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**DISPUTE SETTLEMENT: DISPUTE DS401**

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

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Report(s) adopted, with recommendation to bring measure(s) into conformity on 18 June 2014 

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Short title: EC – Seal Products

Complainant: Norway

Respondent: European Communities

Third Parties: Argentina; Canada; China; Colombia; Ecuador; Iceland; Japan; Mexico; Namibia; Russian Federation; United States


Agreements cited: Agriculture: Art. [4.2](#)
GATT 1994: Art. [I:1](#), [III:4](#), [XI:1](#)
(as cited in request for consultations) Technical Barriers to Trade (TBT): Art. [2.1](#), [2.2](#), [5](#), [5.1](#), [5.2](#), [5.4](#), [5.6](#), [6](#), [6.1](#), [7.1](#), [7.4](#), [7.5](#), [8.1](#), [8.2](#), [9.2](#), [9.3](#)

[Request for Consultations](#) 5 November 2009 received:

[Panel Report](#) 25 November 2013 circulated:

[Appellate Body Report](#) 22 May 2014 circulated:

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The summary below was up-to-date at 8 October 2014 
See also: [One-page summary of key findings of this dispute](#)

Consultations

Complaint by Norway. (See also [DS400](#))

On 5 November 2009, Norway requested consultations with the European Communities concerning Regulation (EC) No. 1007/2009 of the European Parliament and of the EC Council of 16 September 2009 on trade in seal products, and subsequent related measures (the “EC seal regime”). According to Norway, the EC seal regime prohibits the importation and sale of processed and unprocessed seal products, while containing certain exceptions that afford privileged access to the EU market to seal products originating in the EC and certain third countries, but not Norway.

Norway claims that the above measures are inconsistent with the obligations of the European Communities under Article 4.2 of the Agriculture Agreement; Article 2.1 and 2.2 of the TBT Agreement; and Articles I:1, III:4 and XI:1 of the GATT 1994.

On 16 November 2009, Iceland requested to join the consultations. On 20 November 2009, Canada requested to join the consultations.

On 19 October 2010, Norway renewed its consultation request with

respect to the EU seal regime, which, in addition to Regulation (EC) No. 1007/2009, also includes: Commission Regulation (EU) No. 737/2010 (laying down rules for the implementation of Regulation (EC) No. 1007/2009); omissions to adopt adequate procedures for establishing that seal products conforming to the relevant conditions in the EU seal regime may be placed on the EU market; and any other related implementing measures.

Norway claims that the EU seal regime imposes a prohibition on the importation and sale of seal products and establishes certain exceptions that discriminate in favour of seal products originated in the EU and certain third countries. Norway further claims that the EU seal regime also includes elements of a system for certifying that seal products are in conformity with the relevant conditions for being placed on the EU market that is discriminatory and trade-restrictive in a number of respects. Moreover, Regulation (EC) No. 1007/2009 and requested supplementary consultations concerning Commission Regulation (EU) No. 737/2010 do not establish adequate procedures for the assessment of conformity of imported seal products with the relevant conditions for being placed on the EU market.

Norway claims that the EU seal regime is inconsistent, *inter alia*, with Articles 2.1, 2.2, 5.1, 5.2, 5.4, 5.6, 6.1, 6.2, 7.1, 7.4, 7.5, 8.1 and 8.2 of the TBT Agreement; Articles I:1, III:4 and XI:1 of the GATT 1994 and Article 4.2 of the Agriculture Agreement.

On 28 October 2010, Canada requested to join the supplementary consultations.

On 14 March 2011, Norway requested the establishment of a panel. At its meeting on 25 March 2011, the DSB deferred the establishment of a panel.

Panel and Appellate Body proceedings

At its meeting on 21 April 2011, the DSB established a panel. As provided for in Article 9.1 of the DSU with regard to multiple complainants, the DSB agreed that the panel established at the DSB meeting on 25 March 2011 to examine the complaint by Canada (DS400), would also examine this complaint. Argentina, Canada, China, Colombia, Ecuador, Iceland, Japan, Mexico, Namibia and the United States reserved their third party rights. Subsequently, the Russian Federation reserved its third party rights. On 24 September 2012, Canada and Norway requested the Director-General to determine the composition of the panel. On 4 October 2012, the Director-General composed the panel. On 4 April 2013, the Chair of the Panel informed the DSB that the panel expects to issue its final report to the parties by October 2013, in accordance with the timetable adopted after consultation with the parties.

On 25 November 2013, the panel report was circulated to Members.

Summary of key findings

This dispute concerns regulations of the European Union ("EU Seal Regime") that generally prohibit the import and placing on the market of seal products. The EU Seal Regime provides for various exceptions to the prohibition if certain conditions are met, including for seal products derived from hunts conducted by Inuit or indigenous communities (IC exception) and hunts conducted for marine resource management purposes (MRM exception).

The panel determined that the EU Seal Regime is a technical regulation and that the EU Seal Regime does not violate Article 2.2 of the TBT Agreement because it fulfils the objective of addressing EU public moral concerns on seal welfare to a certain extent, and no alternative measure was demonstrated to make an equivalent or greater contribution to the fulfilment of the objective.

The panel concluded that the IC exception under the EU Seal Regime violates Article I:1 of the GATT 1994 because an advantage granted by the European Union to seal products originating in Greenland (specifically, its Inuit population) is not accorded immediately and unconditionally to the like products originating in Norway. With respect to the MRM exception, the panel found that it violates Article III:4 of the GATT 1994 because it accords imported seal products treatment less favourable than that accorded to like domestic seal products. The panel also found that the IC exception and the MRM exception are not justified under Article XX(a) of the GATT 1994 ("necessary to protect public morals") because they fail to meet the requirements under the chapeau of Article XX ("not applied in a manner that would constitute arbitrary or unjustified discrimination where the same conditions prevail or a disguised restriction on international trade"). The panel additionally found that the European Union failed to make a *prima facie* case that the EU Seal Regime is justified under Article XX(b) of the GATT 1994 ("necessary to protect ... animal ... life or health").

The panel found that the European Union had acted inconsistently with its obligations under Article 5.1.2 of the TBT Agreement because the conformity assessment procedures under the EU Seal Regime were

incapable of enabling trade in qualifying products to take place as from the date of entry into force of the EU Seal Regime. With respect to the claims under Article 5.2.1 of the TBT Agreement, the panel concluded that the complainants had not demonstrated that the European Union acted inconsistently with its obligations to undertake and complete conformity assessment procedures as expeditiously as possible.

The panel rejected the claims under Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture, and, in light of the above findings of violation, did not consider it necessary to rule on the non-violation claims under Article XXIII:1(b) of the GATT 1994.

On 24 January 2014, Norway notified the DSB of its decision to appeal to the Appellate Body certain issues of law and legal interpretations developed by the panel. On 29 January 2014, the European Union notified the DSB of its decision to appeal to the Appellate Body certain issues of law and legal interpretations developed by the panel. On 24 March 2014, the Chair of the Appellate Body informed the DSB that the Appellate Body would not be able to circulate its report within 60 days nor within the 90-day time-frame provided for in Article 17.5 of the DSU due to the size of the appeals, and the number and complexity of issues raised. The Appellate Body estimated that the report would be circulated no later than 20 May 2014. On 16 May 2014, the Chair of the Appellate Body informed the DSB that due to the time required for translation and the caseload that the Appellate Body is currently facing, it would not be possible to circulate its report by 20 May 2014. The Appellate Body report would be circulated on 22 May 2014.

On 22 May 2014, the Appellate Body report was circulated to Members.

Summary of key findings

Canada and Norway each filed a Notice of Appeal on 24 January 2014. The European Union filed a Notice of Other Appeal on 29 January 2014.

The Appellate Body reversed the Panel's finding that the EU Seal Regime is a "technical regulation" within the meaning of Annex 1.1 to the TBT Agreement, and consequently declared moot and of no legal effect the Panel's conclusions under Articles 2.1, 2.2, 5.1.2, and 5.2.1 of the TBT Agreement. Specifically, the Appellate Body reversed the Panel's finding that the EU Seal Regime lays down "product characteristics" within the meaning of Annex 1.1. The Appellate Body declined to complete the legal analysis and thus did not rule on whether the EU Seal Regime lays down "related processes and production methods" within the meaning of Annex 1.1, given that this question had not been sufficiently explored by the Panel and the participants.

The Appellate Body upheld the Panel's finding that the legal standard for the non-discrimination obligations under Article 2.1 of the TBT Agreement does not apply equally to claims under Article I:1 and III:4 of the GATT 1994. Given that the European Union's appeal of the Panel's finding of inconsistency under Article I:1 of the GATT 1994 was based entirely on the alleged errors in the interpretation of that provision developed by the Panel, the Appellate Body also upheld the Panel's conclusion that the EU Seal Regime is inconsistent with Article I:1 because it does not "immediately and unconditionally" extend the same market access advantage to Canadian and Norwegian seal products that it accords to seal products originating from Greenland.

The Appellate Body upheld the Panel's finding that the EU Seal Regime is "necessary to protect public morals" within the meaning of Article XX(a) of the GATT 1994. As regards the chapeau of Article XX of the GATT 1994, the Appellate Body found that the Panel erred in applying the same legal test to the chapeau of Article XX as it applied to Article 2.1 of the TBT Agreement, instead of conducting an independent analysis of the consistency of the EU Seal Regime with the specific terms and requirements of the chapeau. The Appellate Body therefore reversed the Panel's findings under the chapeau, and consequently found that it did not need to address the participants' claims on appeal in relation to those findings. However, the Appellate Body completed the analysis and ultimately found, as did the Panel, that the European Union had not demonstrated that the EU Seal Regime meets the requirements of the chapeau of Article XX. Therefore, the Appellate Body concluded that the European Union had not justified the EU Seal Regime under Article XX of the GATT 1994.

At its meeting on 18 June 2014, the DSB adopted the Appellate Body report and the panel report, as modified by the Appellate Body report.

Reasonable period of time

At the DSB meeting on 10 July 2014, the European Union informed the DSB that it intended to implement the DSB recommendations and rulings in a manner that respected its WTO obligations and that it would need a reasonable period of time to do so. On 5 September 2014, Norway and the European Union informed the DSB that they had agreed that the

reasonable period of time for the European Union to implement the DSB recommendations and rulings shall be 16 months from the date of adoption of the panel report. Accordingly, the reasonable period of time expires on 18 October 2015.

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