



29 January 2014

(14-0508)

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

**NOTIFICATION OF AN APPEAL BY NORWAY
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 Norway, is being circulated to Members.

1. Pursuant to Articles 16.4 and 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the *Working Procedures for Appellate Review* (WT/AB/WP/6, 16 August 2010) ("*Working Procedures*"), Norway hereby notifies the Dispute Settlement Body ("DSB") of its decision to appeal certain issues of law and legal interpretations in the Panel Report in *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* (WT/DS401) ("Panel Report").

2. Pursuant to Rules 20(1) and 21(1) of the *Working Procedures*, Norway files this Notice of Appeal together with its Appellant's Submission with the Appellate Body Secretariat.

3. Pursuant to Rule 20(2)(d)(iii) of the *Working Procedures*, this Notice of Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to Norway's ability to rely on other paragraphs of the Panel Report in its appeal.

4. Norway seeks review by the Appellate Body of the following errors of law and legal interpretation by the Panel in its Report, and requests the following findings by the Appellate Body.

I. REVIEW OF THE PANEL'S FINDINGS UNDER ARTICLE 2.2 OF THE *TBT AGREEMENT*

1. With respect to the Panel's identification of the objective of the EU Seal Regime:¹

5. The Panel erred in interpreting and applying Article 2.2 of the *TBT Agreement*, and failed to make an objective assessment of the facts as required under Article 11 of the DSU, when it found that the objectives of the EU Seal Regime *do not* include protecting the interests of indigenous communities ("IC"), as reflected in the "IC requirements"² under the measure, and promoting the sustainable management of marine resources ("SRM"), as reflected in the "SRM requirements"³ under the measure; and rather found that the EU Seal Regime pursues a *sole* "objective" of

¹ Panel Report, paras. 7.410 and 8.2(b).

² See, e.g., Basic Seal Regulation, Exhibit JE-1, Article 3(1); Implementing Regulation, Exhibit JE-2, Article 3(1).

³ See, e.g., Basic Seal Regulation, Exhibit JE-1, Article 3(2)(b); Implementing Regulation, Exhibit JE-2, Article 5(1).

addressing “the moral concerns of the EU public with regard to the welfare of seals”.⁴ In particular, the Panel erred because:

- it failed properly to consider the text, legislative history, structure, design and operation of the EU Seal Regime in identifying the objectives of the EU Seal Regime, as required under Article 2.2;⁵
- in its assessment of the evidence regarding the objectives of the EU Seal Regime, the Panel failed to make an objective assessment of the facts, as required under Article 11 of the DSU;⁶ and
- assuming it did properly assess the text, legislative history, structure, design and operation of the EU Seal Regime (*quod non*), the Panel erred under Article 2.2 in finding that the IC and SRM interests reflected in the IC and SRM requirements do not qualify as objectives.⁷

6. For the reasons provided in paragraph 5 above, Norway requests that the Appellate Body reverse the Panel’s finding that the objectives of the EU *do not* include protecting IC interests and promoting SRM interests, and that the EU Seal Regime’s *sole* objective is to address “the moral concerns of the EU public with regard to the welfare of seals”. As a result, the Appellate Body should also reverse the Panel’s ultimate finding, in paragraph 8.2(b) of the Panel Report, that the EU Seal Regime is not inconsistent with Article 2.2 of the *TBT Agreement*.

2. With respect to the Panel’s finding the EU Seal Regime is “not more trade restrictive than necessary to fulfil” its objective:⁸

7. The Panel erred in interpreting and applying Article 2.2 of the *TBT Agreement*, and failed to make an objective assessment of the facts as required under Article 11 of the DSU, in finding that the EU Seal Regime is capable of making, and does make, some contribution to the identified objective of addressing EU public moral concerns.⁹ In particular, the Panel erred because:

- it failed properly to interpret and apply Article 2.2, by failing to articulate with sufficient clarity and precision the degree or extent of the contribution made by the EU Seal Regime to its objective, and by concluding that the EU Seal Regime is capable of making, and does make, some contribution to EU public moral concerns;¹⁰ and
- it failed to make an objective assessment of the facts, as required under Article 11 of the DSU, in finding that the EU Seal Regime is capable of making, and does make, some contribution to the identified objective of addressing EU public moral concerns;¹¹ and
- the Panel also failed to make an objective assessment of the matter under Article 11 of the DSU by failing to address Norway’s claim and argument that three contested conditions under the SRM requirement – that is, the “sole purpose”, “not-for-profit”, and “non-systematic” requirements¹² (the “three contested conditions”) – make no contribution to the measure’s objectives.

8. The Panel erred in interpreting and applying Article 2.2 of the *TBT Agreement*, and failed to make an objective assessment of the matter, as required under Article 11 of the DSU, by failing to establish whether the EU Seal Regime gives rise to “arbitrary and unjustifiable discrimination”, as required by Article 2.2, read in light of the sixth recital of the preamble of the TBT Agreement;

⁴ Panel Report, para. 7.410.

⁵ Panel Report, paras. 7.372-7.411.

⁶ Panel Report, paras. 7.372-7.411.

⁷ Panel Report, para. 7.402. See also Panel Report, paras. 7.399 and 7.401.

⁸ Panel Report, paras. 7.505 and 8.2(b).

⁹ Panel Report, para. 7.460.

¹⁰ Panel Report, paras. 7.441-7.461.

¹¹ Panel Report, paras. 7.441-7.461.

¹² See, e.g., Basic Seal Regulation, Exhibit JE-1, Article 3(2)(b); Implementing Regulation, Exhibit JE-2, Articles 5(1) and 5(1)(c).

9. The Panel erred in interpreting and applying Article 2.2 of the *TBT Agreement*, and failed to make an objective assessment of the matter as required under Article 11 of the DSU, in finding that one of the less trade-restrictive alternative measures proposed by Norway was not reasonably available to the European Union, having regard to the level of contribution of the alternative.¹³ In particular, the Panel erred because:

- it held the alternative measure up to a benchmark level of contribution that was much higher than the degree of contribution it had found was achieved by the EU Seal Regime, contrary to Article 2.2;¹⁴ and
- it failed to make an objective assessment of the facts under Article 11 of the DSU, by not addressing or making any findings with respect to other less trade-restrictive alternatives put forward by Norway.

10. For the reasons provided in paragraphs 7, 8, and 9 above, Norway requests that the Appellate Body reverse the Panel's finding that the EU Seal Regime is not more trade-restrictive than necessary to fulfil the legitimate objective.¹⁵ As a result, the Appellate Body should also reverse the Panel's ultimate finding, in paragraph 8.2(b) of the Panel Report, that the EU Seal Regime is not inconsistent with Article 2.2 of the *TBT Agreement*.

II. REQUEST FOR LIMITED COMPLETION OF THE ANALYSIS UNDER ARTICLE 2.2 OF THE *TBT AGREEMENT*

11. If, as requested by Norway above, the Appellate Body reverses, for any reason, the Panel's findings under Article 2.2 of the *TBT Agreement*, Norway requests the Appellate Body to complete the legal analysis under Article 2.2 of the *TBT Agreement* and make the following limited findings:

- that, in addition to pursuing the EU public morals objective, the objectives of the EU Seal Regime *also include* protecting the interests of indigenous communities and promoting sustainable marine resource management;
- that promoting sustainable marine resource management is a legitimate objective; and
- that, by virtue of the three contested SRM conditions, the EU Seal Regime is more trade-restrictive than necessary to fulfil its legitimate objectives.

III. REVIEW OF THE PANEL'S FINDINGS UNDER ARTICLE XX OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE ("GATT 1994") AND REQUEST FOR COMPLETION OF THE ANALYSIS UNDER ARTICLE XX OF THE GATT 1994

1. With respect to the Panel's finding that the EU Seal Regime is provisionally justified under sub-paragraph (a) of Article XX of the GATT 1994:¹⁶

12. The Panel erred in interpreting and applying sub-paragraph (a) of Article XX because it examined whether the EU Seal Regime as a whole was provisionally justified under that provision, whereas it was required, but failed, to consider whether the specific aspects of the measure that give rise to violations of substantive provisions of the GATT 1994 could fall under, and be provisionally justified by, sub-paragraph (a).¹⁷ Norway, therefore, requests that the Appellate Body reverse the Panel's findings at paragraphs 7.639 and 8.3(d) that the EU Seal Regime falls under, and is provisionally justified by, sub-paragraph (a).

¹³ Panel Report, para. 7.504.

¹⁴ Panel Report, paras. 7.467, 7.478-7.485 and 7.493-7.505.

¹⁵ Panel Report, para. 7.505.

¹⁶ Panel Report, paras. 7.639 and 8.3(d).

¹⁷ Panel Report, paras. 7.618-7.624.

13. Norway also requests that the Appellate Body complete the analysis and find that the specific aspects of the measure that give rise to violations of the GATT 1994 do not fall under, and are not provisionally justified by, sub-paragraph (a) of Article XX.

14. If the Appellate Body disagrees with Norway's requests under paragraphs 12 and 13 above, Norway further considers that the Panel erred in interpreting and applying sub-paragraph (a) of Article XX, and failed to make an objective assessment of the matter, as required under Article 11 of the DSU. In particular, the Panel erred because:

- it failed properly to interpret and apply subparagraph (a) of Article XX by finding that the EU Seal Regime as a whole contributes "to a certain extent" to the measure's objective;¹⁸
- it failed to make an objective assessment of the facts, as required under Article 11 of the DSU, in finding that the EU Seal Regime as a whole contributes "to a certain extent" to the measure's objective;¹⁹
- it failed to apply the proper legal standard under sub-paragraph (a) of Article XX as regards a less trade-restrictive alternative measure because it held the alternative measure up to a benchmark level of contribution that was much higher than the degree of contribution it had found was achieved by the EU Seal Regime;²⁰ and
- it failed to make an objective assessment of the facts, as required under Article 11 of the DSU, by not addressing or making any findings with respect to other less trade-restrictive alternatives put forward by Norway.

15. As a result of the errors identified in paragraph 14 above, Norway requests that the Appellate Body reverse the Panel's ultimate finding at paragraphs 7.639 and 8.3(d).

2. With respect to the Panel's finding that the EU Seal Regime reflects arbitrary and unjustifiable discrimination under the chapeau of Article XX of the GATT 1994:²¹

16. The Panel erred in interpreting and applying the chapeau of Article XX because, in determining whether the IC and SRM requirements are applied in a manner that reflect "arbitrary or unjustifiable discrimination", it failed to end its analysis upon finding that the IC and SRM requirements are not "rationally connected" to the EU public moral concerns.²²

17. If the Appellate Body disagrees with Norway's requests under paragraphs 12 and 13 above, Norway requests that the Appellate Body modify the reasoning underpinning the Panel's finding at paragraphs 7.651 and 8.3(d) that the measure is not consistent with the requirements of the chapeau to Article XX, and uphold that finding, albeit for reasons different than those given by the Panel.

¹⁸ Panel Report, paras. 7.630-7.639.

¹⁹ Panel Report, paras. 7.630-7.639.

²⁰ Panel Report, para. 7.639.

²¹ Panel Report, paras. 7.651 and 8.3(d).

²² Panel Report, paras. 7.644-7.651.