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Page: 1/5

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

COMMUNICATION FROM THE PANEL

The following communication, dated 1 February 2013, was received from the Chairperson of the Panel with the request that it be circulated to the Dispute Settlement Body (DSB).

On 19 December 2012, the European Union submitted to the Panel a request for a preliminary ruling concerning removal of certain exhibits from the record of the proceedings.

On 29 January 2013, the Panel issued the attached preliminary ruling to the parties and third parties.

After consulting the parties to the dispute, the Panel decided to inform the Dispute Settlement Body (DSB) of the content of its preliminary ruling. Therefore, I would be grateful if you would circulate this letter and the attached preliminary ruling to the Members of the DSB.

PRELIMINARY RULING OF THE PANEL

29 January 2013

1 PROCEDURAL BACKGROUND

1.1. On 11 December 2012, Canada submitted a letter seeking leave to withdraw Exhibit JE-13 and all references to it in its first written submission. Canada explains that the European Union requested Canada to take such an action because, according to the European Union, the document in question was released without authorization.

1.2. On 13 December 2012, Norway submitted a letter addressing the same matter. Norway indicates that it received a similar request from the European Union with respect to Exhibits JE-13 and NOR-75¹. Norway is seeking leave not only to withdraw Exhibits JE-13 and NOR-75, but also to re-file an amended first written submission, together with new exhibits to replace those it will withdraw.

1.3. On the same day, the European Union submitted a letter in response to Canada's and Norway's letters of 11 and 13 December 2012, respectively. The European Union states that Exhibits JE-13 and NOR-75 contain classified documents under the EU regulations, which have not been authorized for disclosure to the public. The European Union explains that, as it is confident that Canada and Norway have acted in good faith, it has invited them informally to withdraw the documents from the record. Regarding Norway's request to re-file an amended first written submission, however, the European Union considers it unnecessary. In its view, if Norway wishes to submit new exhibits and argument in place of the withdrawn exhibits, it should do so at the first substantive meeting.

1.4. Following the European Union's letter, Norway submitted a letter on 14 December 2012 to withdraw its "conditional request to withdraw" Exhibits JE-13 and NOR-75, submitted on 13 December 2012. Norway explains that its initial request to withdraw these exhibits was expressly made "conditional" upon an understanding that the European Union would not object to Norway's filing of an amended first written submission, including replacement exhibits. As the European Union objects to Norway's request in this regard, it withdraws its conditional request to withdraw Exhibits JE-13 and NOR-75.

1.5. On 19 December 2012, pursuant to paragraph 6 of the Panel's Working Procedures², the European Union submitted a request that the Panel "issue a preliminary ruling removing from the file Exhibit JE-13 and Exhibit NOR-75"³.

1.6. Following the Panel's invitation of 20 December 2012, the complainants submitted their responses to the European Union's request on 16 January 2013.

2 MAIN ARGUMENTS OF THE PARTIES AND THE THIRD PARTIES**2.1 Main arguments of the parties**

2.1. Exhibit JE-13 is titled "Legal Service of the Council of the European Union, *Opinion on the proposal for a Regulation of the European Parliament and of the Council concerning trade in seal*

¹ Canada and Norway are the complainants in DS400 and 401, respectively. In addition to their own sets of exhibits (i.e. CDA and NOR), the complainants have also agreed to submit Joint Exhibits (JE) in these proceedings pursuant to paragraph 11 of the Panel's Working Procedures.

² Paragraph 6 of the Panel's Working Procedures provides:

A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If the complainants request such a ruling, the respondent shall submit its response to the request in its first written submission. If the respondent requests such a ruling, the complainants shall submit their response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

³ European Union's request of 19 December 2012, para. 1.

products – Compatibility with WTO, 7691/09 (17 March 2009)"⁴. Exhibit NOR-75 is titled "*Opinion on the proposal for a Regulation of the European Parliament and of the Council concerning trade in seal products – Legal Basis*, 6623/09 (18 February 2009)"⁵.

2.2. The European Union argues that both legal opinions are classified documents under the applicable regulations of the European Union and have not been authorized by the EU Council for public disclosure⁶. At the same time, the European Union does not dispute that both Canada and Norway had acted in good faith when providing copies of them to the Panel⁷.

2.3. The European Union further argues that "in many jurisdictions ... evidence obtained illegally cannot be relied upon in judicial proceedings" and opines that "this principle should also be upheld in WTO dispute settlement proceedings"⁸. The European Union acknowledges that the WTO Agreement does not contain any provision addressing specifically the situation where a WTO Member seeks to rely on evidence obtained in breach of the laws of another WTO Member, but argues that "[t]his does not mean, however, that WTO Members are free to submit such illicit evidence"⁹. The European Union also recalls that Article 3.10 of the DSU enjoins WTO Members to engage in dispute settlement in good faith¹⁰. Finally, the European Union argues that the exhibits in question are "not relevant, let alone necessary, in order to prove Norway's claims"¹¹.

2.4. In response to the European Union's request, Canada recalls that it has already agreed to withdraw Exhibit JE-13 as communicated in its request for leave dated 11 December 2012¹², and observes that such removal also entails the removal of certain paragraphs from its first written submission¹³. Canada states further that the removal of those paragraphs will not require it to make additional revisions to its first written submission¹⁴. Norway submits that it has no objection in principle to withdrawing the concerned exhibits as reflected in its conditional application for leave dated 13 December 2012¹⁵. Norway also submits that the facts revealed by the relevant exhibits can also be demonstrated, "albeit in a less direct and immediate manner, by other evidence"¹⁶.

2.5. Further, Canada requests the Panel to provide guidance on how to proceed as a result of the removal of the exhibits and argues that the complainants' due process rights be protected by providing them with "an opportunity to remedy the impact that such removal might have on the coherence and completeness of the legal arguments"¹⁷ presented in their first submissions. Norway argues that it "would not be consistent with due process and orderly procedure for [the exhibits] to be withdrawn without giving Norway an opportunity to replace that evidence"¹⁸. It also seeks an opportunity to address resulting incomplete sentences and paragraphs in its submission should it be instructed to expunge therefrom any references to the exhibits¹⁹. In this regard, the European Union states that like Canada, it defers to the Panel on the most appropriate mechanism

⁴ List of Joint Exhibits to the first written submissions of Canada and Norway (9 November 2012), Exhibit JE-13.

⁵ List of Exhibits to the first written submission of Norway (9 November 2012), Exhibit NOR-75.

⁶ European Union's request of 19 December 2012, paras. 6-9.

⁷ European Union's request of 19 December 2012, para. 12. The European Union explains that the EU Council received a request from some individuals under Regulation (EC) No 1049/2011, but refused to grant full access and allowed partial access to the legal opinions at issue in accordance with Article 4.2 of the same EU regulation, and expunged all traces of legal advice. The European Union submits that whoever provided the documents submitted as Exhibits JE-13 and NOR-75 to Canada and Norway did so in flagrant violation of the applicable EU regulations. (European Union's request of 19 December, para. 10)

⁸ European Union's request of 19 December 2012, para. 17.

⁹ European Union's request of 19 December 2012, para. 26.

¹⁰ European Union's request of 19 December 2012, para. 27.

¹¹ European Union's request of 19 December 2012, para. 22.

¹² Canada's response of 16 January 2013, p.1.

¹³ Canada's response of 16 January 2013, p. 1.

¹⁴ Canada's response of 16 January 2013, p. 2.

¹⁵ As described above in paragraph 1.3, on 14 December 2012, Norway withdrew its conditional application for leave filed on 13 December 2012. We understand that Norway's agreement to withdraw the exhibits in its communication of 16 January 2013 supersedes its withdrawal of the application for leave submitted on 14 December 2012.

¹⁶ Norway's response of 16 January 2013, p. 2.

¹⁷ Canada's response of 16 January 2013, p. 2.

¹⁸ Norway's response of 16 January 2013, p. 2.

¹⁹ Norway's response of 16 January 2013, p. 2.

to modify the record²⁰. The European Union nevertheless considers it unnecessary for Canada and Norway to re-file their first written submissions. It argues that it would be sufficient if the Panel instructed the parties to refrain from submitting any further argument based on Exhibits JE-13 and NOR-75, and if the Panel disregarded those two exhibits, as well as any arguments included in Norway's and Canada's first written submission referring to them, when deliberating and making its findings.

2.2 Main arguments of the third parties²¹

2.6. The United States opines that the legal opinions of an agency of a Member would appear to be of limited relevance to both the factual and legal matter before the Panel²². Further, the United States argues that the Panel should refrain from rejecting evidence without a basis in the DSU for doing so²³. The United States asserts that the European Union has not provided any basis in the DSU for a panel to reject a piece of evidence provided by a party. Based on the European Union's arguments on this matter, therefore, the United States does not see a basis in the DSU for the Panel to reject Exhibits JE-13 and NOR-75²⁴.

3 RULING OF THE PANEL

3.1. As a preliminary matter, we observe that, as expressed in their respective communications on this matter²⁵, including their latest responses of 16 January 2013, both Canada and Norway are in principle willing to withdraw the exhibits in question. Under these circumstances, we consider that it is not necessary for us to pronounce on the legal status of the documents or the relevance thereof. Moreover, given the complainants' willingness to remove the documents and our decision set out below, it is not necessary for us to determine whether the European Union would suffer any impairment in its ability to defend itself in these proceedings were the documents to remain in the record.

3.2. Second, as acknowledged by the European Union, we are mindful of the fact that Canada and Norway have acted in good faith in submitting these exhibits to the Panel.

3.3. We further consider that, in light of the complainants' agreement to withdraw the documents from the record and their undertaking to refrain from making any reference thereto in these proceedings, the complainants' due process rights would not be affected by the removal of the two exhibits from the record in the present proceedings. Commensurate with this determination, we consider that the complainants should have an opportunity to file replacement evidence together with explanations demonstrating how such new documents relate to the relevant arguments made in their first written submissions. The European Union will be given an opportunity to respond to any replacement exhibits and explanations submitted by the complainants at the first substantive meeting.

3.4. For these reasons, therefore, and without prejudice to our decision on Norway's request for the Panel to exercise its power under Article 13 of the DSU²⁶, we grant the European Union's request to remove Exhibits JE-13 and NOR-75 from the record of the proceedings in DS400 and DS401.

3.5. In deciding to rule on the European Union's request, we are aware of the complainants' view that, in light of their willingness to withdraw these exhibits, the Panel does not need to make a formal ruling. However, under the circumstances of the present disputes, we consider it in the interest of procedural clarity to issue this ruling and explain the reasons therefor. We also find it useful to set out procedural directions for giving effect to this ruling.

²⁰ European Union's request of 19 December 2012, para. 30.

²¹ The United States submitted, in its third party written submission dated 25 January 2013, its comments on the European Union's preliminary ruling request. The United States is the only third party to have done so in these proceedings.

²² United States' third party written submission, paras. 14-15.

²³ United States' third party written submission, paras. 16-17.

²⁴ United States' third party written submission, para. 20.

²⁵ See paras. 1.1. and 1.2.

²⁶ On 16 January 2013, together with its response to the European Union's request for a preliminary ruling, Norway submitted a separate request for the Panel to exercise its power under Article 13 of the DSU to seek certain documents.

3.6. The record in these proceedings shall therefore be modified in the following manner:

- The members of the Panel and those members of the Secretariat assisting the Panel, including the DS Registrar, shall destroy the originals and all copies of Exhibits JE-13 and NOR-75, be they in electronic or paper form;
- The Chairman of the Panel through the DS Registrar shall place on the record a note indicating that Exhibits JE-13 and NOR-75 have been destroyed pursuant to the Panel's preliminary ruling dated Tuesday, 29 January 2013;
- The complainants shall destroy all copies (electronic and paper) of Exhibits JE-13 and NOR-75 and shall refrain from making any further references to Exhibits JE-13 and NOR-75 in these proceedings;
- The third parties shall destroy all copies (electronic and paper) of Exhibits JE-13 and NOR-75; and
- The Panel shall disregard, in its deliberations and in its reports, Exhibits JE-13 and NOR-75, as well as any references to such exhibits.

3.7. We thus invite the complainants to submit any replacement exhibits, along with a brief explanation of their relevance to the complainants' arguments, referring to relevant paragraphs in their respective first written submissions. We underline that any such explanations should be strictly limited to the specific arguments that have already been presented in the first written submissions in relation to Exhibits JE-13 and NOR-75 and should not raise new legal claims or arguments. Nor should the parties submit amended versions of their entire first written submissions.

3.8. We do not consider it necessary, however, to redact specific paragraphs in the complainants' first written submissions in which the two exhibits are referenced²⁷.

3.9. The complainants shall submit such replacement exhibits and any brief explanation thereof no later than 5 pm, Friday, 8 February 2013, following the procedures prescribed in paragraph 25 of the Panel's Working Procedures regarding service of documents. As mentioned above, the European Union will have the opportunity to respond to any replacement exhibits and explanations submitted by the complainants at the first substantive meeting.

3.10. Finally, we reserve the right to modify this ruling and observe that this ruling, in its modified form if any modifications are made, will be incorporated as an integral part of the Panel's findings.

²⁷ See also the European Union's view described in para. 2.5. above.