to function *in practice* in a manner consistent

[35] Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 15 December 2003, paras. 97-99.

with WTO obligations. As the Appellate Body has explained: "[W]here discretionary authority is vested in the executive branch of a WTO Member it cannot be *assumed* that the WTO Member will fail to implement its obligations under the WTO Agreement in good faith."[36]

59. While presenting its complaint as an "as such" challenge to the EU Seals Regime, Canada's assertions about "less favourable treatment" of Canadian products amount to mere predictions or expectations as to how EU officials may administer the regime. Indeed, Canada admits that its predictions are based on "limited evidence."[37] This is far from the inevitability or virtual certainty of a violation that is required to support an "as such" claim.

60. In its submissions with regard to GATT Article III:4, Canada makes the remarkable admission that its claims are founded on speculations as to how European officials may or may not exercise their discretion in the future application of the Seals Regime. Thus, Canada acknowledges that whether there is less favourable treatment of Canadian seal products would largely depend on the interpretation or application of certain criteria or terms that are not defined in the EU Seals Regime,[38] and are thus subject to the discretion of officials and legal interpretation of the courts. Canada merely asserts repeatedly that it is "likely"[39] and "very likely"[40] that the EU scheme will operate in a manner unfavourable to allegedly like Canadian seal products. Such speculations of how a

[36] Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, adopted 2 January 2002, para. 259 (emphasis added).
[37] Canada's First Written Submission, para. 337.
[38] Canada's First Written Submission, paras. 337 and 339.
[39] Canada's First Written Submission, para. 337.
[40] Canada's First Written Submission, paras. 341 and 344.

scheme will likely fall well below the certain or virtual certainty of violation required for an "as such" challenge to a law, regulation, or norm.

61. Canada acknowledges that the EU scheme came into force and has been applied to all seal products since August 20, 2010. Yet the best Canada can do is offer speculations that the scheme may be operated at some future time in a manner inconsistent with the obligation of "no less favourable treatment" under Article III:4. Not being able to muster evidence that the actual operation of the scheme violates WTO obligations after more than two years of operation, Canada now perversely and misleadingly has resort to an "as such" challenge, based on flimsy predictions about future exercises of administrative discretion.

62. Indeed, the facts presented by Canada sometimes contradict its own predictions or speculations. For example, at para. 342, Canada conjectures that the marine management exception might be interpreted in the future such that by-products of EU origin would be eligible for "subsequent sale for profit on the EU market and elsewhere." However, at para. 341, Canada presents evidence that by-products of this nature are sold "on a private basis" in the local community. It is thus very likely that the EU regime supposes that such by-products will not enter into the normal stream of commerce and that the exception would be interpreted in such a manner as to exclude such a possibility. Canada does not offer any textual reading of the EU regulation that could compel the EU authorities to authorize the sale of by-products from the marine management hunt in the EU into large-scale commercial markets, contrary to existing practice in those communities.

63. The considerations herein apply *mutatis mutandis* to Canada's framing of its national treatment claim under Article 2.1 of the TBT Agreement and also to Canada's

speculations about how the exceptions might operate in its submissions concerning Article 2.2 of the TBT Agreement. In each case, Canada relies on predictions as to how the exceptions in the EU Seals Regime may be interpreted and applied in the future by EU officials based on "limited evidence."[41] The violations in question predicted by Canada do not result from the Seals Regime "as such."

VII. THE EU SEALS REGIME DOES NOT FALL WITHIN ARTICLE XI OF THE GATT

64. As Canada acknowledges in its submission, the EU Seals Regime applies to the marketing and use of all seal products within the EU, regardless of whether they originate from inside or outside the EU.

65. The restriction on imports is merely a modality of implementing the general regulatory requirements of the scheme in the case of those products originating outside the EU.

66. The Note *Ad Article III* in the Notes and Supplementary Provisions in Annex I to the GATT 1994 states the following: "any 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 in the case of the imported product 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."

67. The Note suggests that the way to distinguish between Article XI and Article III is to look at whether the measure affects the 'importation' of products (Article XI), or whether it affects 'imported products' (Article III). In other words, Article XI does not refer to

[41] Canada's First Written Submission, para. 337.

internal requirements, but to measures imposed at the border, while Article III applies to internal requirements and regulations.

68. As the panel in *EC – Asbestos* observed when considering a similar scheme where general regulatory requirements were enforced at the border in the case of imported products: "Article III:4 must be assessed in the light of the interpretative Note relating to it. When a domestic measure applies to both domestic and imported products, Article III must apply."[42]

69. The EU Seals Regime applies to both domestic and imported products, and therefore must be considered an internal law regulation or requirement within the meaning of Article III of the GATT. Thus Article XI of the GATT does not apply.

VIII. THE EU SEALS REGIME DOES NOT VIOLATE ARTICLE I OF THE GATT

70. Canada's argument that the EU has violated Article I of the GATT is fundamentally incoherent and fails to take into account the different purposes of Articles I and III.

71. The entire basis for Canada's claim of an Article I violation is that the EU Seals Regime discriminates in favor of Denmark (Greenland) in relation to Canada. However, Denmark is a member state of the EU, which is the responding WTO Member in this case.

72. The MFN obligation is clearly intended to prevent a WTO Member from treating goods imported from another WTO Member more favourably than imports from a third state.

73. If the MFN obligation applied in the case of differentiation between domestic products and imported products rather than between imported products originating from different states, it would render the national treatment obligation inutile.

[42] Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R and Add.1, adopted 5 April 2001 (hereinafter Panel Report, *EC – Asbestos*), para. 8.90.

IX. THE EU SEALS REGIME DOES NOT VIOLATE ARTICLE III:4 OF THE GATT

a. The universe of products to be compared as "like"

74. The overall purpose of determining whether products are like for purposes of applying the National Treatment obligation is to ascertain whether there is a close and significant competitive relationship between the products being compared. As the Appellate Body stated in *EC – Asbestos*, "a determination of 'likeness' under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products."[43] More recently, the Appellate Body observed while interpreting the concept of "likeness" in Article 2.1 of the TBT Agreement: "The products identified by the complaining Member are the starting point in a panel's likeness analysis. However, Article 2.1 requires panels to assess objectively, on the basis of the nature and extent of the competitive relationship between the products in the market of the regulating Member, the universe of domestic products that are like the products imported from the complaining Member."[44]

75. Canada suggests that the appropriate universe of products to be compared as "like" is Canadian commercial seal products, on the one hand, and EU-originating products derived from traditional indigenous hunting or marine management culling, on the other. However, for purposes of determining whether there is discrimination, or "protection" within the meaning of Article III:1 of the GATT (which informs the approach to the concept of "treatment no less favourable" in Article III:4), a more appropriate comparison would be between Canadian products derived from traditional indigenous hunting or marine management culling and EU products of this character. Canada

[43] Appellate Body Report, *EC – Asbestos*, para. 99.
[44] Appellate Body Report, *US – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS/406/AB/R, adopted 24 April 2012 (hereinafter Appellate Body Report, *US – Clove Cigarettes*), para. 192.

acknowledges that such Canadian products exist or can exist and that they are or can be in competition with EU-origin products of the same character.

76. As the Appellate Body observed in *US – Clove Cigarettes*, "the national treatment obligation of Article 2.1 does not require Members to accord no less favourable treatment to each and every imported product as compared to each and every domestic like product."[45] The ultimate aim is to evaluate whether there is even-handed treatment of domestic and imported products. This purpose is best accomplished by comparing the identified EU-origin products with Canadian products placed on the market under similar conditions or circumstances. Ultimately, as the Appellate Body held in *US – Clove Cigarettes*, there must be an objective basis for the choice of the "product scope" that determines the analysis of "likeness" and "treatment no less favourable."[46] Canada does not provide any objective basis for choosing the comparator it proposes over the alternative approach, which seems more appropriate, given that it compares products in more equivalent circumstances.

b. Commercial seal products are not "like" the products to which Canada compares them because they have different features related to market competition

77. From the perspective of competition, which goes, *inter alia*, to the preferences of consumers including wholesale consumers, processors, distributors, and resellers, Canada is wrong to assert that commercial Canadian seal products are "like" products to which the marine management and traditional indigenous activity exceptions apply.

78. In the case of marine management, the products are produced as a consequence of sporadic and unpredictable events (culling). From the perspective of wholesalers, the

[45] Appellate Body Report, *US – Clove Cigarettes*, para. 193.
[46] Appellate Body Report, *US – Clove Cigarettes*, para. 194.

marketing and sale of such products involves very different challenges than in the case of commercial seal products, where, although the overall supply is affected by the hunt in a given year, there is a significant measure of predictability within certain parameters. It is unlikely that wholesalers or distributors could justify the costs of maintaining profitable channels of distribution and retailing based upon highly sporadic access to the product in question, where supply is unable to respond to consumer demand on an ongoing basis.

79. The preferences of wholesale consumers are likely to be different for products supplied on an unpredictable or sporadic basis than for products supplied on a regular basis and on normal commercial principles. Moreover, the interest of wholesale or intermediary customers in these products is likely to be fundamentally different than in the case of commercial seal products, because the marine management seal products carry the constraint that they may only be brought to the market on a non-profit basis.

80. A similar analysis applies with respect to indigenous products, derived from traditional hunting activities. The nature, scale, and location of these activities is an inherent and considerable constraint on the quantity and nature of the products supplied, which affects the cost of commercial transactions, limits economies of scale in transacting, and may affect transportation costs as well. Thus, the preferences of wholesale consumers in relation to indigenous products are different than in the case of regular commercial seal products. Canada claims that "prior to the institution of the EU Seal Regime, manufacturers and end consumers did not distinguish between seal oil from Inuit hunts and non-Inuit commercial harvests."[47] However, this is not relevant to the question of likeness, because the comparison to be made in this instance is not between *all* Inuit and non-Inuit products but between commercial non-Inuit products and that subset of Inuit

[47] Canada's First Written Submission, para. 318.

products resulting from hunts that contribute to the subsistence of indigenous communities and have at least partly to be used, consumed, and processed within the community. It is only this latter set of Inuit products that are treated differently from non-Inuit commercial hunt products under the EU Seals Regime that is the subject of this complaint.

81. Canada itself admits that there are differences between the commercial channels that apply to Canadian commercial seal hunt products and EU traditional indigenous products, and concedes that they have different end uses. Thus, Canada describes the specific commercial realities and market situation applicable to *Canadian commercial seal hunt products*: these products are "intended to be placed on the market systematically by the harvesters, processors and manufacturers ... the Canadian seal harvest takes place every year at the same time, in the same place, and for the specific purpose of commercial gain."[48] By contrast, the commercial realities and market conditions, as well as the end uses of products resulting from the kind of hunts covered by the exceptions are quite different: "The COWI 2010 Report concluded that hunts in Finland and Sweden do not take place on a commercial basis and the products are not being placed on the market in a repetitive way. Also, most by-products of the hunt are sold on a private basis in the local community."[49]

c. End uses

82. Further, the end use of subsistence among the members of a traditional indigenous community is a very different end use than that of luxury goods (fashion furs) aimed at well-heeled consumers, or in the case of seal oil, health supplements.

[48] Canada's First Written Submission, para. 340.
[49] Canada's First Written Submission, para. 341 (footnote omitted).

83. In *US – Clove Cigarettes*, the Appellate Body noted that, in determining likeness, "[a]n analysis of end-use should be comprehensive and specific enough to provide meaningful guidance as to whether the products in question are like products."[50] Canada provides no such comprehensive and specific analysis, and indeed such evidence that Canada offers as to end uses of EU traditional aboriginal products (which Canada seeks to compare as "like" to Canadian commercial seal products) suggests that end uses may well be *different*.

d. "Treatment No Less Favourable" in Article III:4

84. Canada misstates the legal test under GATT Article III:4 regarding "treatment no less favourable." As the Appellate Body held in *EC – Asbestos*[51] and has subsequently affirmed in, for example, *US – Clove Cigarettes* (discussing the relevance of its jurisprudence on III:4 GATT to TBT 2.1),[52] applying this second step under Article III:4 entails a comparison of the *entire group of imported products* with the *entire group of domestic products*. We have submitted that Canada is wrong to suggest that commercial seal products are "like" those products put on the market in the circumstances defined by the indigenous and marine management exceptions. However, assuming *arguendo* that Canada is correct, then the group of "like" products to be compared would be Canadian-origin products (commercial, traditional indigenous, and marine management *taken together*) and EU-origin products (commercial, traditional indigenous, and marine management *taken together*).

85. Canada does not even attempt to assess or provide a factual basis to support the conclusion that the *group* of imported products (commercial, traditional indigenous, and

[50] Appellate Body Report, *US – Clove Cigarettes*, para. 129.
[51] Appellate Body Report, *EC – Asbestos*, para. 100.
[52] Appellate Body Report, *US – Clove Cigarettes*, para. 176.

marine management) taken as a whole is treated less favourably than the group of like domestic products (commercial, traditional indigenous, and marine management) taken as a whole. Thus, Canada has failed to state even a *prima facie* case of less favourable treatment of the group of "like" imported products. It has simply not compared the *group* of imported products with the *group* of domestic products.

86. As the Appellate Body indicated in *EC – Asbestos* and further elaborated in *Dominican Republic – Cigarettes* and in *US – Clove Cigarettes*,[53] the requirement of treatment no less favourable permits regulatory distinctions between products that do not relate to national origin. Differential effects due to considerations unrelated to national origin do not constitute "treatment less favorable." There is nothing *on the face of* the EU regime to indicate less favourable treatment based on national origin-related considerations. Canada makes a number of assertions that individual applications of the regime, to respectively Canadian and EU-origin products will operate in a manner unfavourable to allegedly "like" Canadian products. As already noted, these assertions are merely speculative, based upon assumptions about how, in the future, EU officials might interpret or apply the Seals Regime in relation to Canadian as opposed to EU seal products in various categories established in the regime.

87. Canada seeks to impugn the distinction between indigenous and non-indigenous economic activity as somehow not a legitimate basis for distinguishing between products it considers "like." However, Canada's challenge to this distinction is in fundamental contradiction with Canada's own constitution and laws, as well as international law.

[53] Appellate Body Report, *EC – Asbestos*, para. 100; Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005, paras. 92-99; Appellate Body Report, *US – Clove Cigarettes*, paras. 178-179.

88. Canada attacks the indigenous hunt exception for "restrict[ing] the harvesting of seals to a narrow population of hunters based solely on their ethnic origin."[54] It is startling that Canada would apparently condemn as tantamount to racism a legal distinction that is not only solidly established in Canadian law but is rooted in the very foundations of Canada's national identity. In fact, the exception in the EU Seals Regime only applies to traditional hunting activities; it does not permit seal products produced on a commercial basis, outside the context of traditional indigenous activities in indigenous communities, simply because the persons engaged in commercial seal hunting is of aboriginal origin.

89. Section 35 of the Canadian Constitution recognizes and affirms the aboriginal and treaty rights of the aboriginal peoples of Canada,[55] rights that are held solely on the basis of aboriginal identity (what Canada's submission dismissively calls "ethnic origin").[56] Traditional subsistence hunting is generally protected by aboriginal rights, while fishing and hunting to earn a livelihood may be protected by treaty rights, depending on the provisions of the relevant treaty.[57]

90. Aboriginal rights, as the Canadian Royal Commission on Aboriginal Peoples observed in 1996, are "older than Canada itself," and the continuity of Aboriginal and treaty rights "was part of the bargain between Aboriginal and non-Aboriginal people that made Canada possible."[58] Aboriginal communities are not defined by race, or "ethnicity" (the

[54] Canada's First Written Submission, para. 404.
[55] *Rights of the Aboriginal Peoples of Canada*, Part II of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11.
[56] Canada's First Written Submission, para. 404.
[57] *R. v. Marshall*, *(No. 1)*, [1999] 3 S.C.R. 456, holding that the Mi'kmaq and Maliseet people of Canada's East Coast continue to have treaty rights to hunt, fish and gather to earn a moderate livelihood (attached hereto as Exhibit 5).
[58] Canada, Royal Commission on Aboriginal Peoples, *People to people, nation to nation: Highlights from the report of the Royal Commission on Aboriginal Peoples* (1996).

term used in Canada's submission)[59] in the narrow sense, but by bonds of culture and identity, shared history, and a sense of themselves as peoples.[60]

91. Canada argues that the indigenous hunt exception is not even-handed and not legitimate because the non-indigenous Canadian seal hunt is similar to hunting covered by the exception in all relevant respects, "save for the 'indigenous' status of the harvester."[61] This argument attempts to portray that single proviso, indigenous status, as trivial, when in is critical to the EU's decision to adopt this exception. Not only that, it also reflects a distinction that is profoundly significant, and is the basis for similar ameliorative schemes, in Canada's own law.

92. For example, the Supreme Court of Canada has upheld a special communal fishing license provided exclusively to Aboriginal fishers against a challenge by non-Aboriginal fishers excluded from participation in the fishery, who claimed that the scheme discriminated against them on the basis of race and thus violated the of the equality rights provisions of the *Canadian Charter of Rights and Freedoms.*[62] The Court found that the programme was not discriminatory, because it was designed to help a disadvantaged group improve their situation and thus to combat discrimination.[63] The Court noted that aboriginal and treaty rights are given special protection under Section 35 of the Constitution and, furthermore, that the *Charter of Rights and Freedoms* includes a section confirming that the rights therein are not to be construed so as to derogate from aboriginal and treaty rights. These considerations played an important role in informing

[59] Canada's First Written Submission, para. 407.
[60] Canada, Royal Commission on Aboriginal Peoples, *People to people, nation to nation: Highlights from the report of the Royal Commission on Aboriginal Peoples* (1996).
[61] Canada's First Written Submission, para. 405.
[62] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11.
[63] *R. v. Kapp*, 2008 S.C.C. 41, [2008] 2 S.C.R. 483 (attached hereto as Exhibit 6), para. 16.

the Court's interpretation of the *Charter*'s equality provisions and their application to the challenged scheme.

93. The special significance of the status of indigenous peoples and the rights of such peoples to self-determination and preservation of their culture are also recognized in international law. The United Nations Declaration on the Rights of Indigenous Peoples recognizes, *inter alia*, the right of indigenous peoples to self-determination, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.[64]

94. Canada argues that the indigenous hunting exception is not based on a legitimate distinction because it is unrelated to the Seals Regime's central objective of responding to concerns about animal welfare.[65] Canada does not expressly go so far as to say that indigenous hunting is carried out without regard for animal welfare, but it does imply that indigenous seal hunting can be assumed to fall below acceptable animal welfare standards, alluding to "evidence that some seals in Denmark (Greenland) are killed in a manner that causes avoidable pain and suffering."[66]

95. In fact the indigenous hunting exception, consistent with the right of indigenous peoples to self-determination, reflects deference to aboriginal nations and communities to regulate animal welfare standards under their own cultural and spiritual traditions and their own laws. While these principles may not exactly duplicate Canadian government regulations (or any other non-aboriginal regulatory regime), it would be entirely wrong to

[64] *United Nations Declaration on the Rights of Indigenous Peoples*, G.A. Res. 61/295, UNGAOR, 61st Sess., UN Doc A/61/L67 (2007), available at , Article 3 and Article 20(1), available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/467/34/PDF/N1146734.pdf?OpenElement.
[65] Canada's First Written Submission, para. 406.
[66] Canada's First Written Submission, para. 406.

conclude that this means there is no protection for animal welfare in indigenous hunting that is exempted from the Seals Regime, as Canada implies.

96. The *Nunavut Wildlife Act*, which governs the exercise of treaty hunting rights (including seal hunting) by Inuit in the territory of Nunavut, sets out a series of principles of Inuit Qaujimajatuqangit, or traditional Inuit values, knowledge, behaviour, perceptions, and expectations, that apply to the regulation of hunting and the relationship between humans and wildlife. These principles include "Sirliqsaaqtittittailiniq/Naklihaaktitihuiluhi, which means that hunters should avoid causing wild animals unnecessary suffering when harvesting them" and "Avatimik Kamattiarniq/Amiginik Avatimik, which means that people are stewards of the environment and must treat all of nature holistically and with respect, because humans, wildlife and habitat are inter-connected and each person's actions and intentions towards everything else have consequences, for good or ill."[67]

97. Observance of these governing principles is no guarantee that there will be *no* instances of killing in a manner that causes avoidable pain and suffering, any more than Canada's regulatory regime under the *Marine Mammal Regulations*[68] and other applicable Canadian and provincial laws can ensure such an outcome. It does not follow that the indigenous hunt exemption nullifies or disregards the EU's animal welfare objective. In the circumstances where the exemption applies, respect for the right of indigenous peoples to self-determination and to regulate hunting and the protection of animal welfare based on their own traditions and laws prevails over the policy choices of the EU.

98. Furthermore, while the indigenous hunt exception provides an exemption from the overall ban on buying and selling seal products, it does not represent an "exception" to

[67] *Nunavut Wildlife Act*, Snu 2003, c. 26, s. 8, available at http://www.canlii.org/en/nu/laws/stat/snu-2003-c-26/latest/snu-2003-c-26.html.
[68] SOR/93-56, available at http://laws-lois.justice.gc.ca.

the overall purpose of the EU Seals Regime. In fact, the indigenous exception is entirely consistent with, and indeed required by, the character of the EU Seals Regime as an expression of moral opprobrium at the gratuitous suffering of seals for commercial exploitation by an industry that would not exist if market forces were the only determinant. The regime would be overinclusive if it applied to traditional indigenous hunting. Indigenous seal hunting that qualifies for the exemption is an expression of cultural identity and contributes to the subsistence of the indigenous communities in question. This practice is distinct from the commercialized and unnecessary cruelty that the EU Seals Regime targets, and it neither deserves nor attracts the same moral opprobrium.

99. Based upon the approach of the Appellate Body to the relationship of Article 2.1 of the TBT and Articles III:4 and XX of the GATT, the submissions above concerning GATT Article III:4 apply, *mutatis mutandis*, to Canada's claims under Article 2.1 of the TBT Agreement.

X. EVEN IF THE EU SEALS REGIME VIOLATES A WTO DISCIPLINE, IT IS PERMITTED UNDER GATT ARTICLE XX(A) AND ARTICLE XX(B)

100. Even if Canada and Norway were able to demonstrate that the EU has violated a WTO discipline through its seal products measure, the Seals Regime would nevertheless justified in its orientation to the expression of moral opprobrium under GATT XX(a) *and* in its instrumental orientation to the protection of animal life and health under GATT XX(b).

101. The analysis under Article XX proceeds in three stages. First, when the purpose of the measure is considered, does the measure under examination fit under one of the named exceptions in Article XX? Second, is there an alternative measure available, capable of

achieving the regulating country's desired level of protection or purpose (i.e. is the measure necessary)? Third, does the measure constitute arbitrary or unjustifiable discrimination? In this case the analysis at each stage must take into account the coherent moral purpose that motivates the Seals Regime.

a. The EU measure is justified by Article XX(a) (public morals)

102. Article XX(a) allows Members to justify violations of GATT/WTO rules if the measure is necessary to protect "public morals." The EU Seals Regime clearly qualifies as a measure designed to protect public morals. In this amicus brief and in the submissions made by the EU, considerable evidence has been marshaled to indicate that the EU Seals Regime is an expression of the shared public morality of Europe, which holds needless, gratuitous suffering inflicted on animals to be cruel and outrageous.[69]

103. In the *US – Gambling* case, the panel interpreted Article XIV of the GATS, which contains the public morals exception for the GATS. The panel adopted a dynamic approach to the meaning of "public morals." "In the panel's view, the content of these concepts for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values."[70] The panel suggested that each WTO Member has considerable discretion to determine what practices would

[69] In suggesting that the EU Seals Regime can be justified under Article XX(a) in its non-instrumental orientation to the expression of moral opprobrium at senseless, unnecessary cruelty to seals, the *amici* are not suggesting that Article XX(a) applies *only* to *non*-instrumental moral measures. In the *US – Gambling* case, for example, the justifications for the US measures were related to the achievement of certain policy aims associated with public morality, not the expression of the intrinsic wrongfulness of gambling itself (a practice permitted under many conditions in the US). The general interpretative framework for "public morals" provided by the Appellate Body applies to measure that have instrumental as well as non-instrumental orientations or aspects.

[70] Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, adopted 20 April 2005, para. 6.461.

violate the moral code of its community.[71] In *China – Audiovisuals*, the panel adopted the same interpretation for the phrase "public morals" in Article XX of GATT.[72]

104. Based on deferential reasoning of the *US – Gambling* and *China – Audiovisuals* panels as to the content of public morals, it is clear that the content of "public morals" extends to the moral beliefs of a WTO Member concerning the wrongfulness of consuming products produced in a matter that is perceived to be inhumane.

b. The EU measure is justified by Article XX(b) (properly interpreted to reflect evolving concepts of animal life and health)

105. The reference to "animal … life or health" in Article XX(b) of GATT should be interpreted to allow Members to adopt policies aimed at protecting the wellbeing of individual animals. Such measures reflect a conception of human ethical obligations towards other animals, understood as morally significant sentient beings. The justification of measures adopted to protect animal life or health thus overlaps with and complements the public morals category under GATT Article XX(a). The EU's objective of reducing animal suffering is clearly within the category of protection of animal life or health under Article XX(b).

106. As the EU points out, the Seals Regime contributes to the life and health of seals in that it reduces global demand for seals and thus cuts down the number of seals who are killed and made to suffer. [73] Protecting the welfare of individual animals is a legitimate

[71] For an extended discussion of why this would be problematic, see generally Robert Howse and Joanna Langille, *Permitting Pluralism: The* Seal Products *Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values*, 37 Yale Journal of International Law 367 (2012) (attached hereto as Exhibit 7).
[72] Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R and Corr.1, adopted 19 January 2010, as modified by Appellate Body Report WT/DS363/AB/R, para 7.759.
[73] First Written Submission of the EU, para. 591.

objective under the rubric of "animal health," as the panel recognized in *US – Tuna II*, in that case interpreting identical language in Article 2.2 of the TBT Agreement.[74]

107. The *US – Tuna II* panel noted that "Article 2.2 refers to "animal life or health" in general terms, and does not require that such protection be tied to a broader conservation objective."[75] The objective of protecting animal health thus allows Members "to pursue policies that aim at also protecting individual animals or species whose sustainability as a group is not threatened."[76] The panel observed that there was evidence to raise a presumption of genuine concerns that the practice of "setting on" dolphins to catch tuna caused various adverse welfare effects for dolphins beyond mortality and observable physical injury, including acute stress and the separation of mothers and calves.[77]

108. The recognition that measures to protect "animal life or health" can include animal welfare regulations is in keeping with the Appellate Body's observation in *US – Shrimp* that certain legal terms are not static in their content or reference, but by definition evolutionary.[78] At the time that GATT was drafted, the exception for measures to protect "animal life or health" may have been designed primarily to address concerns about mortality affecting species or populations, or large numbers of domestic animals, and about the spread of zoonotic diseases that could jump to humans.

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[74] Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, adopted 15 September 2011 (hereinafter Panel Report, *US – Tuna II*), para. 4.87. The Appellate Body upheld the Panel's finding that dolphin protection was a legitimate objective for the US measure within the meaning of Article 2.2 of the TBT Agreement. Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 16 May 2012, para. 342.
[75] Panel Report, *US – Tuna II*, para. 7.347.
[76] Panel Report, *US – Tuna II*, para. 7.347.
[77] Panel Report, *US – Tuna II*, paras. 7.495-7.499.
[78] Appellate Body Report, *United States – Import Prohibition of Certain and Shrimp Products*, WT/DS58/AB/R, adopted on 12 October 1998 (hereinafter *US – Shrimp*), para. 130 and n. 109.

109. In international legal discourse today, the concepts of animal life and animal health have evolved to include recognition of the interests of individual animals themselves in not being deprived of life or made to suffer. This evolution is epitomized in the developing mandate of the World Organisation for Animal Health (OIE),[79] recognized as a WTO reference organization for animal health.[80] Created to facilitate international cooperation in controlling outbreaks of infectious disease in livestock – that is, to protect human interests in animals as resources for human consumption – the OIE in this millennium has embraced an ethical understanding of human-animal interactions, and a responsibility for advancing animal welfare at the global level.

110. The OIE's *Terrestrial Animal Health Code* includes Guiding Principles on Animal Welfare,[81] which state that human use of animals "carries with it an ethical responsibility to ensure the welfare of such animals to the greatest extent practicable."[82] OIE Director-General Bernard Vallat has said that "the OIE must also conduct a new mission that has not yet been undertaken at worldwide level, namely to convince all the decision-makers in its member countries of the need to take into account the human–animal relationship in favour of a greater respect for animals."[83]

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[79] The organization changed its name to the World Organisation for Animal Health in 2003, but retained the historical acronym OIE, based on the original French name, the Office Internationale des Epizooties.
[80] *Agreement on the Application of Sanitary and Phytosanitary Measures*, 15 April 1994, *Marrakesh Agreement Establishing the World Trade Organization,* 1876 UNTS 493, Article 12(3) and Annex A Article 3(b) (providing that the establishment, recognition and application of common sanitary and phytosanitary measures for animal health should be based on the standards, guidelines and recommendations developed under the auspices of the International Office of Epizootics (the former English name of the OIE)).
[81] OIE, *Terrestrial Animal Health Code*, Article 7.1.2, available at http://www.oie.int/index.php?id=169&L=0&htmfile=chapitre_1.7.1.htm.
[82] OIE, *Terrestrial Animal Health Code*, Article 7.1.2(6), available at http://www.oie.int/index.php?id=169&L=0&htmfile=chapitre_1.7.1.htm.
[83] "Foreword," in *Proceedings of the Global Conference on Animal Welfare: An OIE Initiative* (Paris, 23-25 February 2004), available at http://www.oie.int/fileadmin/Home/eng/Conferences_Events/docs/pdf/proceedings.pdf.

111. The terms "animal life" and "animal health" have evolved to reflect the same philosophy of animal welfare that the Seals Regime is based on, recognizing animals as "sentient beings that can experience pain, distress, fear and other forms of suffering."

c. Alternatives measures are not available to meet the EU's two aims (the protection of public morals and animal life and health) and therefore the measure is necessary

112. The dual purpose of the EU's measure means that it falls under both Article XX(a) and (b). These provisions also require that the measure under consideration be "necessary" to achieve the objectives in question. In this case, EU's means of furthering its objectives – a general ban on the importation of seal products, coupled with carefully designed exceptions – is necessary.

113. When analyzing whether a measure is necessary, a panel must examine whether there is an alternative measure available that would allow the Member to meet their desired level of protection or purpose.

114. This concept of "necessity" must be conceptualized differently with respect to the two different purposes of the EU's measure.

115. With respect to the EU's non-instrumental moral purpose (the expression of moral opprobrium of practices that the EU has determined to be cruel), the issue is whether the level of moral outrage held by the EU could be adequately expressed in a measure other than a ban. As we argue below, in this case it is very unlikely that a measure other than a ban could achieve the EU's objective. Given the extraordinary levels of public support for the measure and the widely-held belief within Europe that it is morally wrong to inflict unnecessary suffering on seals, and given that alternatives such as a labeling or certification regime were carefully considered during the legislative process, no

alternative could meet the EU's goal of expressive moral outrage at the practice of seal hunting.

116. With respect to the EU's instrumental objective (a reduction in the suffering experienced by seals, as a means of improving their life and health), the "necessity" analysis must consider whether the chosen level of protection (the desire to protect seals from unnecessary suffering, to contribute to their welfare) can be achieved through an alternative measure. As we argue below, it is unlikely that such an alternative is available, given the inability of the Canadians and the Norwegians to guarantee that their hunts are cruelty-free or to develop a system of certification or labeling.

117. There are several reasons why there is no alternative to the EU measure that can adequately meet its dual purposes, making it "necessary" to protect public morals (Article XX(a)) or animal life or health (Article XX(b)).

118. First, one of the most fundamental aspects of the "right to regulate"[84] under Article XX is a WTO Member's prerogative to determine the "level of protection" it is seeking. This is a notion that has been repeatedly affirmed by the WTO.[85] The complaining Member cannot challenge the decision of the regulating Member to seek a very high level of protection regarding its regulatory objective. In this case, the EU has the right to seek a very high level of regulatory protection, prohibiting the consumption of products that may have violated animal welfare when produced and that do not serve some pressing alternative objective. Canada's case fundamentally errs when it appears simply not to accept the level of protection the EU seeks.

[84] For a discussion of the concept of the "right to regulate," see Howse and Langille (Exhibit 7), p. 415.
[85] Panel Report, *EC – Asbestos*, para. 291; Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007, para. 57.

119. Second, the concept of "necessity" in relation to the public morals exception has been explored in the *US – Gambling* case. There, the panel made clear that the regulating Member need only make a *prima facie* case of necessity, showing there is a plausible or reasonable fit between the measure and its objectives.[86] Once this burden is met, the onus of proof is reversed and it is the complaining party that must prove that there is a reasonably available alternative for the regulating Member; otherwise the measure will be found to meet the necessity test.[87] Thus the burden on the EU in this case is not high; it must simply demonstrate a reasonable connection between its measure and the goals it wishes to achieve, which it has amply done.

120. Third, Canada and Norway will not be able to meet the definition of a plausible alternative measure, because the WTO jurisprudence has made it clear that any alternative must be "reasonably available." As the Appellate Body has noted, "[a]n alternative measure may be found not to be 'reasonably available' … where it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties."[88] As the panel in *US – Clove Cigarettes* observed, it is not enough for the complainant to merely list possible or hypothetical alternatives; rather, the complainant must show that the alternative in question will provide an equivalent contribution to the defending Member's legitimate objective.[89]

[86] Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005 (hereinafter Appellate Body Report, *US – Gambling*), para. 310.
[87] Appellate Body Report, *US – Gambling*, para. 310.
[88] Appellate Body Report, *US – Gambling*, para. 308.
[89] Panel Report, *US – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS/406/R, adopted 24 April 2012 (hereinafter Panel Report, *US – Clove Cigarettes*), para. 7.423.

121. Both and Canada and Norway argue that an alternative measure was available to the EU when it was designing the Seals Regime. Both parties argue that the EU could have implemented a certification or labeling system that could identify whether a particular seal entering the EU's market was hunted humanely or not.[90]

122. Canada and Norway's argument hinges on the possibility that a certification or labeling system could actually identify which seals were killed humanely. Such a system, however, has never before been developed, which strongly implies that it is not possible to do so. Despite the fact that they have every incentive to create such a system, given that their seal hunting regimes have been criticized for failing to achieve humane standards for decades, Canada and Norway have never proposed, developed, or implemented a system for certifying that seals were caught in a humane fashion.

123. While Canada has a Catch Certification Program designed to certify whether fish were caught in accordance with the relevant regulations for the purpose of exporting catches to the European market,[91] the Catch Certification Office does not certify seals. Presumably, if it were possible for the Office to certify seals in this fashion, the Canadian government would have done so, given the criticism from other governments of its sealing regulations.

124. Norway has a certification system for licensing sealers, and requires an inspector to be on board every sealing vessel.[92] But Norway has also not developed a certification system documenting whether seals were caught humanely. Again, given their professed desire to achieve a humane seal hunt and to reassure other countries and markets that their hunt is

[90] Canada's First Written Submission, paras. 555-696; Norway's First Written Submission, paras. 793-917.
[91] Federal Department of Fisheries and Oceans, *Canada's Catch Certification Program*, available at http://www.dfo-mpo.gc.ca/fm-gp/ccp-pcc/index-eng.htm.
[92] Norway's First Written Submission, paras. 50 and 252.

undertaken in a humane fashion, if it were possible to certify that seals were hunted humanely, the Norwegian government would have developed such a system. It is likely that the reason a certification system was never developed by either country is that it would be too difficult to implement such a system.

125. Since neither Canada nor Norway has been able to demonstrate the workability of a certification system, their claim that the EU could have imposed such a system and that such a system would have been workable cannot be correct. Therefore their conclusion that there was an alternative measure available for the EU is also incorrect.

126. Fourth, the EU and other *amici* have presented massive scientific evidence that given the physical conditions under which the hunt operates it is not possible to ensure that humane practices, as the EU understands them in light of its chosen level of protection for seals, are followed.

127. As the panel indicated in *US – Clove Cigarettes*, for the complaining Member to discharge its burden of proof it is not enough for the Member merely to assert that, hypothetically, some reasonably available alternative exists. It must demonstrate with specificity how such an alternative might be designed and operated to achieve the regulating Member's chosen level of protection in the circumstances: to "establish a prima facie case", the complaining Member must "show that such measures would make an *equivalent* contribution to the achievement of the objective."[93] The EU could not make effective the kind of labeling or certification scheme proposed by Canada without Canada's permission or agreement.

128. In addition to being not practical for the reasons noted above, any scheme premised upon certification and labeling would require the EU to provide for monitoring and

[93] Panel Report, *US – Clove Cigarettes*, para. 7.423.

enforcement outside its territory and beyond its prescriptive jurisdiction under general principles of international law as understood by the European Court of Justice. This would require either regulatory cooperation with the Canadian authorities or some third party or international monitoring or enforcement system, which in practice would also be impossible to operate without the assistance and approval of the Canadian government. Under Canada's *Marine Mammal Regulations*, it is illegal for anyone to approach within one-half nautical mile of a person fishing for seals, except under the authority of a seal fishery observation license issued by the Canadian Minister of Fisheries and Oceans.[94]

129. As the Appellate Body indicated in *US – Gambling*,[95] a Member's ability to achieve a legitimate regulatory objective cannot be made dependent under WTO law on regulatory cooperation with another Member of the WTO. To be reasonably available, an alternative measure must not be subject to such uncertainties as whether other actors, such as other WTO Members, will cooperate with the regulating state. It is obvious that the EU cannot determine through inspection at the border whether or not a particular shipment of seal products has been derived from a hunt conducted in accord with practices that meet the EU's high level of protection, or understanding of humane treatment. Canada has produced no evidence or explanation as to how the EU could verify certification or labeling without cooperation with Canadian authorities and/or the Canadian industry. Effective monitoring would require that the EU authorities, or some intermediary chosen by the EU, be granted an observation license at the discretion of the Canadian Government as required under the *Marine Mammal Regulations*.[96]

[94] SOR/93-56, S. 33(1), available at http://laws-lois.justice.gc.ca.
[95] Appellate Body Report, *US – Gambling*, para. 326 (rejecting the claim that consultations by the US with Antigua were a reasonably available alternative).
[96] SOR/93-56, S. 33(1), available at http://laws-lois.justice.gc.ca.

130. Barring the negotiation of a binding international legal instrument between the EU and Canada that gave the EU or delegated agents rights of monitoring and inspection at the point at which the animals are killed, such monitoring and inspection would remain at all times under the ultimate legal control of the Canadian authorities, subject to their fiat and discretion. To hold that that the EU in order for its achievement of its level of protection to be consistent with Article XX must adopt a measure requiring agreement with another sovereign state would, to paraphrase the language of the Appellate Body in *US – Shrimp*, give that state "a veto over whether" the EU "could fulfill its WTO obligations."[97]

131. Nor should the EU be required to adopt an alternative where it would have to rely on assurances by Canadian authorities or the sealing industry about the animal welfare standards of the seal hunt, without the opportunity to verify such claims independently. WTO Members are entitled to pursue their regulatory objectives taking into account risks that best practices may not be followed, and that control and enforcement of standards by regulators may not be optimal. In *EC – Hormones*, the Appellate Body confirmed that risks of potential abuse and difficulties of control in the administration of controlled substances were among the type of risks that could be taken into account in assessing risks to health under Articles 5.1 and 5.2 of the *SPS Agreement*.[98] By analogy, in determining the level of protection necessary to fulfill its objectives relating to animal welfare, the EU must be allowed to take into account the risks of non-compliance and non-enforcement that would be inherent in any certification scheme that it did not control.

[97] Appellate Body Report, *US – Shrimp*, para. 123.
[98] Appellate Body Report, *European Communities — Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 16 January 1998, para. 206.

132. Finally, the very notion of a strict analysis of alternative measures is problematic in the context of a public morals exception. Any approach to assessing the non-instrumental aspect of moral regulation that mimics the approach to instrumental regulation may well result in intractable dilemmas of legitimacy and institutional competence for the WTO. If countries choose to ban products for religious or moral reasons, is the WTO in a position to interrogate the sincerity or necessity of such a belief for the religious or philosophical system from which the belief stems? A stringent and hard-nosed inquiry into the appropriateness of a particular action for the maintenance of a moral system would be a significant overreach of the WTO into the cultural autonomy of its Members. Such decision-making would be inherently at odds with one of the major purposes of allowing moral regulation under the WTO in the first place: preserving the regulatory pluralism of the members of the international community that constitute the WTO.

133. For these reasons, the EU's measure must be considered "necessary."

d. The EU measure does not constitute arbitrary or unjustifiable discrimination or a disguised restriction on trade

134. The Seals Regime also meets the requirement in the chapeau of GATT Article XX that measures are not to be applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.

135. The "fundamental theme" of the chapeau is the prevention of "abuse or illegitimate use" of the Article XX exceptions "under the guise" of a measure that is formally within their terms.[99] In this case, this fundamental theme has to be looked at through the lens of the moral purposes of the EU Seals Regime. In particular, the expressive purpose of the

[99] Appellate Body Report, *US – Standards for Reformulated and Conventional Gasoline,* WT/DS4/AB/R, adopted 20 May 1996 (hereinafter Appellate Body Report, *US – Gasoline*), p. 25.

legislation must be understood in terms of manifesting a specific moral objection: opprobrium towards the commercial exploitation of animal suffering to produce items that do not meet any real human need. The EU measure is tailored to its moral objectives, and it is not arbitrary, unjustified, or abusive.

136. Cases where the requirements of the Article XX chapeau were found not to be met have in common a concern with "*under*-regulation," where there are "unexplained gaps in the application of a measure in situations where it should be applied."[100] They involve measures that contribute to the purposes specified in the Article XX exceptions but contain exemptions or differentiations in standard that unfairly favour domestic producers or distinguish between countries on a basis unrelated to the purpose of the measure. For example, in *US – Gasoline*, statutory baselines differentiated between domestic and imported gasoline, even though they were not distinguishable in terms of the purpose of the measure; and in *Brazil – Tyres,* a ban in importing retreaded tyres contained an exemption for imports from other MERCOSUR countries, again unrelated to the purposes of the measure.

137. By contrast, in the Seals Regime the exemptions from the ban on seal products conform precisely to the objectives of the measure. The exceptions do not constitute under-regulation; on the contrary, the Seals Regime would be overinclusive in terms of its objectives if it did not include them. The purpose of the Seals Regime does not require banning products where systematic commercial exploitation is not at issue, or where the instrumental aspect of the policy is shaped by a combination of moral considerations – including the protection of the environment and respect for indigenous rights and self-

[100] Lorand Bartels, *The WTO Legality of the Application of the EU's Emission Trading System to Aviation*, 23 European Journal of International Law 429 (2012) (attached hereto as Exhibit 8), p. 452 (emphasis in the original).

government as well as the protection of animals, consistent with the weighing of other considerations that is characteristic of animal welfarism (as further discussed below).

138. The *amici* have submitted that the Seals Regime does not give rise to *de facto* discrimination such that GATT Article III:4 is engaged because there is no differential treatment of like products. But even if the Panel were to find that the exemptions amount to discrimination for that purpose, it is clear that arbitrary or unjustified discrimination or the disguised restriction of trade within the meaning of the chapeau is something more. As the Appellate Body noted in *US – Gasoline*, "[t]he enterprise of applying Article XX would clearly be an unprofitable one if it involved no more than applying the standard used in finding that [the challenged measure was] inconsistent with Article III:4."[101] There is nothing in the Seals Regime that varies its application based on irrelevant or protectionist factors like the origin of a product. The ban on seal products and the limited exceptions to the ban are shaped by a coherent moral theory. The Seals Regime reflects a particular philosophy – animal welfarism.

139. As Howse and Langille outline,[102] animal welfarism is a long-established tradition of moral thought, characterized by a concern for animal suffering and the moral attitudes of humans in their relation to animals. Animal welfarists seek to protect animals from unnecessary cruelty, pain, and suffering.[103] Unlike the more modern and radical animal *rights* movement,[104] which argues that any killing and use of animals by humans is unacceptable, much of the animal welfare movement permits the (limited) subjugation of animals to human needs. For an animal welfarist, it may be acceptable to kill animals,

[101] Appellate Body Report, *US – Gasoline*, p. 22.
[102] Howse and Langille (Exhibit 7), pp. 378-379.
[103] Gary L. Francione, *Rain Without Thunder: The Ideology of the Animal Rights Movement* (1996), p. 1; Harold Guither, *Animal Rights: History and Scope of a Radical Social Movement* (1998), p. 9.
[104] Gary L. Francione, *Rain Without Thunder: The Ideology of the Animal Rights Movement* (1996), p. 1.

provided that there is some basic human need or purpose served by killing the animal and that the animal does not suffer unnecessarily.[105] As Professor Gary Francione describes, animal welfarists seek the regulation of animal exploitation, while animal rights activists seek its abolition.[106]

140. The philosophy of animal welfare also opposes commodification, understood as moral outrage at cruelty towards animals that is imposed and commercially exploited for no positive or non-frivolous purpose. Animals can be made to suffer for some significant human purpose (such as environmental management or the preservation of cultural autonomy and practices), but without such a purpose, the cruelty towards the animals found deserving of respect should be considered to be inappropriate commodification.[107]

141. In short, the philosophy of animal welfarism seeks to eliminate unnecessary suffering experienced by animals; gratuitous cruelty towards animals cannot be justified. This does not mean that animals cannot be used for human purposes. But in order for humanly-imposed suffering of animals to be permitted, it must be justified by some important objective.

142. Understood as an animal welfarist measure, the European seal products measure is entirely consistent from a moral perspective. The European measure places a ban on seal products, because the members of the European Parliament concluded that seals cannot be hunted in a humane fashion, making certification or labeling systems insufficient. Further, the overall purpose of the hunt, particularly given its extremely limited impact on the economies of the seal hunting countries, serves no compelling purpose in its own

[105] Robert Garner, *Animal Welfare: A Political Defense*, 1 Journal of Animal Law and Ethics 161 (2006) (attached hereto as Exhibit 9), p. 162.
[106] Gary L. Francione, *Rain Without Thunder: The Ideology of the Animal Rights Movement* (1996), p. 1.
[107] Kimberley K. Smith, *Governing Animals: Animal Welfare and the Liberal State* (2012), p. 87.

right. However, exceptions were made for when seals are hunted for an important human purpose. The indigenous exception was designed to protect the rights of indigenous peoples to participate in their cultural practices. The marine management exception was designed to allow government to protect their natural environments. From the perspective of animal welfare and anti-commodification, the exceptions to the EU measure actually help to render it more consistent with the underlying philosophical motivation than if no exceptions had been permitted.

143. Therefore, when understood in animal welfarist terms, the various aims of the European measure constitute a coherent regulatory scheme without arbitrary or unjustified discrimination.

144. Canada also argues that the European measure is inconsistent because the EU does not perfectly guarantee animal welfare in Europe. Canada points to examples of policies permitted in Europe that they believe harm animal welfare.[108] This is intended to call into question the sincerity of the European commitment to animal welfare, as evidenced by the seal products ban.

145. From the perspective of moral theory, however, this objection does not hold water. Societies have often differed over which animals are most in need of human protection and worthy of human respect. The varied treatment of dogs, cats, horses, pigs, and cows throughout various societies in the world makes this clear. Not treating all animals as requiring the same level of respect or protection does not render a measure meant to protect one species inconsistent.

146. In any case, as will be submitted below, there is no requirement in the WTO provisions invoked by Canada that the same level of protection be adopted with respect to different

[108] Canada's First Written Submission, paras. 142-213.

situations or risks. The plain language of the chapeau refers to arbitrary or unjustifiable discrimination between countries where the same conditions prevail; the inconsistency addressed by the chapeau is that which occurs where different *countries* are treated differently.

147. Further, it simply cannot be the case that the WTO demands that all of a society's regulations are consistent with one another and motivated by a single moral goal, in order for a particular regulation to be justified and WTO-compliant. First, this would prevent any change in a new direction. Canada cannot demand that the EU regulate and protect all aspects of animal welfare in Europe at once for this measure to be legitimate. Second, it would be far too high a bar to demand from pluralist, democratic societies like Europe, which balance multiple points of view and legislative objectives, that all of their legislation be applied without permitting any trade-offs between different objectives.

148. In sum, contrary to Canada's claims of arbitrary inconsistency, the Seals Regime is a coherently designed regulatory scheme structured in all respects to reflect the philosophy of animal welfare.

e. The Indigenous Exception is Consistent with the EU's Objectives

149. As noted, the Seals Regime includes an exemption permitting seal products to be placed on the market when the products result from hunts traditionally conducted by Inuit and other indigenous communities and contribute to the subsistence of those communities.[109]

150. Canada argues that the indigenous exception undermines the animal welfare objective of the Seals Regime.[110]

[109] Regulation (EC) No. 1007/2009 of the European Parliament and of the Council, of 16 September 2009 on trade in seal products, Article 3(1).
[110] Canada's First Written Submission, paras. 483-488.

151. In fact, the exception is completely consistent with the EU's objective of expressing moral opprobrium against unwarranted cruelty for commercial exploitation. Products eligible for the indigenous exception result from traditional subsistence hunting, so the purpose of expressing condemnation of the commercial exploitation of cruelty is not engaged.

152. Furthermore, the indigenous exception reflects a balance between the EU's instrumental objective of protecting animal welfare and the countervailing value of respect for indigenous cultural traditions and rights, which (the EU has determined, consistent with the animal welfare theory) justifies the imposition of some suffering on animals.

153. The submissions above as they relate to Article XX(b) of the GATT and the instrumental animal welfare orientation of the EU requirement in the Seals Regime apply *mutatis mutandis* to the analysis of legitimate objective and least trade restrictiveness under Article 2.2 of the TBT Agreement – bearing in mind, however, that Canada clearly bears the initial burden of proof with respect to that Article.

XI. CANADA'S MISLEADING COMPARISONS WITH OTHER ANIMAL WELFARE MEASURES IN THE EU ARE IRRELEVANT IN DETERMINING WHETHER IT IS IN CONFORMITY WITH ITS OBLIGATIONS UNDER THE GATT AND TBT AGREEMENTS

154. As noted above, paras. 144-162 and 198-213 of Canada's submission discuss EU animal welfare policies with respect to animals other than seals. Canada insinuates that these policies provide a level of protection for animals to which the EU Seals Regime can or should be compared for purposes of the Panel's analysis of the EU's obligations under the provisions of the covered agreements invoked by Canada.

155. Such a comparison is entirely irrelevant to the application by the Panel of the provisions of the GATT and the TBT invoked by Canada. As noted above, the comparison does not

lead to any meaningful objection to the justification of the EU Seals Regime under Article XX and the chapeau of Article XX in particular. But nor is it relevant to other claims of Canada. Canada has *not* asserted that the products from the other animals it discusses are like Canadian seal products. Thus, the discussion of EU laws, regulations, and policies concerning these other animals is irrelevant to its claims under GATT Article III:4 and TBT Article 2.1. Since there is no claim of likeness, there is no basis for a comparison of treatment under these National Treatment provisions.

156. As for Canada's claim under Article 2.2 of the TBT Agreement, nothing in that Article requires that a Member's level of protection be the same with respect to the various different kinds of risks or situations that affect the achievement of a given legitimate objective.

157. That the least trade restrictiveness concept in Article 2.2 does not imply that a Member be consistent in its level of protection across allegedly comparable situations is illustrated by the design and structure of the SPS Agreement. Article 5.6 of the SPS Agreement performs a very similar function to Article 2.2 of the TBT Agreement. On the other hand, Article 5.5 of the SPS Agreement is a separate provision that requires that differences in levels of protection in respect of similar or comparable risks not be arbitrary in such a way as to lead to discrimination in trade. Notably, there is no equivalent provision the TBT Agreement. Clearly the negotiators of the Uruguay Round specialized agreements on trade in goods knew how to draft a provision requiring some kind of consistency between levels of protection, and they could have included similar language in the TBT Agreement if that had been their intent.

XII. CONCLUSION

158. For the reasons stated above, the EU Seals Regime is in compliance with the relevant provisions of the GATT and the TBT.