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# **A PRACTICAL VIEW OF THE WTO DISPUTE SETTLEMENT MECHANISM THROUGH VARIOUS CASES**

## **Session 3 – Case Study: DS400-401 EC – Seal Products**

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## BACKGROUND - MEASURE

# Import ban

- Prohibits the placing into the EU market of
- Exceptions: Seal products
  - ✓ Hunted by the Inuit or other indigenous communities
  - ✓ Hunted for purposes of marine resource management
  - ✓ Personal/traveller goods



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## BACKGROUND – THE PRODUCTS





## BACKGROUND – MAIN DATES

Measures challenged were enacted	2009	Measures in place for more than 3 years
Request for consultations	5 Nov. 2009	
Request for establishment	14 March 2011	
Panel established by DSB	21 April 2011	
Request for DG composition	24 Sept. 2012	
Composition of the panel (DG)	4 October 2012	
Final report circulated	25 Nov. 2013	
Notice of Appeal	24 Jan. 2014	
Notice of an Other Appeal	29 Jan. 2014	
AB report circulated	22 May 2014	
Adoption of the report	18 June 2014	



## DEVELOPMENT OF THE APPEAL

- 24 Jan. 2104: Norway and Canada appeal / submitted appellant submissions
- 29 Jan. 2014: EC submits an other appeal / submitted appellant submissions
- 29 Jan. 2014: Oral hearing opened to the public
- 11 Feb. 2014: Submit appellee's submission
- 14 Feb. 2014: Third party submissions
- 17-19 March 2014: Oral hearing (postponed)
- Amicus curiae briefs (received; not made use)
- 22 May 2014: (delayed) circulation of the report



## HORIZONTAL ISSUES

### Interpretative approach

- **Rigorous** interpretative analysis of the provisions involved – e.g. paras. 5.8 *et seq.* where Annex 1.1 of the TBT Agreement is analysed

### Use of precedent

- The AB **follows its own precedent**, where there is any. E.g. para. 5.11 “The Appellate Body described these characteristics as... As the Appellate Body has noted, a technical regulation...”



## HORIZONTAL ISSUES

### Nature of appeal review

- Points of law: e.g. erroneous interpretations/legal errors, but also the panel objective assessment of the facts (Art. 11 DSU)

### Completion of analysis

- The AB **completes the analysis** with a view to facilitating the prompt settlement and effective resolution of the dispute
- It has done so only *if* the factual findings of the panel and the undisputed facts on the panel record provide it with a sufficient basis for its own analysis



## IS THE MEASURE A TECHNICAL REGULATION?

- Definition of Technical Regulation (TR) in Annex I, TBTA
- AB test:
  - ✓ Does the measure apply to an "identifiable group of products"?
  - ✓ Does the measure "lay[] down characteristics for all products that might contain seal" as well as "applicable administrative provisions for certain products containing seal inputs that are exempted from the prohibition under the measure [at issue]"?
  - ✓ Does the measure imposes mandatory compliance?
- EC appealed only the second finding



## IS THE MEASURE A TECHNICAL REGULATION?

- Based on the *EC – Asbestos* case, the **panel** found that “the prohibition on seal-containing products under the EU Seal Regime lays down a product characteristic in the negative form by requiring that all products not contain seal.”
- **EC:** This conclusion can only be reached by looking at the measure as a whole
- **AB:** “the Panel should therefore have examined the design and operation of the measure while seeking to identify its “integral and essential” aspects before reaching a final conclusion...”



## CHAPEAU OF ARTICLE XX

- Arbitrary or unjustifiable discrimination?
  - ✓ AB: Assess whether the discrimination can be reconciled with, or is rationally related to, the policy objective (public moral concerns re seal welfare) with respect to which the measure has been provisionally justified under one of the subparagraphs of Article XX
  - ✓ NOR/CDA: “rational disconnect between the IC exception and the objective of the EU Seal Regime”
  - ✓ EC: mitigate the effects of the ban on those communities; subsistence purposes only
  - ✓ AB: rejected the EC explanation



## CURRENT SITUATION

- Parties agreed on a reasonable period of time for the implementation of the recommendations – Deadline: October 2015
- Each month the EU must inform the DSB of the status of work – last submitted on 8 May 2015 where
  - ✓ it explains that the proposal has been sent to the legislators and
  - ✓ that it has achieved an agreement with Canada that would allow Canadian Inuit to use the IC exception