



29 January 2014

(14-0510)

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

**NOTIFICATION OF AN APPEAL BY CANADA  
UNDER ARTICLE 16.4 AND ARTICLE 17 OF THE UNDERSTANDING ON RULES  
AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU),  
AND UNDER RULE 20(1) OF THE WORKING PROCEDURES FOR APPELLATE REVIEW**

The following notification, dated 24 January 2014, from the Delegation of Canada, is being circulated to Members.

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Pursuant to Article 16.4 and Article 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) and Rule 20 of the Working Procedures for Appellate Review, Canada notifies its appeal of certain issues of law in the Report of the Panel in *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* (WT/DS400/R) and certain legal interpretations developed by the Panel in this Report.

First, Canada seeks review by the Appellate Body of the Panel's findings and conclusions with respect to the legitimate regulatory distinction test in Article 2.1 of the *Agreement on Technical Barriers to Trade* (TBT Agreement). Specifically, the Panel erred in its intermediate finding that the distinction between commercial and IC<sup>1</sup> hunts based on the purpose of the hunt is justifiable.<sup>2</sup> The Panel erred by formulating and applying the wrong legal test, and in doing so, failed to take into account relevant information about the negative impact of the IC exception on the identified objective of the EU Seal Regime.<sup>3</sup>

Canada also requests the Appellate Body to find that the Panel acted inconsistently with Article 11 of the DSU by failing to make an objective assessment of the facts pertinent to its findings under Article 2.1 of the TBT Agreement with respect to the distinctions between commercial and IC hunts.<sup>4</sup>

Second, Canada seeks review by the Appellate Body of the Panel's findings and conclusion that the EU Seal Regime is not inconsistent with Article 2.2 of the TBT Agreement. This conclusion is incorrect as a matter of law, and is based on erroneous intermediate findings on issues of law and legal interpretation including the Panel's reasoning and findings with respect to whether the EU Seal Regime contributes to the identified objective,<sup>5</sup> the relational analysis under the "weighing and balancing" exercise, and its reasoning and findings as to whether the alternative measure proposed by Canada is reasonably available.<sup>6</sup> Specifically, in relation to the "contribution" element, the Panel erred in finding that the EU Seal Regime as a whole contributes to the identified objective by applying the wrong legal test and failing to articulate with sufficient specificity the extent of the contribution.<sup>7</sup> The Panel also failed to properly assess the risks non-fulfilment would

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<sup>1</sup> IC refers to "Inuit or other indigenous communities".

<sup>2</sup> See e.g. Panel Report, *EC – Seal Products*, paras. 7.283-7.300.

<sup>3</sup> The EU Seal Regime includes the Basic Regulation and the Implementing Regulation as set out in *ibid.* paras. 7.7-7.24.

<sup>4</sup> See e.g. *ibid.* paras. 7.227-7.245 and 7.261-7.271.

<sup>5</sup> See e.g. *ibid.* paras. 7.446-7.460.

<sup>6</sup> See e.g. Panel Report, *EC – Seal Products*, paras. 7.496-7.504.

<sup>7</sup> See e.g. *ibid.* paras. 7.441-7.461.

create, or to conduct a relational analysis.<sup>8</sup> In relation to its reasoning and findings with respect to the reasonable availability of the alternative measure advanced by Canada, the Panel erred by comparing the wrong aspects of the EU Seal Regime with the alternative measure,<sup>9</sup> by disregarding measures applied by the European Union in comparable situations or similar product areas,<sup>10</sup> and by mis-interpreting and mis-applying Appellate Body jurisprudence.<sup>11</sup>

Canada also requests the Appellate Body to find that the Panel acted inconsistently with Article 11 of the DSU by failing to make an objective assessment of the facts pertinent to the above-referenced intermediate findings with respect to Article 2.2 of the TBT Agreement, including its consideration and assessment of facts and evidence pertinent to the question of whether the EU Seal Regime contributes to the identified objective, and has negatively impacted demand in the European Union.

Third, Canada seeks review by the Appellate Body of the Panel's findings and conclusion with respect to Article XX of the GATT 1994. Canada submits that the Panel erred in finding that the EU Seal Regime is provisionally justified under Article XX(a). Specifically, the Panel failed to interpret and apply the first element<sup>12</sup> of Article XX(a) correctly, by ignoring the words "to protect", and thereby omitting to determine whether the sale in the European Union of products derived from commercial seal hunts created a risk to an EU public moral.<sup>13</sup> It also erred in its interpretation and application of the necessity test under Article XX(a) with respect to the issues of the contribution of the EU Seal Regime to the identified objective, and with respect to the reasonable availability of the alternative measure advanced by Canada already noted above in the context of Canada's request for review under Article 2.2 of the TBT Agreement.<sup>14</sup> In addition, although it came to the correct conclusion that the EU Seal Regime is not consistent with the requirements of the chapeau of Article XX, the Panel erred in its reasoning in coming to this conclusion.<sup>15</sup>

Canada also requests the Appellate Body to find that the Panel acted inconsistently with Article 11 of the DSU in relation to its findings under Article XX(a) by failing to make an objective assessment of the facts by not taking into account evidence relating to animal welfare standards in the European Union, including standards applied to other wild animal hunts and commercial abattoirs.<sup>16</sup>

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<sup>8</sup> See e.g. *ibid.* paras. 7.462-7.465 and 7.500-7.504.

<sup>9</sup> See e.g. *ibid.* paras. 7.478-7.484 and 7.493-7.503.

<sup>10</sup> See e.g. *ibid.* para. 7.504, fn 815.

<sup>11</sup> See e.g. *ibid.* para. 7.502.

<sup>12</sup> The measure must be designed "to protect public morals".

<sup>13</sup> See e.g. *ibid.* paras. 7.631 and 7.383-7.411.

<sup>14</sup> See e.g. *ibid.* paras. 7.636-7.639.

<sup>15</sup> See e.g. *ibid.* paras. 7.649-7.650, referring back to paras. 7.256-7.300.

<sup>16</sup> See e.g. *ibid.* paras. 7.188 and 7.222-7.224.