Developments

The Delicate Equilibrium of EU Trade Measures: The Seals Case

By Julinda Beqiraj[*]

A. Premise

Regulation EC No. 1007/2009 of the European Parliament and of the Council of 16 September 2009 banned the placement of seal products in the EU market. The measure has been very controversial, triggering a strong reaction, both from neighboring exporting States, in particular Canada and Norway, and from indigenous people living in the Arctic region. Seal hunting represents a traditional practice carried out for the purpose of personal consumption of seal meat, as well as for commercial trade of related by-products by the indigenous communities (mainly Inuit) living in the Northern Pole.

The ban enforced by the EU explicitly excludes from its scope of application traditional sealing by Inuit communities; nevertheless, it is expected that the overall demand on seal products will fall as a consequence of the impact of the ban on trading chains directed to Europe. This will likely adversely affect the fundamental economic and social interests of the indigenous communities engaged in sealing as a means to ensure their subsistence.

Against the backdrop of EU efforts to develop an integrated policy aimed at coordinating the activities of EU institutions and the policies that may have a bearing on the Arctic,[1] the seals case is an interesting example of the complexity and multi-sector impact of EU trade policy. It raises the issue of the delicate equilibrium to be achieved between (at times) conflicting goals: trade measures related to the effective functioning of the internal market, coherent external trade policy, animal protection and welfare, protection of the rights of indigenous peoples, individual judicial protection at the EU level, and broader environmental issues.

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[1] *See*, *e.g.*, Resolution of 9 October 2008 on Arctic Governance, EUR. PARL. DOC. P6_TA(2008)0474 (2008); *Communication from the Commission to the European Parliament and the Council—The European Union and the Arctic Region*, COM (2008) 0763 final (Nov. 20, 2008); 2914th Foreign Affairs Council meeting, *Council Conclusions on the European Union and the Arctic Region* (Dec. 8, 2008), *available at* http://www.eu-un.europa.eu/articles/en/article_8359_en.htm; 2985th Foreign Affairs Council Meeting, *Council Conclusions on Arctic Issues* (Dec. 8, 2009), *available at* http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/111814.pdf; European Parliament Resolution on a Sustainable EU Policy for the High North, EUR. PARL. DOC. 2009/2214 (INI) (Jan. 20, 2011); Joint Communication of the Commission and of the High Representative of the European Union for Foreign Affairs and Security Policy to the European Parliament and to the Council—Developing a European Union Policy towards the Arctic Region: progress since 2008 and next steps, JOIN(2012) 19 final (Jun. 26, 2012).

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The article will first provide a brief description of the normative developments that triggered reaction at different levels—EU and World Trade Organization (WTO)—against the ban on seal products. It will then describe and critically analyze the substantial and procedural legal arguments put forward by the parties and the decisions of the judicial organs. Waiting for a definitive judicial solution of the case, the purpose of this analysis is to clarify and try to solve possible conflicts emerging from the interaction among European policy, EU law, and international law. In particular, Part D will deal with the emerging dispute against the EU institutions brought before the European General Court (before the entry into force of the Treaty of Lisbon known as Court of First Instance) by indigenous groups and individuals. Part E will consider the related WTO dispute raised by Canada and Norway. A third profile, that of the alleged violation of indigenous peoples' cultural identity rights, will be analyzed in Part F. Even though such a dimension of the seals case has not been challenged before any human rights mechanism, Part F will provide an analysis of the international and EU obligations in this regard for States and EU institutions. Some concluding remarks will follow.

B. Trade in Seal Products: The Development of EU Legislation

Seal hunting takes place both as an organized practice and as a one-man activity. The world's three largest seal hunts take place in Canada, West Greenland, and Namibia.[2] Seal hunting is mainly carried out for commercial purposes, including by members of indigenous communities, but there is also an important quota of seal hunting carried out by indigenous populations as part of their culture and identity, providing a source of income and contributing to the subsistence of the hunter. Additionally, seal hunting takes place for the purpose of safeguarding fisheries: reducing the number of seals has an impact on the population of fish that seals rely on for food.[3]

The first European Community (EC)/EU seal legislation dates back to the early 1980s when broadcasted practices of cruel killing of certain seal pups sparked public clamor in Europe. In response to such concerns, the EC Council adopted Directive 83/129/EEC ("The Seal Pup

[2] *Impact Assessment on the Potential Impact of a Ban of Products Derived from Seal Products, Accompanying Document to the Proposal for a Regulation of the European Parliament and of the Council Concerning Trade in Seal Products*, at 14, COM (2008) 469 final (July 23, 2008) [hereinafter Impact Assessment].

[3] *Id*.

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Directive").[4] The Seal Pup Directive initially applied only until 1985, but its effects were later extended for an indefinite period by two subsequent directives.[5]

The Seal Pup Directive prohibits the import of seal pup fur skins into the EC market, except for products "resulting from traditional hunting by the Inuit people."[6] As explained in its Preamble, the reason for such exception rests partly on the consideration that exploitation of seals, with due respect for the balance of nature, is a natural and legitimate occupation and forms an important part of the traditional way of life and economy in certain areas of the world.[7] The Preamble also acknowledges that seal hunting, as traditionally practiced by the Inuit people, leaves pups unharmed, and therefore the interests of the Inuit people should not be affected.[8]

Additionally, from an environmental perspective, issues related to seal hunting are addressed in the so-called "Habitats Directive" as part of EU's bio-diversity conservation policy.[9] While dealing with broader issues of protection and improvement of the quality of the environment, the Habitats Directive prohibits the usage of certain weapons and methods of hunting of seals belonging to specific seal populations.

More recently, renewed public pressure on the topic led to the introduction of national bans by some EU Member States (Belgium and the Netherlands in particular) and to the adoption of a European Parliament Resolution proposing a total import ban on seal products.[10] Moreover, almost simultaneously, the Parliamentary Assembly of the Council of Europe (CoE) adopted a Recommendation on the ban of all cruel seal hunting

[4] *See* Council Directive No. 83/129/EEC, of the Council of 28 March 1983 Concerning the Importation into Member States of Skins of Certain Seal Pups and Products Derived Therefrom, 1983 O.J. (L 091) 30 [hereinafter Seal Pup Directive No. 83/129/EEC].

[5] *See* Council Directive 85/444/EEC, of the Council of 27 September 1985 Amending Council Directive 83/129/EEC Concerning the Importation into Member States of Skins of Certain Seal Pups and Products Derived Therefrom, 1985 O.J. (L 259) 70; *see also* Council Directive 89/370/EEC, of the Council of 8 June 1989 (Amending Directive 83/129/EEC Concerning the Importation into Member States of Skins of Certain Seal Pups and Products Derived Therefrom, 1989 O.J. (L 163) 37.

[6] *See* Seal Pup Directive No. 83/129/EEC, *supra* note 4, at art. 3.

[7] *Id*. at pmbl. indent 9.

[8] *Id*.

[9] *See* Council Directive 92/43/EEC, Council of 21 May 1992 on the Conservation of Natural Habitats and of Wild Fauna and Flora, 1992 O.J. (L 206) 7–50 (noting in particular articles 12, 15 and 16).

[10] Resolution on a Community Action Plan on the Protection and Welfare of Animals 2006–2010, EUR. PARL. DOC. 2006/2046 (INI), 2006 O.J. (C 308 E) 170.

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methods.[11] These preliminary steps prompted the adoption of Regulation (EC) No. 1007/2009 by the European Parliament and the Council on trade in seal products.[12] Shortly before its entry into force on 20 August 2010, the Commission adopted Regulation No. 737/2010, containing detailed rules necessary for the implementation of the former Regulation.[13]

C. Content of the EU Ban and Exceptions Thereto

The Regulation on trade in seal products (1007/2009) rests on two pillars. First, it introduces a total ban on placing seal products on the market.[14] Seal products comprise both processed and unprocessed products deriving or obtained from seals.[15] Second, the Regulation allows three types of exceptions: The most important among these stipulates that seal products resulting from "hunts traditionally conducted by Inuit and other indigenous communities" and which "contribute to their subsistence" can be placed on the market.[16] Understanding the exact scope of this exception is crucial, not only because it represents the only possibility for placing seal products on the EU market for commercial purposes, but also because it directly affects the interests and concerns of indigenous peoples engaged in seal hunting.

I. Seal Products from Inuit and Other Indigenous Communities

With regards to the subjects benefitting from the exception in Article 3.1 of Regulation 1007/2009, Article 2 clarifies that "'Inuit' means indigenous members of the Inuit homeland, namely those arctic and subarctic areas where, presently or traditionally, Inuit have aboriginal rights and interests, recognized by Inuit as being members of their people

[11] Eur. Consult. Ass., *Recommendation on Seal Hunting*, Doc. No. 1776 (2006) (adopted on Nov. 17, 2006 by the Standing Committee, acting on behalf of the Assembly) [hereinafter *Recommendation on Seal Hunting*].

[12] Council Regulation No. 1007/2009, of the European Parliament and of the Council of 16 September 2009 on Trade in Seal Products, 2009 O.J. (L 286) 36 (EC) [hereinafter Council Regulation 1007/2009].

[13] Commission Regulation No. 737/2010, of 10 August 2010 Laying Down Detailed Rules for the Implementation of Regulation (EC) No. 1007/2009 of the European Parliament and of the Council on Trade in Seal Products, 2010 O.J. (L 216) 1 (EU) [hereinafter Commission Regulation 737/2010].

[14] Council Regulation 1007/2009, *supra* note 12, art. 3.

[15] *Id*. at art. 2.2.

[16] *Id*. at art. 3.1. The two remaining derogations concern occasional importation of seal products exclusively for personal use (Art. 3.2(a)), and the placing on the market of seal products on a non-profit basis when hunting has been conducted for the sole purpose of the sustainable management of marine resources, *i.e.*, mainly safeguard of fish stocks consumed by seals (Art. 3.2(b)).

and includes Inupiat, Yupik (Alaska), Inuit, Inuvialuit (Canada), Kalaallit (Greenland), and Yupik (Russia)."[17]

Instead, the definition of "other indigenous communities" is provided in the implementation Regulation. These include:

> communities in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.[18]

It should be noted that Article 2 of the implementation Regulation refers to the narrower concept of "communities" rather than "peoples"—the latter being the concept of reference in the 1989 International Labour Organization (ILO) Convention No. 169 concerning Indigenous and Tribal Peoples and in the United Nations (UN) Declaration on the Rights of Indigenous Peoples.[19] Quite interestingly, the definition given in the implementation Regulation concerns "communities," but its content is the exact duplication of Article 1 of the ILO Convention, which applies to "peoples." As a corollary, the choice of the wording in the implementation Regulation extends the scope of application of the exception because the products of small communities—that do not necessarily constitute a "people" from the viewpoint of the entity of the group—may be placed on the EU market. Moreover, the use of the term "community" is also a welcomed choice on the part of governments that are generally reluctant to use the term "peoples" because of the rights (in particular self-determination) that may be attached to this concept under international law.[20]

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[17] *Id*. at art. 2.4.

[18] *See* Commission Regulation 737/2010, *supra* note 13, art. 2.1.

[19] *See* International Labour Orgnization Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 1650 U.N.T.S. 383 [hereinafter ILO C169]; *see also* United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Oct. 2, 2007) [hereinafter UNDRIP].

[20] *See* ILO C169, *supra* note 19, art. 1 (specifying that the use of the term "peoples" shall not be construed as having the implications recognized under international law).

As specified in the implementation Regulation, however, not all products originating from "Inuit and other indigenous communities" may be freely placed on the EU market. The derogation to the ban on seal products is drafted in much narrower terms because three additional requirements must be simultaneously fulfilled.

First, products must originate from seal hunts conducted by Inuit or other indigenous communities that have a seal hunting tradition. Thus, for each Inuit community and "other indigenous communities" within the above-mentioned definition, it should be also assessed whether there has been a tradition of seal hunting in the community in question and in the geographical region, and whether sealing is part of its cultural heritage.[21] Second, only seal products that are partly consumed on the local market or processed within the communities according to their traditions will benefit from the exemption.[22]

Third, seal products by Inuit and other indigenous communities may be placed on the EU market only if seal hunts contribute to the subsistence of the community.[23] Although the concrete meaning of "subsistence hunt" is not clear, the Regulation seems to introduce a distinction between this and hunts performed for other purposes: Only the former is consistent with the exemption contained in Regulation 1007/2009. A systematic interpretation of Regulations 1007/2009 and 737/2010 (notably the general emphasis on communities, the recognition of both economic and social interests of indigenous communities engaged in seal hunting, and the reference to the UN Declaration on the Rights of Indigenous Peoples)[24] would suggest a broad interpretation of the term "subsistence"—one that refers to the maintenance, protection, and development of indigenous communities, culture, and identity rather than to mere economic survival. This interpretation is also suggested in the Commission's study on implementing measures for trade in seal products (hereafter COWI Report), in which it is submitted that "hunt for subsistence" should be assessed at the community level, not at individual level, and it should not be a large-scale commercial hunt.[25]

Considering that the main sealing countries at the global level are Canada, Greenland, and Namibia, a preliminary assessment of the Inuit and other indigenous communities that are likely to fulfill the different conditions of the exemption from the ban on seal products is of

[21] *See* Commission Regulation 737/2010, *supra* note 13, at pmbl. indent 3, art. 3.1(a).

[22] *Id*. at pmbl. indent 3, art. 3.1(b).

[23] *Id*. at pmbl. indent 3, art. 3.1(c).

[24] *See* Council Regulation 1007/2009, *supra* note 12, at pmbl. indent 14.

[25] COWI, FINAL REPORT OF THE STUDY ON IMPLEMENTING MEASURES FOR TRADE IN SEAL PRODUCTS 13 (March 2010), *available at* http://ec.europa.eu/environment/biodiversity/animal_welfare/seals/pdf/study_implementing_measures.pdf. This report was drafted by COWI, an international consulting firm, upon request by the European Commission's Directorate-General Environment.

central importance in relation to the implementation in practice of the EU Regulations. Such an effort has been made in the above mentioned COWI Report, which considers the situation in Alaska, Canada, Greenland, Namibia, Norway, Russia, and in three EU Member States (Finland, Sweden and the United Kingdom).

The Report asserts that in Greenland about 90% of the total population is Inuit. Seal products resulting from these communities are likely to comply with the Regulation because sealing has been traditionally an integral part of their culture, and hunting is executed for using the whole animal.[26] Likewise, seal hunting in Alaska by two Inuit communities (Yupik and Inupiat)[27] and by the sub-Arctic indigenous Aleut community living in the Aleutian Islands is also likely to comply with the EU Regulations. These communities have traditionally hunted seals for thousands of years. Hunt products are part of their diet, and seal hunts are seen as a contribution to their social and cultural traditions.[28]

Concerning Canada, the COWI Report clarifies that seal hunting is both an organized commercial activity regulated by law on the basis of commercial licenses and a traditional activity performed by Inuit communities and various other aboriginal coastal communities as an essential part of their culture and economy. The latter type of hunt merely constitutes approximately three percent of the total hunting in Canada, and only products therefrom would probably qualify for the exemption.[29] In Russia as well, there are several indigenous groups (both Inuit and other indigenous communities), and it is likely that part of these communities will also pass the test stipulated in the EU Regulations.[30] In Sweden and Norway, traditional seal hunting is carried out by some coastal Sami communities and serves as a complementary income source. To the extent that hunting activities do not involve large-scale trade for the sole purpose of placing seal products on the market, such products would potentially fulfill the conditions set out in the Regulations.[31] Finally, the COWI Report concludes that seal hunt conducted in Namibia, UK, and Finland will probably not qualify for the exemption in Article 3.1 of Regulation 1007/2009 because the hunt is not undertaken by Inuit and other indigenous communities or for subsistence purposes.[32]

[26] *See id*. at 28–30.

[27] *See* Council Regulation 1007/2009, *supra* note 12, at art. 2.4 (mentioning these two communities specifically).

[28] COWI, *supra* note 25, at 23–24.

[29] *See id.* at 24–27, 42.

[30] *See id.* at 32.

[31] *See id.* at 30–31, 33.

[32] *See id.* at 27, 30, 33.

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II. "Placing on the Market of Seal Products" and Beyond

The ban contained in Regulation 1007/2009 refers to the "placing on the market of seal products."[33] It is also specified that the conditions for placing on the market "shall apply at the time or point of imports for imported products."[34] However, the Regulations do not clarify whether seal products not complying with the conditions set out in Article 3 shall be denied access into Union territory, even if the purpose is not their placement on the market but simple transit through Union territory towards the market of a third country. While the EU ban certainly concerns (1) the placing on the market of seal products that do not comply with the requirements for exemption (mainly in relation to seal products originating in EU Member States) and (2) the import of such incompatible products in the EU for the purpose of placing them on the market, it is not clear whether it will also have an impact on products in transit.

In principle, the ban should not cover goods in transit: Article 3 is entitled "conditions for placing on the market" and not "conditions for entry into the EU market." As a corollary, such conditions should not be applied separately from the purpose for which they were introduced, namely "placement on the market" of seal products.[35]

However, considering the broad definition of "import" in Regulation 1007/2009—"*any* entry of goods in the customs territory of the Community"[36] (emphasis added)—and that conditions for exemption are enforced at the EU border, the COWI Report reaches partly a different conclusion. It assumes a distinction between a mere transit scenario and a transit and processing scenario.[37] The first concerns transit in the form of transport "under customs supervision through the customs territory of the [Union] with a final destination in a third country",[38] and activities of auction houses serving as intermediaries between non-EU sellers and non-EU buyers with no "physical" placement on the EU market: These should not be covered by the Regulations.[39]

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[33] Council Regulation 1007/2009, *supra* note 12, at art. 3.1.

[34] *Id*.

[35] *See* Vienna Convention of the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331 ("A treaty shall be interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty *in their context and in the light of its object and purpose*") (emphasis added). However, the Council Regulation is not properly a treaty, but rather a secondary source based on a treaty.

[36] Council Regulation 1007/2009, *supra* note 13, at art. 2.5.

[37] COWI, *supra* note 25, at 62.

[38] *Id*. at 12.

[39] *Id*. at 62.

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The second scenario involves products originating outside the EU, which are processed within the EU and are intended for non-EU consumers. In such cases, the COWI Report submits that compliance with Article 3 would be compulsory.[40] Nevertheless, the COWI Report also acknowledges the likelihood of challenges to the implementation in practice and cites the example of a German tannery that processes third party (non-EU) sealskins that are later exported to non-EU States without any change of ownership of the products during processing.[41] Even though processing is a value-adding activity that takes place within the EU in exchange for payment, comprising such a case within the scope of application of the Regulations would require a broad interpretation of the notion "placing on the market" "[by] making available to third parties in exchange for payment"[42]—*i.e.*, also making physically available without changes in ownership rights.

Finally, concerning the geographical scope of application, the two Regulations have "European Economic Area (EEA) relevance." This underscores the special situation of Norway, which is part of the European Economic Area. Homogeneity within the EEA implies that EU secondary legislation has to be timely incorporated in the EEA Agreement through appropriate amendments. However, the EEA Joint Committee has not taken any decision in this regard until now. Depending on whether Norway will be included in the regulation as an EEA Member is expected to have consequences on the shift of seal-related activities (for instance, processing and auctioning) from EU Member States, such as Denmark and Germany, to Norway, due to geographic proximity.[43]

As earlier anticipated, the adoption of the Regulation triggered a strong reaction both from the Inuit communities and their representative organizations, as well as from some of the States—Canada and Norway—in which such communities live and are more broadly involved in trade in seal products for commercial purposes. This reaction was voiced before EU judicial organs by individuals and groups directly concerned by the ban[44] and by non EU-States before the WTO dispute settlement organs. The issues raised in these different forums will be analyzed in turn.

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[40] *Id*.

[41] *Id*. at 45.

[42] Council Regulation 1007/2009, *supra* note 12, at art. 2.3.

[43] COWI, *supra* note 25, at 70.

[44] *See* Consolidated Version of the Treaty on the Functioning of the European Union, art. 263, May 9, 2008, 2008 O.J. (C 115) 47 (granting jurisdiction at first instance to the General Court, previously known as the Court of First Instance (CFI), for actions for annulment brought by individuals) [hereinafter TFEU].

D. The Dispute at the EU Level

A group of private applicants—including Inuit seal hunters and trappers associations; individuals in other ways engaged in activities involving the seal products; organizations representing the interests of Inuit; as well as other individuals and companies engaged in the processing of seal products—brought the case against the EU ban on seal products before EU judicial organs. The case is a multi-layered one. It consists of two actions for annulment before the General Court (GC) concerning Regulation 1007/2009[45] and Regulation 737/2010,[46] respectively: The first action for annulment is currently under appeal before the European Court of Justice (ECJ).[47] In relation to the first action for annulment, the applicants also submitted to the President of the GC two requests for provisional suspension of the application of the disputed Regulations until the decision on annulment had been rendered.[48]

In the main actions for annulment,[49] the applicants contended that the European Parliament (EP) and the Council had not adequately demonstrated why intervention at the EU level was necessary. Given that only two Member States (Belgium and the Netherlands) had already introduced a ban on seal products, the applicants argued that the EU institutions had infringed the subsidiarity principle.[50] The principle of proportionality had also been violated because less intrusive measures (*e.g.*, labeling requirements) would have been sufficient to meet the stated goals of the Regulation.[51]

[45] Case T-18/10, Inuit Tapiriit Kanatami and Others v. European Parliament and Council of the European Union (2011) (unpublished), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010TO0018(04):EN:HTML.

[46] Case T-526/10, Inuit Tapiriit Kanatami and Others v. Comm'n, 2011 O.J. (C 13/66) 34 (action pending).

[47] Case C-583/11 P, Inuit Tapiriit Kanatami and Others v. European Parliament, Council of the European Union, Netherlands, and European Comm'n, O.J. (C 58) 3 (appealing the Order of the General Court delivered Sept. 6, 2011, in Case T-18/10, Inuit Tapiriit Kanatami and Others v. European Parliament and Council of the European Union) (action pending).

[48] *See* Case T-18/10 R, Inuit Tapiriit Kanatami and Others v. European Parliament and Council of the European Union, 2010 E.C.R. II-00075; *see also* Case T-18/10 R II, Inuit Tapiriit Kanatami and Others v. European Parliament and Council of the European Union, 2010 E.C.R. II 00235.

[49] *See* Case T-18/10, Inuit Tapiriit Kanatami and Others v. European Parliament and Council of the European Union (2011) (unpublished), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010TO0018(04):EN:HTML.; *see also* Case T-526/10, Inuit Tapiriit Kanatami and Others v. Comm'n, 2011 O.J. (C 13/66) 34 (action pending).

[50] *See* cases cited *supra* note 49.

[51] *See* cases cited *supra* note 49.

From a substantive point of view, the applicants contested that the Regulation introduced undue limits to their subsistence possibilities.[52] They claimed that the EU institutions failed to weigh the surviving interests of the Arctic Inuit Community against the moral convictions of some citizens in the Union concerning animal welfare, thereby violating Article 1 of Protocol I to the European Convention of Human Rights (ECHR)[53] and Article 8 ECHR,[54] read in light of Articles 9[55] and 10[56] as well as the fundamental right to be heard.[57]

The GC has until now eluded the analysis of these issues by declaring the application inadmissible for lack of *locus standi*, in particular for lack of "direct and individual concern" under Article 263(4) Treaty on the Functioning of the European Union (TFEU).[58] Its restrictive interpretation of the conditions upon which natural or legal persons may contest EU acts, although justifiable to some extent, has an important impact on the substantial protection of their rights and raises a delicate issue of compatibility of the EU judicial system with the right to effective access to judicial remedies stipulated in both the ECHR and the EU Charter of Fundamental Rights. The appeal case before the ECJ against the order of inadmissibility of the GC is still in progress.[59]

[52] *See* Case T-18/10, Inuit Tapiriit Kanatami and Others v. European Parliament and Council of the European Union (2011) (unpublished), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010TO0018(04):EN:HTML.

[53] Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol I, art. 1, Nov. 4, 1950, 213 U.N.T.S. 221 (establishing the right to property)[hereinafter ECHR].

[54] *See id*. at art. 8 (establishing the right to private and family life).

[55] *See id*. at art. 9 (announcing the freedom of thought, conscience and religion).

[56] *See id*. art. 10 (announcing the freedom of expression).

[57] Case T-18/10, Inuit Tapiriit Kanatami and Others v. European Parliament and Council of the European Union (2011) (unpublished), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010TO0018(04):EN:HTML.

[58] *See* TFEU, *supra* note 44, at art. 263(4).

[59] Case C-583/11 P, Inuit Tapiriit Kanatami and Others v. European Parliament, Council of the European Union, Netherlands, and European Comm'n, O.J. (C 58) 3 (appealing the Order of the General Court delivered Sept. 6, 2011, in Case T-18/10, Inuit Tapiriit Kanatami and Others v. European Parliament and Council of the European Union) (action pending).

I. The First Request for Interim Suspension of Regulation 1007/2009

Awaiting the Court's judgment on the annulment action, the applicants also requested the provisional suspension of the operation of Regulation 1007/2009 by the President of the GC.[60] Although the President found the request to be prima facie admissible, he finally dismissed the application for interim suspension on the basis of lack of urgency.[61]

The applicants argued that as a result of the ban introduced by Regulation 1007/2009 they would suffer "serious and irreparable harm," because the exemption in favor of Inuit and other indigenous communities is a sort of "empty box."[62] They underlined that Inuit people do not export products themselves, but rely on bigger exportation chains that are also used for seal products obtained from commercial hunts.[63] Since the latter would be denied access to the Union market after the Regulation went into effect, Inuit and indigenous exempted products would also, in practice, lose access to the EU market, which has been very important for the Inuit economy.[64] Moreover, the applicants stressed that, similar to the Seal Pups Directive, the Regulation would have an adverse impact on the image of seal products in general, which would cause the collapse of the market for seal products.[65]

The President thus had to decide whether the concerns highlighted by the applicants fulfilled the "urgency" requirement in relation to the adoption of interim measures, namely the need to avoid "serious and irreparable damage to the party seeking relief."[66] In this regard, he underlined that the damage should be certain or at least shown with a sufficient degree of probability and that damage of purely pecuniary nature cannot be regarded as irreparable since it can be subject of financial reparation.[67] The President affirmed that the grant of an interim measure would be justified if the applicants could prove their impossibility of continuing to live according to their culture and traditions on account of the regime laid down by the Regulation.[68]

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[60] *See* Case T-18/10 R, Inuit Tapiriit Kanatami and Others v. European Parliament and Council of the European Union, 2010 E.C.R. II-00075.

[61] *See id*.

[62] *See id*. at para. 103.

[63] *See id*. at paras. 102–03.

[64] *See id*. at paras. 99–103.

[65] *See id*. at paras. 101, 103.

[66] *See id*. at para. 105.

[67] *See id*. at para. 107.

[68] *See id*. at paras. 106, 107, 109.

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However, the President summarily dismissed the concerns of the applicants, affirming, on the one hand, that the "empty box" argument was raised too early: It could have been adequately addressed only after the adoption of the implementing measures by the Commission.[69] On the other hand, in contrast with the clear conclusions contained in the impact assessment,[70] the President rejected a comparison with the adverse effects of the Seal Pup Directive and established that the applicants had not "proved the existence of circumstances giving rise to urgency such as to justify the grant of interim measures."[71]

II. The Second Request for Interim Suspension of Regulation 1007/2009

Later the same year, the applicants lodged a second request for interim suspension of Regulation 1007/2009 on the basis of new facts.[72] They substantially renewed the argument on the Inuit exception being an "empty box" in light of the Commission's draft regulation spelling out the measures for the implementation of the exception in favor of Inuit and indigenous communities.[73] The day before the anticipated effective date of Regulation 1007/2009 (20 August 2010), the President of the Court ordered, so far as concerns the applicants, a temporary suspension of the restrictive conditions introduced by the Regulation until the adoption of a final decision on the second request for interim measures.[74]

The suspension was received with enthusiasm from Inuit groups and commercial sealers; however, it is worth noting that its practical effects were of little or no relevance. First, the suspension only applied to the limited group of applicants in the *Inuit Tapiriit Kanatami and Others* case.[75] Second, it only applied until the second request for interim measures was decided, not the main annulment issue. Indeed, the suspension was removed a few months later when the President of the General Court dismissed the application for interim

[69] *See id*. at para. 112.

[70] *See* Impact Assessment, *supra* note 2.

[71] *See* Case T-18/10 R, Inuit Tapiriit Kanatami and Others v. European Parliament and Council of the European Union, 2010 E.C.R. II-00075. paras. 112, 114, 116.

[72] *See* Case T-18/10 R II, Inuit Tapiriit Kanatami and Others v. European Parliament and Council of the European Union, 2010 E.C.R. II 00235.

[73] *See id.* at paras. 20–23.

[74] *Id*.

[75] *Id*.

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measures for the second time, holding that the petitioners had not produced sufficient evidence of actual individual injury.[76]

Different arguments in this second order of dismissal are prone to criticism. In particular, the President discharged in a forced way the solid claim raised by the applicants according to which a timely and correct implementation of the Inuit exception was "unrealistic" by reason of the very short period (just ten days) given to States for complying with the Commission's implementing measures before the entry into force of the Regulation.[77] In this regard, despite acknowledging that delay may damage Inuit economy, the order sets a high burden of proof for the applicants who were requested (and failed) to "establish that the implementing regulation is objectively impracticable."[78]

Moreover, the President of the GC takes the view that the responsibility for protecting general economic, social, and cultural interests rests with States or local intra-State bodies; since no entity of this kind was among the applicants, the latter could not rely on the general interests of the Inuit population in those proceedings for interim measures.[79] Accordingly, the order established that each of the applicants taken individually had to adduce pertinent evidence to show that the Regulation would have caused him personally serious and irreparable harm if no suspension were granted.[80]

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[76] *See id*. In December 2010, Inuit Tapiriit Kanatami and others brought an appeal against the Order of the President before the General Court (Case C-605/10 P(R)) but there was no need to adjudicate because, in the meantime, the General Court had adopted its decision on the main action for annulment. Case C-605/10 P(R), Inuit Tapiriit Kanatami and Others v. European Parliament and Council of the European Union, 2011 E.C.R. II-____.

[77] The President took the view that:

> [I]t is admittedly conceivable that the relatively late official publication of the implementing regulation could delay the implementation of the Inuit exception in so far as concerns the marketing on the European Union market of seal products deriving from hunting by Greenlandic Inuit. However, although that delay may damage the 'Inuit economy' of Greenland, the applicants do not establish that the implementing regulation is objectively impracticable, the arguments put forward to that effect being mere unsubstantiated general assertions, whereas they should have provided specific evidence and proved the facts alleged to form the basis of the likelihood of the impracticability alleged, since damage of a purely hypothetical nature cannot justify the ordering of the suspension of operation sought.

Id. at para 86.

[78] *See id*.

[79] *See id.* at para. 52.

[80] *See id.* at para. 54.

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The approach adopted in the order cripples the position of the applicants. First, it quashed the collective argument of the harm to the surviving interests of the Arctic Inuit Community in general. Second, the fragmentation of applicants' requests into a number of individual positions amounts to a higher test for successfully establishing the seriousness of the damage alleged. Third, the order puts forward the argument that States and their regional bodies bear the responsibility for protecting general economic, social, and cultural interests; it thus suggests that group rights—in the case at issue, indigenous peoples' rights—can only be voiced through States or intra-State bodies and that non-governmental organizations or associations set up for the purpose of promoting and strengthening the rights of such groups have no power in this regard.[81] This interpretation points out the problematic issue of the scope and purpose of EU judicial review—whether and to what extent it also has the function of protecting diffuse public interests against legislative or administrative abuse.[82] By overlooking the important presence among the applicants of the Inuit Circumpolar Council (ICC) Greenland, the order obviously rejects a broader reading of the purposes of EU judicial review.[83]

III. The Actions for Annulment: A Mirage of New Opportunities for Private Applicants?

In the main action for annulment,[84] the GC tackles the case only from a procedural perspective of admissibility under the fourth paragraph of Article 263 TFEU (previously, Art. 230 Treaty Establishing the European Community (TEC)) which establishes the conditions under which natural or legal persons may contest the legitimacy of EU acts. The

[81] Individual and group standing to challenge EU measures directly before the EU Court(s) is, and has been, extremely restrictive. By definition, the "individual concern" test is hardly satisfied by groups or associations representing public interests. *See* Case T-38/98, Associazione Nazionale Bieticltori v. Council, 1998 E.C.R. II-4191, paras. 25–29; Case T-447–9/93, AITEC v. Comm'n, 1995 E.C.R. II-1971; Case C-309/89, Codorníu v. Council, 1994 E.C.R. I-1853; Case C-358/89, Extramet Industrie v. Council, 1991 E.C.R. I-2501. However, in relation to applicants claiming non-purely economic interests, the ECJ has constantly denied *locus standi*. *See* Case T-91/07, WWF-UK Ltd. v. Council, 2008 E.C.R. II-81; Joined Cases T-236/04 & T-241/04, Eur. Envtl Bureau & Stichting Natuur en Milieu v. Comm'n, 2005 E.C.R. II-4945; Case T-585/93, Greenpeace v. Comm'n, 1995 E.C.R. II-2205, paras. 59–62.

[82] *See* Adam Cygan, *Protecting the Interests of Civil Society in Community Decision-Making: The Limits of Article 230 EC*, 52 INT'L & COMP. L.Q. 995 (2003); Carol Harlow, *Access to Justice as a Human Right: The European Convention and the EU*, *in* THE EU AND HUMAN RIGHTS 187, 194 (Philip Alston ed., 1999); DAMIAN CHALMERS, GARETH DAVIES & GIORGIO MONTI, EUROPEAN UNION LAW 425 (2010); José Manuel Cortés Martín, *Ubi ius, Ibi Remedium?—Locus Standi of Private Applicants Under Article 230(4) EC at a European Constitutional Crossroads*, 11 MAASTRICHT J. EUR. & COMP. L. 233 (2004).

[83] ICC Greenland is a member of the Inuit Circumpolar Council, an Indigenous Peoples' NGO representing approximately 160,000 Inuit living in the Arctic regions of Alaska, Canada, Greenland, and Chukotka, Russia. The ICC holds consultative status to the United Nations Economic and Social Council (ECOSOC).

[84] *See* Case T-18/10, Inuit Tapiriit Kanatami and Others v. European Parliament and Council of the European Union (2011) (unpublished), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010TO0018(04):EN:HTML.

GC found that the applicants lacked *locus standi* and declared the case inadmissible.[85] An important corollary of this decision is that the GC sidestepped the discussion on the merits of the claims of the applicants concerning the appropriateness of the balance struck in the Regulations between the rights of indigenous peoples and concerns for animal welfare in the light of human rights principles.

1. Individual Applicants Challenging EU General Acts: ECJ's Traditional Restrictive Reading

Traditionally, the ECJ has adopted a most restrictive interpretation of Art. 230(4) TEC[86] in regards to the possibility for private individuals and groups to challenge the legality of a measure of general application (such as a regulation) addressed to one or more Member States.[87]

Under Article 230 TEC, natural or legal persons could challenge either acts (mainly Decisions) addressed to them or measures of general application (*i.e.*, Regulations) by providing evidence that the act was of "direct and individual concern" for them.[88] To that end, the ECJ set a very high threshold for the fulfillment of the criterion of "individual concern" (the so-called *Plaumann* formula), requiring proof that the measure affected the applicants "by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons."[89]

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[85] *See id.* at para. 56.

[86] Consolidated Version of the Treaty Establishing the European Community, art. 230(4), Dec. 24, 2002, 2002 O.J. (C 325) [hereinafter TEC] ("Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, *is of direct and individual concern* to the former." (emphasis added)).

[87] For a critical commentary on the issue of individual *locus standi* before EU courts, see ANGELA WARD, JUDICIAL REVIEW AND THE RIGHTS OF PRIVATE PARTIES IN EU LAW (2000); ALBERTINA ALBORS-LLORENS, PRIVATE PARTIES IN EUROPEAN COMMUNITY LAW: CHALLENGING COMMUNITY MEASURES (1996); Anthony Arnull, *Private Applicants and the Action for Annulment Under Art. 173 of the EC Treaty*, 32 COMMON MKT. L. REV. 7 (1995); Anthony Arnull, *Private Applicants and the Action for Annulment Since Codorníu*, 38 COMMON MKT. L. REV. 7 (2001); Stefan Enchelmaier, *No-One Slips Through the Net? Latest Developments, and Non-Developments in the European Court of Justice's Jurisprudence on Art. 230(4) EC*, 24 Y.B. EUR. L. 173 (2005); Carol Harlow, *Towards a Theory of Access to the European Court of Justice*, 12 Y.B. EUR. L. 213 (1992); Francis Geoffrey Jacobs, *Access to Justice as a Fundamental Right in European Law*, *in* MÉLANGES EN HOMMAGE À FERNAND SCHOCKWEILER 197 (Gil Carlos Rodríguez Iglesias et al eds., 1999); Koen Lenaerts, *The Legal Protection of Private Parties Under the EC Treaty: A Coherent and Complete System of Judicial Review?*, *in* 2 SCRITTI IN ONORE DI GIUSEPPE FEDERICO MANCINI 591, 617 (1998); Giuseppe Federico Mancini, *The Role of the Supreme Courts at the National and International Level: A Case Study of the Court of Justice of the European Communities*, *in* THE ROLE OF THE SUPREME COURTS AT THE NATIONAL AND INTERNATIONAL LEVEL 421, 437 (Pelayia Yessiou-Faltsi ed., 1998); Filip Ragolle, *Access to Justice for Private Applicants in the Community Legal Order: Recent (R)evolutions*, 28 EUR. L. REV. 90 (2003); John Usher, *Direct and Individual Concern—An Effective Remedy or a Conventional Solution?*, 28 EUR. L. REV. 575 (2003).

[88] *See* TEC, *supra* note 86, at art. 230(4).

[89] Case 25/62, Plaumann & Co. v. Comm'n, 1963 E.C.R. 95; s*ee also* cases cited *supra* note 81.

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The demanding fulfillment of the "individual concern" test left in practice no other possibility for private parties than to challenge the general measure indirectly, via the preliminary review procedure (Art. 234 TEC); however, within certain limits, this path and the exact content of the issue that is referred to European judges is upon the discretion of national judicial organs.

As such, the mechanism under Article 230 TEC was undermined by important protection gaps. In particular, in cases in which the acts of general application did not entail implementing measures (and therefore individuals could not challenge the domestic implementing measure before domestic courts), the option left to applicants that could not presumably fulfill the "direct and individual concern" test was to violate the rules laid down by the regulation. They could thus obtain a sanction and rely on the invalidity of the regulation as a defense in the proceedings before national courts with the aim of possibly having the case referred to the ECJ.

These loopholes in the EU system of judicial remedies for individuals were addressed in two cases: *UPA v. Council* and *Jégo-Quéré v. Commission* in 2002 and 2004, respectively.[90] Notwithstanding the proposal to relax the "individual concern" test by taking into account the "substantial adverse effects" of the measure on the interests of the applicant by reason of his particular circumstances,[91] the ECJ reconfirmed in such cases its traditional restrictive reading of the conditions under Article 230 TEC. The ECJ added, however, that any change of that approach had to be introduced through legislative reform of the Treaties.[92]

2. Challenging "Regulatory Acts": The Change Introduced by the Lisbon Treaty

Taking into account the debate on these issues, the Lisbon Treaty inserts in Article 263(4) TFEU an additional possibility of judicial review of the legality of EU measures by individuals.[93] The new provision maintains in place the old test (and consequently the case law developed in that regard) but also adds a third limb stipulating that private parties may

[90] *See* Case C-50/00 P, Unión de Pequeños Agricultores v. Council, 2002 E.C.R. I-6677 [hereinafter *UPA*]; Case C-263/02 P, Comm'n v. Jégo-Quéré, 2004 E.C.R. I-3425 [hereinafter *Jégo-Quéré*].

[91] This solution was suggested in an Opinion of AG Jacobs and in a decision by the Tribunal of First Instance. *See UPA* (opinion of Advocate Gen. Jacobs), *supra* note 90, at para. 60; Case T-177/01, Jégo-Quéré v. Comm'n, 2002 E.C.R. II-2365.

[92] *See UPA*, *supra* note 90, at para. 45; *Jégo-Quéré*, *supra* note 90, at para. 36.

[93] See TFEU, *supra* note 44, at art. 263(4) ("Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.").

challenge "a regulatory act which is of *direct concern* to them and does not entail implementing measures." In other words, with respect to "regulatory acts" that do not entail implementing measures, private parties no longer need to establish "individual concern."

In principle, the novelty introduced by Article 263(4) TFEU constitutes a relaxation of the rules on standing because individuals would only have to meet the "direct concern" test—namely, show that the measure directly affects their legal situation and that no discretion is left to the addressees of the measure.[94] However, the Lisbon Treaty contains no definition of what is a "regulatory act."[95]

As the first case to be decided under Article 263(4) TFEU,[96] *Inuit Tapiriit Kanatami and Others* is of great interest because the GC had the opportunity to offer some clarification as well as its own interpretation in relation to the possibility for natural or legal persons to review the legality of EU "regulatory acts."[97]

3. The Scope of Application of Art. 263(4) TFEU: The GC's Reading

Regarding the definition of a "regulatory act," the GC adopted a narrow approach, taking the view that it must be understood as covering "all acts of general application apart from legislative acts. Consequently, a legislative act may form the subject-matter of an action for annulment brought by natural or legal persons only if it is of direct and individual concern to them."[98]

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[94] It has been authoritatively highlighted that there may be a possible overlap between the two requirements in Art. 263(4), namely, direct concern and absence of implementing measures. *See* Massimo Condinanzi, *Il singolo e la 'comunità di diritto' nel nuovo testo di Trattato che adotta una Costituzione per l'Europa*, 12 IL CORRIERE GIURIDICO 1545, 1549 (2004).

[95] For a comment to art. 263(4) TFEU, see Stephan Balthasar, *Locus Standi Rules for Challenges to Regulatory Acts by Private Applicants: The New Article 263(4) TFEU*, 35 EUR. L. REV. 542 (2010); Johannes Traut, Christoph Werkmeister & Stephan Pötters, *Regulatory Acts within Article 263(4) TFEU: A Dissonant Extension of* Locus Standi *for Private Applicants*, 13 CAMBRIDGE Y.B EUR. LEGAL STUD. 311 (2012).

[96] Less than a month later, an applicant fulfilled for the first time the admissibility requirements under the third limb of Art. 263(4). *See* Case T-262/10, Microban Int'l Ltd. v. Comm'n, 2011 E.C.R. ____, *available at* http://curia.europa.eu/juris/document/document.jsf?text=&docid=111762&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3205953.

[97] In light of the principle *tempus regit actum*, the GC had ruled in precedent cases that the admissibility issue had to be solved under the rules in force at the date of the submission of the application. *See* Case T-539/08, Etimine v. Comm'n, 2010 E.C.R. II-4017 paras. 76, 78; Case T-532/08, Norilsk Nickel Harjavalta v. Comm'n, 2010 E.C.R. II-3959 para. 70.

[98] *See* Case T-18/10, Inuit Tapiriit Kanatami and Others v. European Parliament and Council of the European Union, para. 56 (2011) (unpublished), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010TO0018(04):EN:HTML.

The rationale behind this approach is that if acts are adopted through a legislative procedure, the concerns of citizens have already been taken into account through their representatives in the EU institutions (such as the Council and the EP). Instead, if the procedure for the adoption of EU acts has not involved representative institutions, such acts should be subject to greater scrutiny precisely because of a lower level of legitimacy. The GC grounds its interpretation, mainly, in the drafting history of Article 263, which, however, is known to be the result of a legislative oversight during the process of "switching" from the Treaty establishing a Constitution for Europe ("Constitutional Treaty") to the Lisbon Treaty.[99]

The appeal of the order of the GC currently pending before the ECJ will provide it with the opportunity to reconsider the overall coherence of the EU system of judicial review of EU acts in a post-Lisbon context. Additionally, the tangible effects of the new provision in Article 263(4) will depend on how strictly the Court will interpret the "direct concern" test and the repetitive requirement that the act "does not entail implementing measures."[100] In this regard, it also remains to be seen how the GC will solve the admissibility issue in the second annulment action brought by Inuit Tapiriit Kanatami and others against the Commission's implementing Regulation 737/2010, which was adopted with a non-legislative procedure.[101]

The new possibility introduced in the Lisbon Treaty certainly broadens the chances for individuals and groups to challenge the legitimacy of EU acts by comparison to the protection available under the Nice Treaty.[102] However, there are some arguments that may be invoked as an alternative to the narrow interpretation of Article 263(4) espoused by the GC, grounded on a strict link between the Constitutional Treaty and the Lisbon Treaty.

First, under Article 32 of the Vienna Convention on the Law of Treaties, the *travaux preparatoires* represent a subsidiary means of interpretation.[103] Instead, the general rule

[99] *See id*. at para. 49. The Constitutional Treaty contained an identical provision to that of Article 263(4) TFEU, but it also introduced new categories of legal instruments: a *European regulation* was defined as a non-legislative act, "traditional" regulations were renamed *European laws*.

[100] *See* Condinanzi, *supra* note 9494.

[101] Given, however, that Reg. 737/2010 requires Member States to designate the competent authorities for the verification of attesting documents for imported seal products (Art. 9), the Court will presumably conclude that Art. 263(4) TFEU does not apply to the petitioners in *Inuit Tapiriit Kanatami*.

[102] *See supra* text accompanying note 93.

[103] Vienna Convention on the Law of Treaties, *supra* note 35, at art. 32. The Vienna Convention on the Law of Treaties states that "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the

of interpretation in Article 31(1) stipulates that the interpreter should first refer to the "ordinary meaning to be given to the terms of the treaty in their context"[104] (textual interpretation) in the light of the object and purpose of the treaty (teleological interpretation). Provided that the term "regulatory act" cannot be found elsewhere in the Treaty, its ordinary meaning in the context of Article 263 and in the context of the Lisbon Treaty more broadly could be established on the basis of its affinity with the term "regulation."

The GC argues that "regulatory acts" are "acts of general application."[105] This is correct; however, the following step of the reasoning—namely that they are non-legislative acts—is not necessarily supported by textual interpretation. Indeed, alternative to the Constitutional Treaty, the Lisbon Treaty maintains in place existing legal instruments, including regulations, and the distinction between legislative and non-legislative acts is not based on the function of the different categories of acts but rather on the type of procedure employed for their adoption.[106] Therefore, the specification that the acts considered in Article 263(1) are "legislative acts," may also suggest that "regulatory acts" mentioned in Article 263(4) comprise both legislative and non-legislative acts.[107]

Second, a broader interpretation of Article 263(4) is welcomed because the one currently provided by the GC does not adequately address the practical problems concerning the right of access to a court underlined in the *UPA* and *Jégo-Quéré* cases. In this regard, it should be recalled that the purpose of the introduction of the third limb was precisely to address the above-mentioned problem of lack of remedies for individuals in the absence of national implementing measures to be challenged before domestic courts. A narrow reading of Article 263 would still fail to offer a solution in the case of legislative acts of general application (typically the *UPA* case). Indeed, the GC's formalistic reading—*i.e.*, regulatory acts defined on the basis of the procedure employed for their adoption—of the more relaxed *locus standi* conditions leaves no room for discretion aimed at filling in the

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application of article 31, or to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."). *Id.*

[104] *See id*. at art. 31 ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.").

[105] *See* Case T-18/10, Inuit Tapiriit Kanatami and Others v. European Parliament and Council of the European Union, para. 56 (2011) (unpublished), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010TO0018(04):EN:HTML.

[106] *See* TFEU, *supra* note 44, at art. 289(3) ("Legal acts adopted by legislative procedure shall constitute legislative acts.").

[107] Steve Peers & Marios Costa, *Case Note: Court of Justice of the European Union (General Chamber), Judicial Review of EU Acts After the Treaty of Lisbon; Order of 6 September 2011, Case T-18/10* Inuit Tapiriit Kanatami and Others v. Commission *& Judgment of 25 October 2011, Case T-262/*10 Microban v. Commission, 8 EUR. CONST. L. REV. 82, 92 (2012).

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loopholes in the EU judicial system in cases of substantial adverse effects on the interests of the applicant by reason of his particular circumstances.

In any case, it is desirable that the ECJ will not extend the *Textilwerke Deggendorf* (*TWD*)[108] case law on "one way exclusivity" between the annulment action and the preliminary reference on validity to the third limb of Article 263(4) TFEU.[109]

Third, a narrow interpretation of Article 263 is also problematic under the perspective of the distinct, but strictly related, issue of the right of access to an effective remedy under Article 47 of the EU Charter of Fundamental Rights, which is invoked in case of violation of the rights and freedoms guaranteed by the law of the Union.[110] The right to effective judicial protection was already recognized by the ECJ as a general principle of community law stemming from the constitutional traditions common to Member States.[111] After the entry into force of the Lisbon Treaty the provision of Article 47 of the Charter of Fundamental Rights enshrining such principle achieved the same value of the Treaties.[112] Moreover, Article 19(1) TEU establishes that "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."

Concerning the right of access to an effective remedy, in the *UPA* case, Advocate General Jacobs questions whether in the absence of the "individual interest" requirement the preliminary ruling procedure before national courts provides an effective remedy.[113] He first highlights the circumstance that applicants before domestic courts do not have an automatic right to the preliminary review procedure nor can they decide which measures will be referred to the ECJ or the grounds of invalidity.[114] Second, he underlines the

[108] Case C-188/92, TWD Textilwerke Deggendorf v. Germany, 1994 E.C.R. I-833 [hereinafter *TWD*].

[109] In the *TWD* case the European Court of Justice (ECJ) clarified that whoever undoubtedly had the right to challenge the validity of a Union act, but failed to do so within the two-month time limit established in Art. 230(5) EC (now Art. 263(6) TFEU), may not seek to challenge the legality of this act in proceedings before national judges. For some preliminary considerations on the applicability of such case law to the revised Art. 263(4) TFEU, see Roland Schwensfeier, *The TWD Principle Post-Lisbon*, 37 EUR. L. REV. 156 (2012).

[110] European Union Charter of Fundamental Rights, art. 47, Dec. 18, 2000, 2000 O.J. (C 364/01) ("Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.").

[111] *See* Case C-222/84, Johnston v. Chief Constable of the Royal Ulster Constabulary, 1986 E.C.R. 1651, para. 18.

[112] *See* TFEU, *supra* note 44, at art. 6.

[113] *See* Case T-173/98, Unión de Pequeños Agricultores v. Council, 1999 E.C.R. II-3357; *see also UPA* (opinion of Advocate Gen. Jacobs), *supra* note 90, at para. 35.

[114] *UPA* (opinion of Advocate Gen. Jacobs), *supra* note 90, at para. 42..

impossibility for national courts to declare the invalidity of EU acts on their own.[115] Third, it is objected that legal certainty necessitates immediate review of the act—not after the adoption of implementing measures.[116] Moreover, indirect challenges of EU acts through the preliminary review procedure may involve important delays and additional costs, which could be reduced in the case of direct challenges under the annulment procedure. Fourth, the delays involved in the preliminary review procedure may require the adoption of interim measures. However, the criteria for awarding such measures change from State to State, and this may, in practice, cause contradictory or discriminatory results for the applicants. Moreover, interim measures awarded by a domestic court are confined to the Member State in question.[117]

E. The Dispute at the WTO Level

The EU ban on seal products is currently also the subject of a dispute brought by Canada and Norway before the WTO.[118] The WTO approach to this dispute is fundamentally different from the EU approach for two primary reasons. First, it is a government-to-government dispute. Under WTO rules, individuals and groups, including both indigenous communities and firms operating in the seal products industry, do not have the right to be heard or the right to participate in the proceedings, except for the limited possibility that written briefs are accepted to be considered by the panels or the Appellate Body, which is at their discretion.[119] Second, the WTO approaches the disputed issue from a technical trade law perspective, and as WTO case law shows, in principle, non-trade considerations have limited room for application. Therefore, the problem of the impact of the EU

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[115] *Id.* at paras. 41, 102. *See also* Dorota Leczykiewicz, *"Effective Judicial Protection" of Human Rights After Lisbon: Should National Courts Be Empowered to Review EU Secondary Law?*, 35 EUR. L. REV. 326 (2010).

[116] *UPA* (opinion of Advocate Gen. Jacobs), *supra* note 90, at para. 102.

[117] *Id.* at para. 44.

[118] *See* Request for the Establishment of a Panel by Norway, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products,* WT/DS401/5 (Mar. 15, 2011); Request for the Establishment of a Panel by Canada, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/4 (Feb. 14, 2011). Argentina, China, Colombia, Ecuador, Iceland, Japan, Mexico, Norway, and the United States have joined as third parties. At its meeting on 25 March 2011, the Dispute Settlement Body established a panel. China, Colombia, Iceland, Japan, Mexico, Norway, and the United States, and subsequently Argentina, Ecuador and the Russian Federation, reserved their third party rights. The two requests will be addressed by a single panel. On 4 October 2012, the Director-General composed the panel.

[119] The issue of the admissibility of *amicus curiae* submissions in WTO dispute settlement proceedings is highly contentious. However, the Appellate Body has confirmed the panels' discretion as well as its own authority to accept or reject information and advice from interested entities, which are neither parties nor third parties to the dispute. *See* Appellate Body Report, *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, para. 43, WT/DS138/AB/R (June 7, 2000); Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, paras. 105–108, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *US-Shrimp*].

measure on indigenous peoples' rights is not explicitly addressed in the WTO dispute because the complainants have framed their requests from the perspective of restrictions on trade.

In their requests for the establishment of a panel, Canada and Norway claim the violation of several provisions of the General Agreement on Tariffs and Trade (GATT), of the Agreement on Technical Barriers to Trade (TBT) and of the Agreement on Agriculture (AoA).

More specifically, they assert that the EU measure discriminates among "like products" (seal products and non-seal products; Inuit seal products and seal products in general) originating in different countries in violation of the most favored nation treatment rule enshrined in GATT Article I(1) and Article 2.1 of the TBT Agreement. The EU regime allegedly further violates the national treatment rule established in Article III(4) of the GATT and in Article 2.1 of the TBT Agreement as it apparently discriminates between imported products and "like products" originating in the EU. Alternatively, the EU ban may be perceived as a quantitative restriction on trade violating Article XI(1) of the GATT or as an introduction of a non-tariff measure on agricultural products in contrast with AoA Article 4.2. Canada and Norway claim as well a violation of Article 2.2. of the TBT Agreement, which provides that the adoption of technical regulations should not pose an "unnecessary obstacle to international trade."

The following sections will address some of the problematic issues on which the WTO Panel will presumably focus in order to decide on the compatibility of the EU measures with WTO obligations.

I. The Relationship Between the GATT and the TBT Agreement

Concerning the alleged violation of the most favored nation and national treatment rules, it is worth clarifying that despite being drafted in similar terms in the GATT and in the TBT Agreement, the conditions upon which such provisions apply differ. The approach of the two agreements is also quite different. The GATT contains a general prohibition of restrictive trade measures unless they are justified, for instance, under GATT Article XX. The TBT Agreement, instead, sets out the requirements that legitimate technical regulations and standards must fulfill; it thus assumes their legality in principle, provided that they fulfill the requirements established in the Agreement.[120] Consequently, the WTO Panel will have to decide first which agreement applies in the case at issue.

[120] The sixth recital of the Preamble of the TBT Agreement clarifies this point:

> Recognizing that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the

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In *EC-Asbestos*, the Panel addressed the issue of the relationship between the GATT and the TBT Agreement and clarified that, while the applicability of one or of the other cannot be excluded *a priori*, as both are part of Annex 1A to the WTO Agreement, the order in which they apply should prioritize the agreement that deals "specifically and in detail" with the measure in question.[121] Accordingly, provided that the TBT agreement is the more specific one, the Panel will have to ascertain first whether the EU ban on seal products constitutes a "technical regulation" pursuant to paragraph 1 of Annex I of the TBT Agreement.[122]

II. The EU Measure: Compliance with the TBT Agreement

Annex I of the TBT Agreement defines a "technical regulation" as a "[d]ocument which lays down product characteristics or their related processes and production methods . . . with which compliance is mandatory."[123] The EU Regulation lays down in a mandatory form the process and production methods (*i.e.*, traditional indigenous hunt) for the marketing of seal products in the EU.[124] However, it is not clear whether the EU measure would match the definition of "technical regulation" because there is high legal uncertainty on whether the TBT Agreement covers technical regulations relating to "process and production methods" (PPMs) that are not strictly associated to the production of a specific good and that are not detectable in the final product. Indeed, non-product related PPMs are generally considered to fall outside of the scope of the TBT Agreement.[125]

> levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement.

World Trade Organization Agreement on Technical Barriers to Trade, pmbl., Apr. 15, 1994, 1994 O.J. (L 336) [hereinafter TBT].

[121] Report of the Panel, *European Communities—Measures Affecting Asbestos and Asbestos Containing Products*, 400, WT/DS135/R (Sept. 18, 2000).

[122] The TBT Agreement also applies to *standards*, but these consist of rules compliance with which is not mandatory.

[123] TBT, *supra* note 120, at annex 1, para. 1.

[124] Regulation 1007/09, *supra* note 12, art. 3.

[125] The text of the TBT does not suggest any interpretation of PPMs, but the view generally held on this issue is to interpret the word "relate" in the definition of technical regulations as meaning "having a physical impact on the end product." *See* Note by the Secretariat, *Negotiating History of the Coverage of the Agreement on Technical Barriers to Trade with Regard to Labeling Requirements, Voluntary Standards, and Processes and Production Methods Unrelated to Product Characteristics*, paras. 103–51, WT/CTE/W/10, G/TBT/W/11 (Aug. 29, 1995).

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Nevertheless, it could also happen that if neither party wants to exclude the applicability of the TBT on this ground, the Panel may not address this point.[126]

Further, to establish a violation of Article 2.1 TBT, Canada and Norway will have to provide evidence of a prima facie case that imported products are treated "less favorably" than foreign or domestic "like products." The Appellate Body (AB) has clarified that this should be assessed by examining whether the measure modifies the conditions of competition in the relevant market, whether de jure or de facto, to the detriment of imported products and that a "genuine relationship" should exist between the measure itself and its adverse impact on competitive opportunities.[127]

Additionally, under Article 2.2. TBT "[m]embers shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade." In other words, technical regulations must "not be more trade-restrictive than *necessary* to fulfill a *legitimate objective*, taking account of the risks non-fulfillment would create."[128] (emphasis added). The EU measure could in principle satisfy the "legitimate objective" test because the non-exhaustive list in TBT Article 2.2. explicitly mentions the "protection of animal life or health." By contrast, the necessity test may not be fulfilled because it could be argued that a general certification and labeling regime would have been a less trade restrictive "reasonably available" alternative for the EU in relation to the objective pursued.[129] In this regard, the AB has clarified that a

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Nevertheless, some WTO members have actually notified technical regulations relating to non-product-related PPMs to the TBT Committee. Notably, Belgium has notified its prohibition on production and marketing of seal pup skins unless obtained from Inuit traditional hunt. *See* Notification of Belgium, G/TBT/N/BEL39 (Mar. 8, 2008); *see also* United Nations Conference on Trade and Development, *Dispute Settlement, World Trade Organization, 3.10 Technical Barriers to Trade*, 2003, 10, *available at* http://unctad.org/en/docs/edmmisc232add18_en.pdf; CHRISTIANE CONRAD, PROCESSES AND PRODUCTION METHODS (PPMS) IN WTO LAW: INTERFACING TRADE AND SOCIAL GOALS 378 (2011). Moreover, in the recent reports on *Tuna Dolphin II*, the Panel and the Appellate Body considered certain labeling requirements based on fishing methods as "technical regulation" although they did not specifically address this issue. *See* Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, paras. 190–99, WT/DS381/AB/R (May 16, 2012) [hereinafter *Tuna Dolphin II*].

[126] This is what happened in the *Tuna Dolphin II* case. *See* Elizabeth Trujillo, *The Tuna-Dolphin Encore—WTO Rules on Environmental Labeling*, 16 ASIL INSIGHTS, 7 March (2012).

[127] *Tuna Dolphin II*, *supra* note 125, paras. 214–16, 221, 224–25.

[128] TBT, *supra* note 120, at art. 2.2.

[129] This is also further confirmed. *See* Commission Staff Working Document, *Accompanying document to the Proposal for a Regulation Concerning Trade in Seal Products: Impact Assessment on the Potential Impact of a Ban of Products Derived from Seal Species*, SEC (2008) 2290, (July 23, 2008) [hereinafter Impact Assessment]. Moreover, it should be noted that the original proposal of the Commission concerned the introduction of a certification, labeling and marking regime guaranteeing that seals were "killed and skinned without causing avoidable pain, distress and any other form of suffering." *See* Commission Proposal for a Regulation of the

measure does not cease to be "reasonably available" simply because it involves administrative difficulties for a Member.[130]

If the applicability of the TBT Agreement is excluded, the legitimacy of the EU measure will have to be assessed under the GATT.

III. The EU Measure: Compliance with the GATT

Articles I and III of the GATT prohibit discrimination between "like products" originating in different countries and between domestic and foreign "like products."[131] The latter is a key concept (the same applies to TBT Article 2.1) because, if products are not "like products," States may subject them to different regimes without incurring a violation. Thus, the first issue to be assessed will be whether the seal products covered by the EU ban should be considered "like products" by comparison to products not covered by the ban, such as: (1) products not originating from seals (*e.g.*, pelts from other animals, Omega-3 capsules not obtained from seals) and (2) seal products originating from indigenous traditional hunt. The decision as to what products are comparable will have an important impact on the final solution of the case.[132]

In the absence of a legal definition of the notion of "likeness," the jurisprudence of the WTO adjudicatory bodies on this topic provides some clarification. First, the assessment of the "likeness" between two or more products is to be made on a case-by-case basis. Second, the notion of likeness is not uniform across or within the WTO agreements but has to be interpreted in the specific context of the provisions which make use of it. In this regard, the AB uses the image of an "accordion [that] stretches and squeezes in different places as different provisions of the WTO Agreement are applied . . . as well as by the

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European Parliament and of the Council Concerning Trade in Seal Products, art. 4, COM (2008) 469 final (July 23, 2008).

[130] Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, para. 169, WT/DS135/AB/R (Mar. 12, 2001) [hereinafter Asbestos].

[131] *See* General Agreement on Tariffs and Trade, art. I(1), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT] ("[A]ny advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."); *see also id.* at art. III(4) ("The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.").

[132] Peter L. Fitzgerald, *"Morality" May Not Be Enough to Justify the EU Seal Products Ban: Animal Welfare Meets International Trade Law*, 14 J. INT'L WILDLIFE L. & POL'Y 85, 99 (2011).

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context and the circumstances that prevail in any given case."[133] Third, and quite importantly, the AB explains that the concept involves "a determination about the nature and extent of a competitive relationship between and among products"[134] and identifies four general criteria:

> (i) the physical properties of the products; (ii) the extent to which the products are capable of serving the same or similar end-uses; (iii) the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand; and (iv) the international classification of the products for tariff purposes.[135]

Under the third criterion, consumers' concerns on animal welfare could, in principle, become relevant for excluding the likeness between seal products and either products not originating from seals or indigenous seal products. The EU measure would thus be safe because GATT rules allow States to subject "non-like products" to different regimes. However, there is no clear favorable WTO jurisprudence in relation to the relevance of PPMs concerning the assessment of "likeness" between products.[136] Rather, the AB has specified that an overall determination of the evidence relating to each of the four criteria has to be made.[137] In other terms, physical properties, end uses and tariff classification of products will also be considered in determining the issue of "likeness." Moreover, when considering the issue of a possible violation of GATT Article I, it should be recalled that the EU measure substantially (and de facto) affects Canada and Norway since exports of seal products from these countries to the EU are quite significant.[138]

As an alternative to a violation of GATT Articles I and III, Canada and Norway also claim a violation of Article XI, which prohibits all non-tariff barriers that are applied at the border

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[133] Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, para. 21, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996).

[134] *Asbestos*, *supra* note 130, para. 99. Although the considerations here made reference to the assessment of a *likeness* of products under Article III(4) of the GATT 1994, they nevertheless provide guidance for a general approach to the issue.

[135] *See id*. at para. 101.

[136] In *Asbestos*, for instance, the Appellate Body took into consideration consumer tastes for the purpose of distinguishing products containing asbestos from other fungible products. It is questionable, however, whether in assessing *likeness* consumer preferences as to animal welfare are equivalent to their perception of the health risks posed by asbestos.

[137] Asbestos, *supra* note 130, at para. 109.

[138] Impact Assessment, *supra* note 129, at 46–47, 53.

(including bans) and limit market access.[139] On the one hand, violation of Article XI is easier to demonstrate. Differently from the case of an alleged violation of Articles I and III, the applicants do not have to show any discriminatory intent or effect. On the other hand, however, Articles III and XI pursue different objectives: Unlike Article III, Article XI concerns border measures rather than internal regulations.[140] Even though in principle the EU measure applies to both internal and imported products, the portion of the Regulation providing that the conditions for placing on the market seal products "shall apply at the time or point of import for imported products"[141] raises an issue of compatibility with Article XI and may be considered as a quantitative restriction.

In any case, if the measure is found to violate GATT Article I, Article III, both Articles I and III (because the likeness test is fulfilled and the measure is discriminatory) or Article XI, the Regulation can nevertheless be saved by resorting to the general exceptions provision under GATT Article XX. This Article provides that States may derogate from the general principles by adopting or enforcing measures *necessary* to pursue one of the policy objectives listed therein and upon fulfillment of the conditions set out in the opening provisions of the Article (*chapeau* requirements).[142]

The purpose "to safeguard public morals"[143] and "to protect animal life or health"[144] could, in theory, justify the EU measure, but it is doubtful whether the necessity test and the *chapeau* requirements, as interpreted by the Panels and the AB, would be satisfied. As

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[139] Similarly, Art. 4.2 of the AoA stipulates that Members must convert non-tariff barriers on agricultural products into ordinary customs duties.

[140] GATT, *supra* note 131, at art. III. Art I states:

> Any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in paragraph 1 which applies to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III.").

Id. at art. I.

[141] Regulation 1007/09, *supra* note 12, at art. 3.1.

[142] GATT art. XX ("Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures . . . .").

[143] *Id.* art. XX(a).

[144] *Id.* art. XX(b).

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earlier noted, the preliminary works of the EU regulation, as well as the assessment report made by the Commission, confirm that there were less trade restrictive available options for the EU to adopt (for instance, banning only products for which inhumane killing occurred by introducing a certification regime). Moreover, WTO case law does not clearly establish whether or to what extent unilateral import bans imposed as a reaction to events occurring beyond the jurisdiction of the enacting State can be justified under GATT Art. XX.[145] Further, if the purpose of the regulation is to respond to a general European concern over cruel killing methods that do not guarantee the death of animals without suffering, the choice of the EU institutions to address this problem only in relation to seals is not easily defendable under the *chapeau* conditions in Art. XX.

In sum, one of the general questions underlying the seals dispute concerns the extent to which WTO rules should limit the domestic policies of its members. However, it must be stressed that the object of the examination by WTO dispute settlement organs is not the choice of policy as such, but rather the way it is implemented and whether it respects the rights of other States under the WTO multilateral regime. Accordingly, the interpretation and application of the "necessity" test in the context of the TBT and GATT Article XX and the *chapeau* requirements in Article XX will settle such threshold.

Additionally, in the light of the considerations noted and from a wider perspective, the decision of the Panel will necessarily have an impact on the broader issue of the openness of the WTO system to morally based concerns enforced through trade bans.[146] Despite the occasional accommodation of non-trade interests in the application of WTO law, several provisions under the different WTO Agreements may exclude the compatibility of the EU

[145] Concerning the general exception under GATT Art. XX(g) on the conservation of exhaustible natural resources, the Panel in *US-Tuna II* asserted that "[i]t could not therefore be said that the General Agreement proscribe[s] in an absolute manner measures that relate to things or actions outside the territorial jurisdiction of the party taking the measure." *See* Panel Report, *United States—Restrictions on the Imports of Tuna*, para. 5.16, DS29/R (June 16, 1994). However, in the *US-Shrimp* Appellate Body report, it is clarified that in pursuing fundamental social policies States are bound to "to have prior consistent recourse to diplomacy;" failure to do so may produce a discriminatory impact. *See US-Shrimp*, *supra* note 119, at para. 187.

[146] For a detailed defense of the EU measures, see Robert Howse & Joanna Langille, *Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values*, 37 Yale J. Int'l L. 367 (2012). Paragraph (a) of GATT Art. XX has been directly addressed in the recent decision China-Audio Visual Products, and in the context of the GATS containing a similar provision in the U.S.-Gambling decision. *See* Appellate Body Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R (Dec. 21, 2009); Panel Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R (Aug. 12, 2009); Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services,* WT/DS285/AB/R (Apr. 7, 2005); Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R (Nov. 10, 2004). In both cases the decision organs failed to justify State measures under Art. XX. As this concerns the seals case, it has been authoritatively suggested that this case may not be the most appropriate one for establishing a precedent under Art. XX(a). *See* Fitzgerald, *supra* note 132, at 86.

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regulations with WTO obligations, concerning in particular the way measures are applied in practice. Further, case law shows that reconciliation between trade and other policy objectives is more difficult when the policy aim (*e.g.*, animal welfare) is not explicitly included in the WTO agreements or in the general exceptions or if it reflects local ethical and moral positions rather than "universally" agreed standards.[147] Indeed, it should be noted that the specific issue in the disputed case concerns animal welfare and not animal protection for preservation and environmental purposes. There are very few animal welfare international agreements concerned specifically with the physical and emotional well-being of animals[148]—with the exception of acts of extreme cruelty, animal welfare still remains at the level of personal preferences and cultural choices.[149]

F. The (Possible) Human Rights Path

Besides animal welfare concerns and the pure trade dimension, the seals case can also be read from the viewpoint of the protection of the rights of indigenous peoples and in particular of their right to culture. Even though the EU ban has not been challenged on such grounds before any human rights mechanism, it is important to clarify the existing obligations under international law for States and for EU Members.[150]

I. Specific Instruments on the Rights of Indigenous Peoples

At the international level, the only binding instrument that specifically denotes the rights of indigenous people is the ILO Indigenous and Tribal Peoples Convention of 1989 (ILO C169).[151] Among the EU Member States, Denmark, the Netherlands, Norway, and Spain have ratified the Convention. A more recent, broader but non-binding document has been adopted by the UN General Assembly in 2007, the Declaration on the Rights of Indigenous Peoples (UNDRIP).[152]

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[147] *See US-Shrimp*, *supra* note 119, para. 187; *see also* Fitzgerald, *supra* note 132, at 122–23.

[148] *See Recommendation on Seal Hunting*, *supra* note 11; *see also* Convention for the Conservation of Antarctic Seals, annex, art. 7, Feb. 11, 1972, 29 U.S.T. 441, 11 I.L.M. 251.

[149] By contrast, standards that relate to concerns on the survival of species rely on, and are subject to, scientific determination.

[150] As earlier noted, in the annulment actions before the ECJ, the applicants also raised the issue of the alleged violation of the rights of indigenous peoples including: the right to property, the right to private and family life read in light of the freedom of thought, conscience and religion, and freedom of expression, and the right to be heard.

[151] *See* ILO C169, *supra* note 19.

[152] *See* UNDRIP, *supra* note 19.

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These instruments establish, first, that States shall recognize, respect, protect and promote the "full realization of the social, economic and cultural rights of [indigenous] peoples with respect for their social and cultural identity, their customs and traditions and their institutions."[153] More specifically, Article 8 of ILO C169 clearly establishes the right of indigenous peoples to retain their own customs and institutions.[154] UNDRIP Article 11 further stipulates that indigenous peoples "have the right to practice and revitalize their cultural traditions and customs" including through "the right to maintain, protect and develop the past, present and future manifestations of their cultures." Additionally, indigenous peoples have the right "to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities"[155] as well as the right to the enjoyment of the highest attainable standard of physical and mental health, in relation to which "States shall take the necessary steps with a view to achieving progressively the full realization of this right."[156] Quite importantly, Article 23 of ILO C169 affirms that:

> Handicrafts, rural and community based industries and subsistence economy and traditional activities of the peoples concerned, such as hunting, fishing, trapping and gathering, shall be recognized as important factors in the maintenance of their cultures and in their economic self-reliance and development. Governments shall . . . ensure that these activities are strengthened and promoted.

Second, the UN Declaration and the ILO Convention make clear that indigenous peoples have the right to participate and to be consulted in relation to decision making in matters which would affect their rights.[157] Third, a common thread in these two instruments is the right to effective remedies and to an effective legal protection of the individual and of the collective rights of indigenous peoples.[158]

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[153] ILO C169, *supra* note 19, at arts. 2, 4, 5; *see also id.* at arts. 24, 31, 41.

[154] ILO C169, *supra* note 19, at art. 8.2 ("These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights.").

[155] UNDRIP, *supra* note 19, at art. 20.

[156] *See id.* at art. 24.

[157] *See id.* at arts. 18, 19; ILO C169, supra note 19, at arts. 6, 7.

[158] *See* UNDRIP, *supra* note 19, at art. 40; ILO C169, *supra* note 19 art. 12.

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II. General International Human Rights Supervisory Mechanisms

As earlier noted, the UN Declaration is not legally binding and only a small number of EU member States have ratified the ILO Convention. Nevertheless, alleged violations of the abovementioned rights can be—and have been—assessed in the judicial and quasi-judicial practice of general human rights supervisory mechanisms.

The Human Rights Committee (HRC),[159] for instance, has addressed indigenous peoples' rights under the International Covenant on Civil and Political Rights (ICCPR) in the context of minorities' right to enjoy their own culture (Article 27).[160]

In the early case, *Kitok v. Sweden*, the HRC affirmed that economic activities may come within the scope of application of Article 27 "where that activity is an essential element in the culture of an ethnic community."[161] This approach is also confirmed in *Ominayak v. Canada*, in which the "Committee recognize[d] that the rights protected by Article 27, include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong."[162] The principles developed in these early cases were further clarified in the Committee's General Comment No. 23 on the rights of minorities. With regard to cultural rights it observes that:

> [C]ulture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting . . . . The enjoyment of those rights

[159] The first Optional Protocol to the International Covenant on Civil and Political Rights invests the Committee with the competence to receive and consider individual complaints concerning alleged violation of State obligations under the Covenant; with the exception of the UK, all EU member States have ratified the Optional Protocol. *See* Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc A/6316.

[160] For further references on the relevant jurisprudence, see generally S. JAMES ANAYA, INTERNATIONAL HUMAN RIGHTS AND INDIGENOUS PEOPLES (2009); S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW (2d ed. 2004); Alessandro Fodella, *Indigenous Peoples, the Environment and International Jurisprudence*, *in* INTERNATIONAL COURTS AND THE DEVELOPMENT OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF TULLIO TREVES 347–62 (Nerina Boschiero et al eds., 2012) (forthcoming); Kamroul Hossain, *Globalization, Climate Change and Indigenous Peoples in the Arctic: An Interface Between Free Trade and the Right to Culture*, *in* GLOBALIZATION, INTERNATIONAL LAW AND HUMAN RIGHTS 34 (Jeffrey F. Addicott, Md. Jahid Hossain Bhuiyan & Tareq M.R. Chowdhury eds., 2012); INTERNATIONAL LAW AND INDIGENOUS PEOPLES (Joshua Castellino & Niamh Walsh eds., 2005); PATRICK THORNBERRY, INDIGENOUS PEOPLES AND HUMAN RIGHTS (2002); ALEXANDRA XANTHAKI, INDIGENOUS RIGHTS AND UNITED NATIONS STANDARDS: SELF-DETERMINATION, CULTURE AND LAND (2007).

[161] U.N. Human Rights Comm'n, Kitok v. Sweden, para. 9.2, U.N. Doc. CCPR/C/33/D/197/1985 (1988).

[162] U.N. Human Rights Comm'n, Ominayak v. Canada, para. 32.2, U.N. Doc. CCPR/C/38/D/167/1984 (1990).

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> may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.[163]

The Committee also explains the relationship between Article 27 (rights of minorities) and Article 1 (self-determination) of the ICCPR when applied to indigenous peoples. It maintains that the right to self-determination belongs to all peoples (not to minorities) and is not a cognizable right under Protocol I of the ICCPR; however, provided that members of indigenous communities constitute a minority within a State party, their rights are protected under Article 27 of the Covenant.[164] Notably, several years later, while reconfirming the non-justiciable character of Article 1, the HRC also acknowledged that the provisions of Article 1 may be relevant in the interpretation of Article 27.[165] It thus provides broader space for the protection of indigenous peoples' rights under the Covenant.

HRC jurisprudence also clarifies the scope of State duties concerning the protection of indigenous community members' rights and the conditions upon which interference with such rights is permissible under the ICCPR.

In a series of cases concerning alleged governmental interference with traditional activities carried out by indigenous communities, the HRC has concluded that the freedom of States to encourage economic activities[166] has to be assessed by reference to the obligation in Article 27 requiring that members of minorities shall not be "denied," de jure or de facto, the right to enjoy their own culture; accordingly, measures whose impact is so "substantial that it does effectively deny"[167] the rights in Article 27 are incompatible with the Covenant. Moreover, in taking steps affecting the rights under Article 27, States must bear in mind that although certain individual activities may not breach Article 27, when taken together they may have the effect of eroding the possibility for members of indigenous communities to continue to carry out their cultural traditional practices, thus threatening

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[163] General Comment No. 23: The Rights of Minorities (Art. 27), Doc. CCPR/C/21/Rev.1/Add.5 (4 August 1994) para. 7.

[164] *Id.* at paras. 3.1, 3.2.

[165] *See, e.g.*, U.N. Human Rights Comm'n, Mahiuka v. New Zealand, para. 9.2, U.N. Doc. CCPR/C/70/D/547/1993 (2000) [hereinafter *Mahiuka v. New Zealand*].

[166] It should be recalled that the EU Regulation was justified as a measure of harmonization beneficial to the internal market as well as a measure concerning animal welfare.

[167] *See* U.N. Human Rights Comm'n, Howard v. Canada, para. 12.7, U.N. Doc. CCPR/C/84/D/879/1999 (2005); U.N. Human Rights Comm'n, Länsman v. Finland, paras. 9.4, 9.5, U.N. Doc. CCPR/C/52/D/511/1992 (1994) [hereinafter *Länsman v. Finland I*].

the very survival of such communities.[168] In this latter regard, the HRC has also observed that Article 27 does not only protect "traditional means of livelihood," but it can additionally be invoked in cases where members of indigenous communities may "have adapted their methods . . . over the years and practice [the activities] with the help of modern technology."[169] In a case concerning fishing activities carried out by the Maori people, the HRC confirmed the broad reading of Article 27 and addressed the issue of the alleged interference by the State with the possibilities for Maori to engage in both commercial and non-commercial fishing.[170] Finally, from a procedural perspective, the HRC has clarified that Article 27 implies an obligation for the State to consult with the communities whom the measure is expected to have an impact on and to ensure the communities' effective participation in the decision making process.[171]

Even though the HRC has found a violation of Article 27 in very few cases, its considerations elucidate important aspects of the limits on State interference with the cultural rights of the members of indigenous communities and may serve as a source from which other regimes can draw interpretative and supportive arguments.[172] The same may be said with regard to the work of other relevant human rights monitoring bodies, such as the Committee of Economic Social and Cultural Rights (CESCR) or the Committee on the Elimination of Racial Discrimination (CERD).

The CESCR has addressed the protection of the members of indigenous communities while interpreting and monitoring the compatibility of State measures with the obligations enshrined in ICESCR Article 15 on the right to cultural life and ICESCR Article 11 on the right to an adequate standard of living.[173] The CERD has addressed indigenous peoples' issues

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[168] *See* U.N. Human Rights Comm'n, Poma Poma v. Peru, para. 7.6, U.N. Doc. CCPR/C/95/D/1457/2006 (2009) [hereinafter *Poma Poma v. Peru*]; U.N. Human Rights Comm'n, Länsman v. Finland, para. 10.2, U.N. Doc. CCPR/C/83/D/1023/2001 (2005) [hereinafter *Länsman v. Finland III*]; *Mahiuka v. New Zealand*, *supra* note 165, at para. 9.5; U.N. Human Rights Comm'n, Länsman v. Finland, para. 10.7, U.N. Doc CCPR/C/58/D/671/1995 (1996) [hereinafter *Länsman v. Finland II*]; *Länsman v. Finland I*, *supra* note 167, at para. 9.8.

[169] *Länsman v. Finland I*, *supra* note 167, at para. 9.3.

[170] *See Mahiuka v. New Zealand, supra* note 165, at para. 9.4.

[171] *See id.* at para. 9.5; *Poma Poma v. Peru*, *supra* note 168, at para. 7.6; U.N. Human Rights Comm'n, Äärelä v. Finland, para. 7.6, U.N. Doc. CCPR/C/73/D/779/1997 (2001); *Länsman v. Finland I*, *supra* note 167, at para. 9.6. On the exact scope of the "obligation to consult," see also Int'l Labor Org. Comm'n of Experts on the Application of Conventions and Recommendations, *General Observation Concerning Indigenous and Tribal Peoples Convention*, ILO Doc. 052011GENS20 (2011).

[172] *See* Fodella, *supra* note 160.

[173] *See* Rep. on the Forty-Sixth and Forty-Seventh Sessions of the Comm'n on Econ., Soc. & Cultural Rights, May 2–20, Nov. 14–Dec. 2, 2009, paras. 194, U.N. Doc. E/2012/22; ESCOR, Supp. No. 2 (2012) (concluding observations on Cambodia); Rep. on the Forty-Second and Forty-Third Sessions of the Comm'n on Econ., Soc. & Cultural Rights, May 4–22, Nov. 2–20, 2009, paras. 194, U.N. Doc. E/2010/22; ESCOR, Supp. No. 2 (2010) (concluding observations on Cambodia); *id.* para. 311 (concluding observations on the Democratic Republic of Congo); *id.* para. 330

not only in its general recommendations and concluding observations[174] but also in the context of the "early warning and urgent action procedure," which may be activated directly by indigenous communities and is aimed at preventing serious and irremovable

(concluding observations on Chad); U.N. Comm'n on Econ., Soc. & Cultural Rights, General Comment no. 21: Right of Everyone to Take Part in Cultural Life (Art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights), paras. 36–37, 49, 55, U.N. Doc. E/C.12/GC/21 (2009); Rep. on the Thirty-Eighth and Thirty-Ninth Sessions of the Comm'n on Econ., Soc. & Cultural Rights, Apr. 30–May 16, Nov. 5–23, 2007, paras. 391, U.N. Doc. E/2008/22; ESCOR, Supp. No. 2 (2008) (concluding observations on Costa Rica); Rep. on the Thirty-Second and Thirty-Third Sessions of the Comm'n on Econ., Soc. & Cultural Rights, Apr. 26–May 14, Nov. 8–26, 2004, paras. 278, 301, U.N. Doc. E/2005/22; ESCOR, Supp. No. 2 (2005) (concluding observations on Ecuador); Rep. on the Thirtieth and Thirty-First Sessions of the Comm'n on Econ., Soc. & Cultural Rights, May 5–23, Nov. 10–28, 2003, paras. 142–43, 165–66, U.N. Doc. E/2004/22; ESCOR, Supp. No. 2 (2004) (concluding observations on Brazil); Rep. on the Twenty-Fifth, Twenty-Sixth, Twenty-Seventh Sessions of the Comm'n on Econ., Soc. & Cultural Rights, Apr. 23–May 11, Aug. 13–31, Nov. 12–30, 2001, paras. 121, 132, 151, U.N. Doc. E/2002/22; ESCOR, Supp. No. 2 (2002) (concluding observations on Honduras); *id.* paras. 450, 466 (concluding observations on Panama); *id.* paras. 761 (concluding observations on Colombia); Rep. on the Twentieth and Twenty-First Sessions of the Comm'n on Econ., Soc. & Cultural Rights, Apr. 26–May 14, Nov. 15–Dec. 3, 1999, para. 337, U.N. Doc. E/2000/22; ESCOR, Supp. No. 2 (2000) (concluding observations on Cameroon); Rep. on the Sixteenth and Seventeenth Sessions of the Comm'n on Econ., Soc. & Cultural Rights, Apr. 28–May 16, Nov. 17–Dec. 5, 1997, paras. 100, 109, 116, U.N. Doc. E/1998/22; ESCOR, Supp. No. 2 (1998) (concluding observations on the Russian Federation); Rep. on the Eighth and Ninth Sessions of the Comm'n on Econ., Soc. & Cultural Rights, May 10–28, Nov. 22–Dec. 10, 1993, paras. 231, 234, 236, U.N. Doc. E/1994/23; ESCOR, Supp. No. 2 (1994) (concluding observations Mexico).

[174] *See* Rep. of the Comm'n on the Elimination of Racial Discrimination, 51st Sess., Aug. 4–22, 1997, annex V para. 4, U.N. Doc. A/52/18; GAOR, 52d Sess., Supp. No. 18 (1997). *See also* Rep. of the Comm'n on the Elimination of Racial Discrimination, 66th Sess., Feb. 21–Mar. 11, 2005, 67th Sess., Aug. 2–19, 2005, para. 294, U.N. Doc. A/60/18; GAOR, 60th Sess., Supp. No. 18 (2005) (concluding observations on Nigeria); Rep. of the Comm'n on the Elimination of Racial Discrimination, 64th Sess., Feb. 23–Mar. 12, 2004, 65th Sess., Aug. 2–20, 2004, para. 60, U.N. Doc. A/59/18; GAOR, 59th Sess., Supp. No. 18 (2004) (concluding observations on Brazil); *id.* paras. 190–94; Rep. of the Comm'n on the Elimination of Racial Discrimination, 62d Sess., Mar. 3–21, 2003, 63d Sess., Aug. 4–22, 2003, paras. 59–62, U.N. Doc. A/58/18; GAOR, 58th Sess., Supp. No. 18 (2003) (concluding observations on Ecuador); *id.* paras. 335, 339 (concluding observations on Bolivia); *id.* para. 405 (concluding observations on Finland); Rep. of the Comm'n on the Elimination of Racial Discrimination, 60th Sess., Mar. 4–22, 2002, 61st Sess., Aug. 5–23, 2002, paras. 330–31, U.N. Doc. A/57/18; GAOR, 57th Sess., Supp. No. 18 (2002) (concluding observations on Canada); Rep. of the Comm'n on the Elimination of Racial Discrimination, 58th Sess., Mar. 6–23, 2001, 59th Sess., July 30–Aug. 17, 2001, para. 400, U.N. Doc. A/56/18; GAOR, 56th Sess., Supp. No. 18 (2001) (concluding observations on the United States); Rep. of the Comm'n on the Elimination of Racial Discrimination, 56th Sess., Mar. 6–24, 2000, 57th Sess., July 31–Aug. 25, 2000, para. 32, U.N. Doc. A/55/18; GAOR, 55th Sess., Supp. No. 18 (2000) (concluding observations on Australia); Rep. of the Comm'n on the Elimination of Racial Discrimination, 54th Sess., Mar. 1–19, 1999, 55th Sess., Aug. 2–27, 1999, paras. 194, 202, U.N. Doc. A/54/18; GAOR, 54th Sess., Supp. No. 18 (1999) (concluding observations on Costa Rica); *id.* paras. 469, 473 (concluding observations on Colombia); Rep. of the Comm'n on the Elimination of Racial Discrimination, 52d Sess., Mar. 2–20, 1998, 53d Sess., Aug. 3–21, 1998, paras. 293, 299, U.N. Doc. A/53/18; GAOR, 53d Sess., Supp. No. 18 (1998) (concluding observations on Cambodia); Rep. of the Comm'n on the Elimination of Racial Discrimination, 50th Sess., Mar. 3–21, 1997, 51st Sess., Aug. 4–22, 1997, paras. 338, 350, U.N. Doc. A/52/18; GAOR, 52d Sess., Supp. No. 18 (1997) (concluding observations on Panama); Rep. of the Comm'n on the Elimination of Racial Discrimination, 48th Sess., Feb. 26–Mar. 15, 1996, 49th Sess., Aug. 5–23, 1996, paras. 139, 148, U.N. Doc. A/51/18; GAOR, 51st Sess., Supp. No. 18 (1996) (concluding observations on Russian Federation); *id.* paras. 177, 189 (concluding observations on Finland); *id.* paras. 299, 303, 309 (concluding observations on Brazil); Rep. of the Comm'n on the Elimination of Racial Discrimination, paras. 535–36, U.N. Doc. A/50/18; GAOR, 50th Sess., Supp. No. 18 (1995) (concluding observations on Nicaragua).

violations of the Convention.[175] The CERD has clearly established that States must recognize and respect indigenous distinct culture, that they must "provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics" and that they must ensure that "indigenous communities can exercise their rights to practice and revitalize their cultural traditions and customs."[176]

III. The European Convention of Human Rights

By comparison to international human rights supervisory mechanisms, regional human rights courts are generally endowed with broader and more penetrating judicial powers regarding the legal impact of their decisions on States. Their rulings and judgments are legally binding for the State party specifically concerned, and the execution of the final judgment is subject to further supervision under different political, quasi-judicial procedures or both.[177]

The disputed measures originating from the two EU regulations have to be enacted in the single Member States, which are also parties to the ECHR. It follows that the European Court of Human Rights (ECtHR) would have been the competent regional court for dealing with the Inuit case from a human rights perspective.

However, it should be noted that ECtHR jurisprudence has dedicated little attention to indigenous human rights issues and has recognized an even smaller importance to the

[175] The mechanism has been developed by the CERD itself to respond to problems requiring immediate attention and to prevent or limit the scale or number of serious violations of the Convention. *See* Rep. of the Comm'n on the Elimination of Racial Discrimination, 42d Sess., Mar. 1–19, 1993, 43d Sess., Aug. 2–20, 1993, annex III, U.N. Doc. A/48/18; GAOR, 48th Sess., Supp. No. 18 (1993). For an example, concerning in particular the refusal to consult Suriname's indigenous peoples about granting forestry and mining concessions to foreign companies and the fact that the mining companies' activities, especially the dumping of mercury, constituted a threat to their health and the environment, see Comm'n on the Elimination of Racial Discrimination Dec. 1/69, U.N. Doc. CERD/C/DEC/SUR/5 (Aug. 18, 2006); Comm'n on the Elimination of Racial Discrimination Dec. 1/67, U.N. Doc. CERD/C/DEC/SUR/2 (Aug. 18, 2005); Comm'n on the Elimination of Racial Discrimination Dec. 3/62, U.N. Doc. CERD/C/62/Dec.3 (June 3, 2003). *See also* Comm'n on the Elimination of Racial Discrimination Dec. 1/68, U.N. Doc. CERD/C/USA/DEC/1 (Mar. 07, 2006) (concerning Shoshone indigenous peoples' denial of their traditional rights to land through legislative efforts directed at privatizing Western Shoshone ancestral lands for transfer to multinational extractive industries and energy developers). Letters to the Russian Federation dated 11 March 2011 and 2 September 2011 express concern over the small number of indigenous peoples from the Nanai District in relation to the new draft law on traditional fishing activities, which would reportedly negatively affect traditional economic activities by preventing them from selling fish for their livelihood. *See* Rep. of the Comm'n on the Elimination of Racial Discrimination, 78th Sess., Feb. 14–Mar. 11, 2011, 79th Sess., Aug. 8–Sept. 2, 2011, 10, para. 28, U.N. Doc. A/66/18; GAOR, 66th Sess., Supp. No. 18 (2011).

[176] Rep. of the Comm'n on the Elimination of Racial Discrimination, 51st Sess., Aug. 4–22, 1997, annex V para. 4, U.N. Doc. A/52/18; GAOR, 52d Sess., Supp. No. 18 (1997).

[177] *See, e.g.*, ECHR, *supra* note 53, at art. 46 (naming the functions of the Committee of Ministers).

collective dimension of the rights of these groups. One possible explanation may be that at the European level, indigenous peoples' rights have traditionally been of lesser social and political concern in comparison to the issue of the protection of the rights of individuals belonging to national, ethnic, or linguistic minorities.[178]

In a few cases involving indigenous peoples the ECtHR (and formerly the Commission) has addressed the situation of the Sami indigenous population and examined the issue of alleged State interference with their traditional hunting, reindeer herding and fishing rights under the perspective of the length of proceedings (ECHR Article 6), the right to peaceful enjoyment of possessions (ECHR Protocol I, Article 1) and the right to respect for private and family life (ECHR Article 8).[179] An additional case concerned an application made by members of the Inuit community of the Thule district in Denmark, complaining that they had been deprived of their natural resources and cultural heritage (as part of their right to peaceful enjoyment of their possessions, ECHR Protocol I Article I) as a consequence of an agreement between Denmark and the United States after WWII for the establishment of a U.S. air base which had forced them to relocate.[180] In these cases, despite clarifying some of the possible rights (*e.g.*, protection of natural heritage and resources), the ECtHR has almost always failed to identify a State breach of the obligations arising from the ECHR.

Instead, some limited but more concrete protection signals can be detected in the ECtHR's case law concerning the right to cultural identity of members belonging to minorities. The fact that the ECHR enshrines mainly civil and political rights has not been an obstacle, as the ECtHR has repeatedly extended and stretched by way of interpretation the scope of those rights to the economic and social domain as well.

For instance, in the *Chapman* case, the Grand Chamber had to examine the issue raised by a Gypsy applicant under Article 8 of the Convention (right to respect for private and family life),[181] namely, that measures threatening her occupation of her land in caravans affected

[178] The latter topic has prompted the adoption of several Council of Europe instruments. *See* European Charter for Regional or Minority Languages, Nov. 5, 1992, CETS No. 148; Framework Convention for the Protection of National Minorities, Feb. 1, 1995, CETS No. 157, 2151 U.N.T.S. 243. Protection of national minorities is also at the core of the mandate of the OSCE High Commissioner on National Minorities.

[179] Handölsdalen v. Sweden, App. No. 39013/04 (2010), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-97993 (violation of Art. 6, length of proceedings); Johtti Sapmelaccat Ry v. Finland, App. No. 42969/98 (2005), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-68136 (inadmissible); Könkämä v. Sweden, App. No. 27033/95 (1996), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-3390 (inadmissible); O.B. v. Norway, App. No. 15997/90 (1993), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-1462 (inadmissible); Östergren v. Sweden, App. No. 13572/88, 69 Eur. Comm'n H.R. Dec. & Rep. 198 (1991) (inadmissible).

[180] *See* Hingitaq v. Denmark, 2006-I Eur. Ct. H.R. (inadmissible).

[181] ECHR, *supra* note 53, at art. 8. Article 8 states:

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not only her home and property but also her "private and family life as a Gypsy with a traditional lifestyle of living in mobile homes which allow travelling."[182] Despite finding no effective violation in the concrete case, the ECtHR recognized that ECHR Article 8 protects the right to maintain a minority identity and to lead one's private and family life in accordance with the traditions forming an integral part of such identity.[183] It further acknowledged an emerging international consensus amongst the CoE members in recognizing "the special needs of minorities and an obligation to protect their security, identity and lifestyle . . . not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community"[184] and implicitly accredited the applicants' suggestion of a reduced margin of appreciation for States. Moreover, the ECtHR recognized that Article 8 entails positive obligations for the State "to facilitate" minorities' way of life, especially as concerns "vulnerable minorities."[185]

These principles could have applied to the seals case, involving interference through national measures (related to the EU import ban) with the right to cultural identity of Inuit people; however, the human rights' path would have been uncertain, complicated and incomplete for at least three reasons.

First, as just discussed, the ECHR lacks a well-established case law that strongly and extensively protects the cultural, social and economic values of members belonging to minorities and indigenous peoples. In contrast, other regional courts have been proactive and creative in this regard.[186] Second, the procedure would have addressed the situation

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> (1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Id.

[182] Chapman v. United Kingdom, 2001-I Eur. Ct. H.R.

[183] *See id.* at para. 73.

[184] *See id.* at para. 93.

[185] *See id.* at para. 96.

[186] *See, e.g.*, Xákmok Kásek Indigenous Community v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214, paras. 85–89, 183–217, 242–44 (Aug. 24, 2010); Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No.172, paras. 82–96, 115, 124–40 (Nov. 28, 2007); Mayagana (Sumo) Awas Tingni Cmty v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, paras. 148–55 (Aug. 31, 2001); African Comm'n on Human &

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in single States, not the overall effects of the EU Regulations because the EU has not yet acceded to the ECHR. Moreover, applicants can bring claims in relation to violations occurred under the jurisdiction of one of the member States, and this would have left out part of the applicants in *Inuit Tapiriit Kanatami and Others*, such as the Inuit indigenous communities of Canada. Third, individual applications to the ECtHR are admissible upon previous exhaustion of effective domestic remedies. This requirement is already quite burdensome for individual applicants by reason of the often unreasonable length of national procedures, but as earlier discussed, the seals case presented an additional layer of complexity because of the intricate combination of domestic and EU legitimacy review procedures.

IV. Human Rights Protection Under EU Law

Apart from the formal *locus standi* issues discussed in Part D, from a human rights perspective the protection of indigenous peoples' rights may be grounded on different provisions of the EU treaties and of the Charter of Fundamental Rights of the European Union (the Charter).

Notwithstanding the absence of a specific reference to indigenous peoples in the Charter, the Preamble affirms that the Union respects "the diversity of the cultures and traditions of the peoples of Europe."[187] Article 22 of the Charter reiterates that "[t]he Union shall respect cultural, religious and linguistic diversity." Lastly, Article 7 declares the right to respect for private and family life.[188] Moreover, Article 2 TEU stipulates that "the Union is founded on the values of respect for human dignity . . . respect for human rights, including the rights of persons belonging to minorities," and Article 167(4) TFEU establishes that "[t]he Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures." An obligation to consult interested communities before the adoption of EU legislation may derive from this last provision.

Peoples' Rights, Soc. & Econ. Rights Action Ctr v. Nigeria, paras. 55–58, 64–66, Case No. ACHPR/COMM/A044/1 (Oct. 27, 2001), *available at* http://www.cesr.org/downloads/AfricanCommissionDecision.pdf; African Comm'n on Human & Peoples' Rights, Ctr. for Minority Rights Dev. v. Kenya, 276/2003 (Feb. 4, 2010), *available at* http://www.unhcr.org/refworld/docid/4b8275a12.html. For a detailed analysis of the case law, see S. James Anaya & Robert Williams, *The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HARVARD HUM. RTS J. 33 (2001); Fodella, *supra* note 160; Lucas Lixinski, *Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law*, 21 EUR. J. INT'L L. 585 (2010); Gerald Neuman, *Import, Export and Regional Consent in the Inter-American Court of Human Rights*, 19 EUR. J. INT'L L. 101 (2008); Gaetano Pentassuglia, *Towards a Jurisprudential Articulation of Indigenous Land Rights*, 22 EUR. J. INT'L L. 165 (2011).

[187] European Union Charter of Fundamental Rights, pmbl., Dec. 18, 2000, 2000 O.J. (C 364/01).

[188] *See id.* at art. 7 ("Everyone has the right to respect for his or her private and family life, home and communications.").

At a minimum, these provisions imply an obligation not to interfere in a detrimental way with the cultural and economic interests of indigenous peoples. But what if the Union sets the threshold of interference with such rights too high for the purpose of "preventing the disturbance of the internal market" or in the name of non-economic values, such as animal welfare? On the one hand, this raises an issue of compatibility of the obligations established in the EU Charter with the international human rights obligations of EU Member States,[189] including those established in the ECHR. On the other hand, there is a problem of likely competence contrasts between the two European Courts.

While the EU has not yet acceded to the ECHR, the Lisbon Treaty has endowed the Charter with binding force.[190] It should, however, be underlined that the Charter is a peculiar human rights instrument because it is an instrument of Union law that operates within Union law. The Preamble of the Charter stipulates that it is the Union that recognizes the rights, freedoms and principles set out in that instrument, not the Member States in their own right. Indeed, the scope of application of the provisions of the Charter is circumscribed to the areas of State activity ruled by Union law. Article 51 of the Charter emphasizes that: "The provisions of th[e] Charter are addressed to the institutions and bodies of the Union . . . and to the Member States only when they are implementing Union law."

Concerning EU institutions, compliance with the Charter will be a requirement for the validity and legality of EU Directives and Regulations, but Member States remain responsible (for instance under the ECHR or the ICCPR) for potential violations of human rights whether they are implementing Union law or not.

G. Final Considerations

The seals case is a paradigmatic example of the complexity and interrelatedness of different sectors and subject areas of international law, which inevitably have a bearing on the ability of States to freely pursue policies of their choice based on ethical, social or

[189] *See* Philip Alston & J. H. H. Weiler, *An "Ever Closer Union" in Need of a Human Rights Policy: The European Union and Human Rights*, *in* THE EU AND HUMAN RIGHTS 3 (Philip Alston ed., 1999); Armin von Bogdandy, *The European Union as a Human Rights Organization? Human Rights at the Core of the European Union*, 37 COMMON MKT. L. REV. 1307 (2000); Piet Eeckhout, *The EU Charter of Fundamental Rights and the Federal Question*, 39 COMMON MKT. L. REV. 945 (2002); Francis Geoffrey Jacobs, *The European Convention on Human Rights, the EU Charter of Fundamental Rights and the European Court of Justice: The Impact of European Union Accession to the European Convention on Human Rights*, *in* THE FUTURE OF THE EUROPEAN JUDICIAL SYSTEM IN A COMPARATIVE PERSPECTIVE 291 (Ingolf Pernice, Juliane Kokott & Cheryl Saunders eds., 2006).

[190] *See* TFEU art. 218. The Lisbon Treaty foresees the accession of the EU to the ECHR, but subordinates it to a unanimous decision, which may in practice prove to be problematic. *See* Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities, Dec. 13, 2007, 2007 O.J. (C 306) art. 6, 218, protocol 8, declaration 2.

environmental concerns while being compliant with their international obligations. Such complexity can be perceived at least at three levels.

At the EU level, this complexity is apparent in the Union's efforts to develop an integrated policy for the Arctic aimed at coordinating the activities of EU institutions and the different policies that may have an impact on this area. The analysis of the seals case shows that the Union has embarked upon a very narrow path leading to a difficult and delicate reconciliation between the demands for animal welfare, protection of indigenous peoples' rights and measures directed at the elimination of barriers to trade in the internal market. However, the EU is not a system in "a vacuum:" its Member States, and to a certain extent the EU itself, must comply with international obligations—for instance, in the field of trade and human rights.

The latter consideration leads to a second, broader viewpoint on the seals case, namely, that of the twofold issue of intra-system effectiveness and coherence, on the one hand, and inter-system communication in international law, on the other, as highlighted by the seals case. Under the first perspective, the analysis of the seals case has shed light on substantive and procedural gaps within the single systems: The important weaknesses of the review procedure taking place before the ECJ, in particular the requirements for individual standing, the failure to take into adequate consideration the collective dimension of the human rights of indigenous peoples at both EU and COE levels and the "self-contained" character of the WTO system and overemphasis on trade interests.

Under the second perspective, because of its multi-sector impact, the seals case raises the problem of the unity of international law, exemplified in the question of how to reconcile the conflicting interests pursued by State policies with different but contextually applicable obligations under international law. The general picture that emerges is a fragmented one, in which different systems operate on the basis of their own rules with occasional consideration of external sources.

These concerns become rather evident if the seals case is considered from a third viewpoint—the proliferation of judicial courts and bodies as a consequence of the expansion of international law. The lack of circulation of legal solutions and the absence of judicial cross-fertilization between sectors intensifies the above mentioned intra-system weaknesses. Different outcomes are to be expected depending on the focus of each system, which in turn stimulates considerations of opportunity and forum shopping logics and increases the unpredictability of disputes' final outcome. Such loopholes are exploited by single actors, whether individuals or States, and quite often this occurs to the detriment of human rights protection. In the seals case, it is by fortuitous circumstance that Canada's and Norway's economic interests coincide with those of the indigenous populations of the Arctic.