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EUROPEAN COMMUNITIES – MEASURES PROHIBITING THE IMPORTATION AND MARKETING OF SEAL PRODUCTS

NOTIFICATION OF AN OTHER APPEAL BY THE EUROPEAN UNION UNDER ARTICLE 16.4 AND ARTICLE 17 OF THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU), AND UNDER RULE 23(1) OF THE WORKING PROCEDURES FOR APPELLATE REVIEW

The following notification, dated 29 January 2014, from the Delegation of the European Union, is being circulated to Members.

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1. Pursuant to Article 16.4 and Article 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) and Rule 23 of the *Working Procedures for Appellate Review*, the European Union hereby notifies its decision to appeal to the Appellate Body certain issues of law and certain legal interpretations developed by the Panel in *European Communities – Measures prohibiting the importation and Marketing of Seal Products* (WT/DS400/R, WT/DS401/R) (Panel Report).

1. THE PANEL ERRED BY FINDING THAT THE EU SEAL REGIME IS A TECHNICAL REGULATION WITHIN THE MEANING OF THE TBT AGREEMENT

2. The European Union appeals the Panel's conclusion that the EU Seal Regime is a technical regulation within the meaning of Annex 1.1 of the TBT Agreement.[1]

3. This conclusion is in error for the following reasons: 1) the Panel wrongly interpreted the terms "applicable administrative provisions" and wrongly concluded that the exceptions under the EU Seal Regime constitute applicable administrative provisions;[2] 2) the Panel wrongly established the scope of products characteristics under Annex 1:1 of the TBT Agreement, which led it to erroneously conclude that the criteria under the exceptions lay down product characteristics[3]; and 3) the Panel failed to make a holistic assessment of the measure at issue[4] and, thus, wrongly found that the measure as a whole is a "technical regulation" within the meaning of Annex 1:1 of the TBT Agreement.[5]

4. Reversal of the Panel's conclusion that the EU Seal Regime is a technical regulation would dispose of Canada's and Norway's claims under the TBT Agreement. Accordingly, the European Union requests the Appellate Body to find that the Panel's findings and conclusions with regards to Articles 2.1, 2.2, 5.1.2 and 5.2.1 of the TBT Agreement are moot and of no legal effect.

[1] See e.g. Panel report, para. 7.111. See also the conclusion under para. 8.2.a) of both reports.
[2] Panel report, para. 7.108.
[3] Panel report, para. 7.110.
[4] Panel report, para. 7.100, 7.106, footnote 153.
[5] Panel report, paras. 7.111, 7.125.

2. THE PANEL ERRED BY FINDING THAT THE IC EXCEPTION BEARS NO "RATIONAL RELATIONSHIP" TO THE PRIMARY OBJECTIVE OF THE EU SEAL REGIME

5. The European Union also appeals the Panel's finding, as part of its analysis under Articles 2.1 and 2.2 of the TBT Agreement and under Article XX(a) of the GATT 1994, that "the IC exception does not bear a rational relationship to the objective of addressing the moral concerns of the public on seal welfare".[6]

6. This finding is in error because it is based on an incorrect interpretation of the notion of "public morals", according to which a Member invoking that a measure pursues a public morals objective would have to show that such measure is supported by a majority of its population.

7. Furthermore, the European Union submits in the alternative that, in reaching its conclusion that the EU public does not support the IC exception the Panel failed to make an objective assessment of the evidence before it, as required by Article 11 DSU. Specifically, the Panel relied upon the following factual evidence: 1) the results of two opinion polls analysed in Canada's Royal Commission Report on Sealing7; and 2) the results of a public consultation conducted by the EU Commission as part of the preparation of its proposal to the EU legislators.[8] Yet this evidence lends no support to the Panel's appealed finding.

8. In view of these errors, the European Union requests the Appellate Body to reverse this finding.

3. THE PANEL ERRED BY FINDING THAT THE EU SEAL REGIME IS INCONSISTENT WITH ARTICLE 2.1 TBT AGREEMENT BECAUSE THE IC EXCEPTION IS NOT DESIGNED AND APPLIED EVEN-HANDEDLY

9. The European Union also appeals the Panel's finding that the IC exception "is not designed and applied in an even-handed manner" and that, consequently, "the IC exception of the EU Seal Regime is inconsistent with the European Union's obligations under Article 2.1 of the TBT Agreement as the European Union has failed to demonstrate that the detrimental impact caused by the IC exception on Canadian seal products stems exclusively from a legitimate distinction".[9]

10. This finding is in error because the Panel misinterpreted and misapplied Article 2.1 of the TBT Agreement when examining the even-handedness in the design and application of the IC exception.[10] Rather than considering whether the IC exception was designed and applied in a reasonable, impartial and harmonious manner, having regard to its objective (i.e., the protection of the interest of the Inuit and other indigenous communities traditionally engaged in seal hunting for subsistence purposes), the Panel determined that the IC exception was available *de facto* exclusively to Greenland without examining the actions (and omissions) of the relevant Canadian (and Canadian Inuit) authorities and operators. The Panel also wrongly focused on the alleged similarities of Greenland's hunts to the commercial hunts. Those similarities, however, were irrelevant for assessing even-handedness, in view of the Panel's earlier finding that the Inuit hunts are conducted primarily for subsistence purposes and can be legitimately distinguished from the commercial hunts.[11]

11. Furthermore, the European Union submits in the alternative that this finding was based on several material inaccuracies leading to erroneous factual determinations as well as incoherent reasoning, contrary to the Panel's duties under Article 11 of the DSU. Specifically, the European Union challenges the Panel's finding that "the IC exception is available *de facto* exclusively to Greenland"[12] based on "the text of the IC exception, its legislative history, and the actual application of the IC exception".[13] The European Union also challenges the Panel's findings that

[6] See e.g. Panel report, para. 7.275.
[7] See e.g. Panel report, footnote 676.
[8] See e.g. Panel report, footnotes 652 and 676.
[9] See e.g. Panel Report, para. 7.319.
[10] Panel Report, para. 7.317.
[11] Panel Report, paras. 7.288 and 7.289.
[12] Panel Report, paras. 7.314 – 7.317.
[13] Panel Report, para. 7.317.

"the degree of the commercial aspect of [Greenland's] hunts is comparable to that of the commercial hunts",[14] and that "the Inuit hunt [in Greenland] bears the greatest similarities to the commercial characteristics of commercial hunts".[15] The European Union submits that these errors are material. Consequently, the European Union requests the Appellate Body to find that the Panel failed to make an objective assessment of the matter, contrary to Article 11 of the DSU, when finding that the IC exception was not currently designed and applied in an even-handed manner.[16]

12. In view of these fundamental errors, or any combination thereof, the European Union requests the Appellate Body to *reverse* the Panel's finding that the distinction made by the IC exception between IC and commercial hunts based on the purpose of the hunt "is not designed and applied in an even-handed manner" and, thus, that "the IC exception of the EU Seal Regime is inconsistent with the European Union's obligations under Article 2.1 of the TBT Agreement as the European Union has failed to demonstrate that the detrimental impact caused by the IC exception on Canadian seal products stems exclusively from a legitimate distinction".[17]

4. THE PANEL ERRED BY FINDING THAT THE IC EXCEPTION DIMINISHES THE CONTRIBUTION OF THE EU SEAL REGIME TO ITS PUBLIC MORALS OBJECTIVE

13. The European Union appeals the Panel's finding, as part of its analysis under Article 2.2 of the TBT Agreement and Article XX(a) of the GATT 1994, that the IC exception "diminishes" the contribution of the EU Seal Regime to its public morals objective.[18]

14. This finding is in error because it is premised on the Panel's earlier erroneous finding that the IC exception bears no "rational relationship" to the public morals objective pursued by the EU Seal Regime. Accordingly, the European Union requests the Appellate Body to reverse this finding.

5. THE PANEL MADE AN ERRONEOUS INTERPRETATION OF ARTICLES I:1 AND III:4 OF THE GATT 1994

15. The European Union appeals the Panel's finding that it "do[es] not consider that the legal standard with respect to the non-discrimination obligation under Article 2.1 of the TBT Agreement 'equally applies' to claims under Articles I:1 and III:4 of the GATT 1994"[19]. The European Union submits that the Panel's finding constitutes an erroneous interpretation of Articles I.1 and III:4 of the GATT 1994. Therefore, the European Union requests the Appellate Body to reverse that finding.

6. THE PANEL'S FINDING THAT THE EU SEAL REGIME IS INCONSISTENT WITH ARTICLE I:1 OF THE GATT IS IN ERROR BECAUSE THE PANEL FAILED TO CONSIDER WHETHER THE IC EXCEPTION INVOLVES A LEGITIMATE REGULATORY DISTINCTION

16. The European Union also appeals the Panel's application of its erroneous interpretation of Article I:1 of the GATT 1994 in reaching its finding that the EU Seal Regime is inconsistent with Article I:1 of the GATT 1994.[20] Accordingly the European Union requests the Appellate Body to reverse that finding.

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[14] Panel Report, para. 7.313.
[15] See e.g. Panel Report, para. 7.317.
[16] See e.g. Panel Report, paras. 7.317 and 7.319.
[17] Panel Report, para. 7.319. See also the conclusion under paragraph 8.2 (b) with regard to the complaint by Canada (DS 400).
[18] See e.g. Panel report, para. 7.460. See also Panel report, paras. 7.447-7.448, 7.451-7.452, 7.466 and 7.638.
[19] See e.g. Panel Report, para. 7.586.
[20] See e.g. Panel Report, para. 7.600. See also the conclusion under para. 8.3 a) with regard to both complaints (DS 400 and DS 401).

7. SUBSIDIARILY, THE PANEL ERRED BY FINDING THAT THE IC EXCEPTION IS NOT JUSTIFIED UNDER ARTICLE XX(A) GATT BECAUSE IT FAILS TO MEET THE REQUIREMENTS OF THE CHAPEAU

17. Were the Appellate Body to uphold the Panel's finding that the IC exception is inconsistent with Article I:1 of the GATT 1994, the European Union appeals the Panel's finding that the IC exception is not justified under Article XX(a) of the GATT 1994 because it fails to meet the requirements of the chapeau.[21]

18. The Panel's analysis of the even-handedness of the IC exception under Article 2.1 of the TBT Agreement contained several legal errors.[22] Should the Appellate Body reverse the Panel's finding that the IC exception "is not designed and applied in an even-handed manner" and, thus, that "the IC exception of the EU Seal Regime is inconsistent with the European Union's obligations under Article 2.1 of the TBT Agreement as the European Union has failed to demonstrate that the detrimental impact caused by the IC exception on Canadian seal products stems exclusively from a legitimate distinction",[23] the European Union requests the Appellate Body to also *reverse* the Panel's finding under the chapeau of Article XX(a) of the GATT 1994. The European Union further requests the Appellate Body to *complete the analysis* under the chapeau of Article XX(a) of the GATT 1994 and *find*, on the basis of the considerations made before, that the IC exception is not "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade" and, accordingly, that the IC exception meets the requirements under Article XX(a) of the GATT 1994, including its chapeau.

8. SUBSIDIARILY, THE PANEL ERRED BY FINDING THAT THE EUROPEAN UNION HAD FAILED TO ESTABLISH A PRIMA FACIE CASE FOR ITS CLAIM THAT THE IC EXCEPTION IS JUSTIFIED UNDER ARTICLE XX(B) GATT

19. Finally, in the event that the Appellate Body were to 1) uphold the Panel's finding that the EU Seal Regime is inconsistent with Article I:1 of the GATT 1994; and 2) reverse the Panel's finding that the EU Seal Regime falls within the scope of GATT Article XX(a), the European Union appeals the Panel's finding that "the European Union has failed to establish a *prima facie* case for its claim under Article XX(b) [of the GATT]".[24] The European Union submits that in reaching this conclusion the Panel failed to fulfil its duty to conduct an objective assessment of the matter as required by Article 11 of the DSU. Accordingly, the European Union requests the Appellate Body: 1) to reverse the Panel's finding that the European Union failed to establish a *prima facie* case under GATT Article XX(b); and 2) to complete the analysis under GATT Article XX(b) and find that the EU Seal Regime is justified under that provision.

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[21] See Panel Report, para. 7.650. See also the conclusion under para. 8.3 d) with regard to both complaints (DS 400 and DS 401).

[22] See para. 9 above.

[23] Panel Report, para. 7.319.

[24] See e.g. Panel report, para. 7.640 and para. 8.3 e) of the conclusions and recommendations in boith WT/DS400 R and WTDS401/R.