

The EU Seal Products Ban – Why Ineffective Animal Welfare Protection Cannot Justify Trade Restrictions under European and International Trade Law

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Abstract

In this article, the author questions the legitimacy of the general ban on trade in seal products adopted by the European Union. It is submitted that the EU Seal Regime, which permits the marketing of Greenlandic seal products derived from Inuit hunts, but excludes Canadian and Norwegian seal products from the European market, does not ensure a satisfactory degree of animal welfare protection in order to justify the comprehensive trade restriction in place. It is argued that the current ineffective EU ban on seal products, which according to the WTO Appellate Body cannot be reconciled with the objective of protecting animal welfare, has no legal basis in EU Treaties and should be annulled.

Keywords: *Trade in seal products; animal welfare; rights of indigenous peoples; EU law; WTO law; Arctic*

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1. Introduction

Trade in seal products is controversial because it raises profound animal welfare concerns among European citizens and governments.¹ Images of seal hunting distributed through the mass media, portraying some of the methods involved in the hunts, such as the shooting and clubbing of seals, have motivated interest groups and national politicians to seek to put an end to the hunts. In response to the demands for improved animal welfare, the European Union decided in September 2009 to ban trade in seal products throughout the entire European internal market by adopting Regulation (EC) No. 1007/2009.²

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In the wake of the introduction of the regulation in 2009, a long line of lawsuits has followed. In this regard, both the Court of Justice of the European Union as well as the WTO dispute settlement system have been called upon to review the legality of the measure. One of the primary reasons for the intense litigation can be explained by the design of the “EU Seal Regime.”³ Despite strong voices demanding improved protection of animal welfare, the current EU Seal Regime is riddled with inconsistencies that appear to have no straightforward solution. The most problematic aspect of the regime is that the general ban does not apply to *all* seal products. On the one hand, certain seal products, namely those originating from Greenlandic Inuit hunts, have been granted exemption under the regime and can still be sold in Europe. On the other hand, the restrictive measures in place have resulted in an exclusion of Canadian and Norwegian seal products, which, not unexpectedly, have upset Canadian and Norwegian hunters and national authorities.

Part 2 of this article contains an analysis of the case *Inuit Tapiriit Kanatami and Others v Commission*, which was decided by the European General Court in April 2013.⁴ In this case, Canadian seal hunters sought an annulment of Regulation (EC) No. 1007/2009. The litigants, among others Canadian Inuit interest groups, hunters’ associations and individual hunters, claimed that the EU did not have legislative competence to adopt the regulation based on Article 114 Treaty on the Functioning of the European Union (TFEU).⁵ The litigants submitted that the primary objective of the general ban was the protection of animal welfare, and that the regulation did not fulfil the mandatory requirement for recourse to regulatory intervention by the EU under Article 114 TFEU, which requires that the measure in question must make a contribution to the improvement of the functioning of the (EU) internal market. In this regard, it is looked into why the General Court concluded that the ban on seal products had a beneficial effect on the functioning of the internal market, and subsequently why the plea of illegality was rejected.

Part 3 of this article contains an analysis of the findings in the reports issued by the WTO Appellate Body [hereinafter referred to as the AB] in *EC – Seal Products*.⁶ In these reports, the AB concluded that the EU Seal Regime, which presently only permits the marketing in the EU of seal products deriving from Greenlandic Inuit hunts and excludes products of other origin, constitutes arbitrary discrimination against Canadian and Norwegian seal products. Based on the findings of the AB, it is emphasised that the current EU Seal Regime does not provide a sufficient level of animal welfare protection for the regime to be justified under Article XX(a) of the GATT 1994. In Part 3, it is also asked how the significant inconsistencies in the regime can be amended in order to ensure compliance with the requirements of WTO law.

In part 4 of this article, the judgment by the General Court in *Inuit Tapiriit Kanatami and Others v Commission* is assessed in light of the reports issued by the AB in *EC – Seal Products*. It is submitted that the case *Inuit Tapiriit Kanatami and Others v Commission*, is difficult to reconcile with the findings of the AB in *EC – Seal Products*. It is argued that it is highly doubtful whether the current EU Seal Regime, which does very little in terms of addressing animal welfare issues, in any way makes

a valuable contribution to the improvement of the internal market. Thus, it is submitted that partial and ineffective animal welfare protection cannot justify a trade restrictive regime that permits the marketing of Greenlandic seal products, but excludes access to the EU market for Canadian and Norwegian products.

2. The legal basis for regulation (EC) No. 1007/2009 – does a ban on seal products improve the establishment and functioning of the European internal market?

In *Inuit Tapiriit Kanatami and Others v Commission*, the applicants brought an action seeking the annulment of Regulation (EC) No. 1007/2009. Among the submissions put forward, it was argued that the contested regulation had no legal basis in the EU Treaties. According to the litigants, the EU lawmakers had erred in law in using 114 TFEU (ex. Article 95 EC) as the legal basis for the adoption of the act.⁷

In the view of the litigants, the EU had exceeded the limits of its legislative competence under Article 114 TFEU, by adopting Regulation (EC) No. 1007/2009. The claim was that the principal objective of the regulation was the protection of animal welfare, which, *per se*, lies outside the scope of the regulatory powers conferred upon the Union in the TFEU.⁸ The submission by the applicants finds support in the wording of Article 114(1) TFEU, which empowers the EU to harmonise national laws by adopting common regulatory measures that “have as their object the establishment and functioning of the internal market.” It is also clear from case law of the European Court of Justice that Article 114 TFEU does not confer upon the EU legislative competence to harmonise national laws in pursuit of purely *non-economic objectives*. This is especially true when the EU decides to *ban* a specific product, or group of products, which are deemed morally offensive or otherwise unwanted by the general public. Simply prohibiting the undesirable product, does not necessarily improve the functioning of the internal market.⁹

The case *Tobacco advertising* illustrates why a ban on a freestanding product, or group of products, may not be compatible with the proviso in Article 114(1) TFEU. The essential requirement of Article 114(1) TFEU is that the act adopted by the EU contributes to the improvement of “the establishment and functioning of the internal market.”¹⁰ The *Tobacco advertising*-case concerned the first Tobacco Advertising Directive, in which the EU attempted to introduce various advertising bans, among others a prohibition of tobacco advertising on posters, parasols and ashtrays.¹¹ It was clear from the legislative history of the measure that the principal reason for introducing the advertising restrictions was to protect EU public health from the harm caused by smoking.¹² Despite the noble intentions of the EU to protect public health, the Court laid down that; “Article 129(4) [Article 168(5) TFEU] of the Treaty excludes any harmonisation of laws and regulations of the Member States designed to protect and improve human health.” Since the Tobacco Advertising Directive was mainly inspired by public health considerations, and, as stressed by the Court, the directive contained prohibitions “which in no way help facilitate trade in

the products concerned,”¹³ Article 114 TFEU could not constitute a legal basis for the directive.

Thus, the question which had to be answered by the General Court in *Inuit Tapiriit Kanatami and Others v Commission*, was how the general ban on seal products in Regulation (EC) No. 1007/2009, makes a positive contribution to the functioning of the internal market as required in Article 114 TFEU. The General Court started out by rejecting the claim submitted by the applicants that the main objective of the regulation was the protection of animal welfare. According to the General Court, it was “clear from the regulation that its principal objective is not to safeguard the welfare of animals but to improve the functioning of the internal market.”¹⁴ With reference to the preamble to the regulation, the General Court went to lengths to explain precisely how the general ban was beneficial from the perspective of free movement of goods.

It was stressed that the preamble emphasises that differences between national rules on the import, production and marketing of seal products adversely affect the operation of the internal market.¹⁵ As the General Court made clear, the fact that certain Member States *prohibit* the import and marketing of seal products, whereas other Member States *permit* the sale of such products, results in a fragmentation of the internal market, as traders have to adapt their practices to the different provisions in force in each Member State.¹⁶

A usual procedure for facilitating trade between Member States is through the introduction of a single EU rule that leaves no room for Member State action. This procedure is often referred to as “exhaustive” or “full” harmonisation.¹⁷ Full harmonisation of national laws permits goods in compliance with the EU measure to be freely imported and marketed in all EU Member States. In this way, differences between national laws that previously hampered trade are removed. For instance, the Toy Safety Directive requires that all toys produced and sold in the EU meet certain minimum health and safety requirements.¹⁸ Thus, all toys in compliance with the minimum standards of the directive may be sold throughout the entire internal market. The introduction of the minimum standards effectively removes the trade barriers created by different national toy health and safety standards. In such a case, where harmonisation consists of an EU measure that *facilitates* trade in a product previously hindered by differences between national laws, it is easy to understand and justify that the European legislature decides to intervene and harmonise national laws.

Now, explaining how an EU-wide *ban* on a product, or a certain group of products, improves the functioning of the internal market, is a far more complex matter. The problem is that the introduction of a ban on a product, in itself, is the extreme opposite of a harmonisation measure, which liberalises trade in the product concerned. The internal market is all about “free trade,” and justifying how a ban on a product, which removes all possibilities of free movement of the product in question, facilitates trade between Member States is a far more intricate mission.

With the potential pitfalls of the *Tobacco advertising* case in mind, the General Court elaborated on how the ban on seal products would improve the functioning of the internal market. Well aware that a ban, by itself, does very little in terms of

removing trade restrictions, the court emphasised that the ban would benefit free of movement of *other similar animal products*. With reference to the preamble, the General Court explained that animal welfare concerns may:¹⁹

[...] discourage consumers from buying products not made from seals, but which [might] not be easily distinguishable from similar goods made from seals, or products which [might] include elements or ingredients obtained from seals without being clearly recognisable.

Examples of similar products that might contain elements or ingredients obtained from seals without being clearly recognisable are: furs, Omega-3 capsules and oils, and leather goods.²⁰ The principal objective of the regulation is thus to harmonise national laws by introducing a ban, and thereby eliminate worry among consumers that products made from *other* animals on the internal market “might” contain traces of seal.²¹ Theoretically, by introducing the EU-wide ban, the regulation is intended to create reassurance among consumers that all animal products originating from other EU Member States are “seal-free” and safe to buy. The measure is thus expected to eliminate alleged trade restrictions caused by consumer concerns that animal products imported from other Member States might contain seal. The idea is that when consumer hesitation toward imported animal products is removed, an improvement in the functioning of the internal market will be accomplished. Hinging on this reasoning, the General Court confirmed that the ban in Regulation (EC) No. 1007/2009 improved the functioning of the internal market, and fulfilled the criteria for recourse to Article 114 TFEU.

As discussed in further detail in Part 4 below, it is worth mentioning here that the litigants further submitted that the regulation constituted a breach of the principles of subsidiarity and proportionality. As regards the principle of proportionality, it was put forward that the regulation was “manifestly inappropriate.” According to the litigants, the regulation was an inappropriate tool for the purpose of eliminating obstacles to the free movement of goods since the measure contained an exception for seal products deriving from Inuit hunts.²²

The General Court swiftly rejected the submission that the regulation was “manifestly inappropriate.” According to the court, the litigants had not presented “arguments in support of their assertion that the prohibition on seal products provided for by the basic regulation could not further the creation of the internal market.”²³ Instead, emphasis was placed on the broad discretion of the Union legislature in “areas in which its action involves political, economic and social choices and in which it is called upon to undertake complex assessments and evaluations.”²⁴ According to the General Court, it was apparent from the preamble to the regulation that the EU legislators had managed to take into account both the objective of protecting animal welfare as well as the particular situation of Inuit communities and other indigenous communities.

However, the General Court did not pause to reflect on whether the regulation, *in practice*, makes a significant, if any, contribution to the removal of consumer concerns over seal welfare. The problem in this regard is that the EU Seal Regime is

remarkably contradictory. The inconsistencies in the framework are clearly apparent when the General Court in paragraph 45 of the judgment first states that:²⁵

As is apparent from recital 13 in the preamble to the basic regulation, the Union legislature took the view that the most effective means of preventing existing and expected disturbances of the operation of the internal market in the products concerned was to reassure consumers by offering them a *general guarantee* that no seal product would be marketed on the Union market, inter alia by banning the import of such products from third countries.

In the subsequent paragraph, the Court remarks that “[h]owever, the Union legislature provided for an exception to that ban in the case of seal hunting by Inuit communities and other indigenous communities for the purposes of subsistence.”²⁶ But herein lies the controversy. By permitting the continued marketing of seal products hunted by Inuit communities and other indigenous communities, no “general guarantee” can be offered to consumers that the offending products have been effectively removed from the internal market. As pointed out in Part 3 below, the exception granted to indigenous groups is generous in terms of allowing the continued sale of seal products, and does not in any way contribute to the objective of furthering animal welfare.

Another aspect of the EU Seal Regime that significantly undermines the objective of safeguarding animal welfare is the free movement clause in Article 4 of Regulation (EC) No. 1007/2009, which states that “[m]ember States shall not impede the placing on the market of seal products which comply with this Regulation.” From a trade perspective, a free movement clause is essential, and ensures that goods in compliance with the regulation can be traded without hindrance across national borders. However, in this case the free movement clause counteracts efficient animal welfare protection. This is especially true since the free movement clause *forces* those Member States that desire to maintain or introduce a total ban on seal products, to permit the sale of seal products originating from Inuit or other indigenous hunts. The adoption of the “free movement clause” compels Member States that wish to eliminate all types of seal products from their national markets, to soften national restrictive rules and to allow the import and marketing of seal products in compliance with the regulation. The same applies to those Member States that plan to introduce a total ban in the future.

Both the generous exception as well as the free movement clause, give reason to raise critical questions concerning the efficiency of Regulation (EC) No. 1007/2009, in terms of providing any sort of reassurance to consumers that offending seal products have been removed from the internal market. As the analysis of the report by the WTO Appellate Body in *EU – Seal Products* in Part 3 shows, there is good reason to doubt the efficiency of the regulation from an animal welfare perspective. Further, as the analysis in Part 4 demonstrates, the considerable inconsistencies in the EU Seal Regime also give reason to question the legitimacy of adopting the contested regulation on the basis of Article 114 TFEU.

3. WTO Law – the discriminatory aspects of the EU seal regime

In *EU – Seal Products*, Canada and subsequently Norway, claimed before the WTO Dispute Settlement Body that the EU had violated its obligations under WTO law. In May 2014, the case was finally brought to an end by the WTO Appellate Body (AB).²⁷ The most notable breach reported by the AB consists of a violation of Articles I:1 and III:4 of the GATT 1994.

The basis for the complaints by Canada and Norway is that the EU Seal Regime has an exclusionary effect. After the introduction of the regime, the result is that access to the EU internal market has been cut off. The only seal products permitted to be sold in the EU are those comprised by the IC exception, in this case products originating from Greenlandic Inuit hunts. Consequently, seal products originating from Norwegian and Canadian hunts, including Canadian Inuit hunts, are barred.

The AB confirmed that the regime is inconsistent with Article I:1 of the GATT 1994, because it does not unconditionally extend the same market access advantage to Canadian and Norwegian seal products that it accords to similar products originating from Greenland.²⁸ The AB subsequently went on to examine whether the discriminatory aspects of the framework could be justified under Article XX of the GATT 1994. Article XX contains a list of possible derogations, which might justify different regulatory treatment based on the origin of the products. However, as laid down in the chapeau of Article XX, trade restrictive measures must not be applied in a manner that constitutes “arbitrary or unjustifiable discrimination.” In this regard, the EU argued that the favourable treatment accorded to seal products originating from Greenlandic Inuit hunts, could be justified in accordance with Article XX subparagraph a), which makes an exception for trade restrictions “necessary to protect public morals.”

As noted in Part 2 above, it is worth reiterating that in *Inuit Tapiriit Kanatami and Others v Commission* the General Court expressly stated that “it is clear from the basic regulation that its principal objective is not to safeguard the welfare of animals but to improve the functioning of the internal market.”²⁹ The European Commission, which was the defendant in the case, did not object to this finding, nor did the European Parliament or the Council, which intervened in the case. In *Inuit Tapiriit Kanatami and Others v Commission*, this finding was key, because under Article 114 TFEU, the EU has only been conferred competence to improve the establishment and functioning of the internal market. Regarding non-economic matters, such as improving animal welfare, the EU has no competence to intervene and conduct a harmonisation of national laws. The applicant’s claim that the primary objective of the basic regulation is the protection of animal welfare, and not the functioning of the internal market, was dismissed by the General Court.

However, in *EU – Seal Products*, the EU firmly alleged that the *principal objective* of the regime is to address public moral concerns over seal welfare. As the EU declared before the AB, “the text of the Basic Regulation [...], its drafting history, and its structure and design establish that the EU Seal Regime was adopted in order to respond to EU public moral concerns with regard to the welfare of seals.”³⁰

Setting aside for now the problems associated with the shifting reasons given by the EU for introducing the contested regulation, the AB preliminarily accepted that a marketing ban on seal products, could, in principle, fall within the scope of Article XX subparagraph a), as a measure “necessary to protect public morals.” However, the AB found that the regime constitutes “arbitrary or unjustifiable” discrimination on three counts.

The first aspect which constitutes “arbitrary or unjustifiable” discrimination, is the lack of a “rational relationship” between the discriminatory treatment of “commercial” seal products, in this case products originating from Canada and Norway, and the EU’s stated policy objective of protecting animal welfare. As the AB noted, the IC exception represents a “significant carve-out” from the general ban, and the EU had failed to demonstrate how the discrimination resulting from the different regulatory treatment of products from IC hunts and “commercial hunts,” could be reconciled with, or was related to, the policy objective of addressing EU public moral concerns regarding seal welfare. Further, the AB found that the EU admits that IC hunts can cause the same pain and suffering that the public is concerned about, but has not made efforts to address animal welfare issues in relation to the permitted IC hunts.³¹

Secondly, the AB pointed out that the criteria for drawing a distinction between products derived from proper IC hunts and banned “commercial” hunts were ambiguous and could lead to arbitrary or unjustified discrimination. According to the AB, the criteria that have to be satisfied in order to qualify for the IC exception contain imprecisions that could have the undesired consequence that products from what should be characterised as “commercial” hunts, could enter the European market under the IC exception.³²

The first ambiguity of the IC exception is the lack of a detailed definition of the “subsistence”-criterion in Article 3(1) of the regulation, which requires that “[t]he placing on the market of seal products shall be allowed only where the seal products result from hunts traditionally conducted by Inuit and other indigenous communities and contribute to their existence.” The problem with the “subsistence”-criterion is that it not only encompasses use and consumption as part of Inuit or indigenous peoples’ culture and tradition, but that it also permits unrestrained *commercial* exchange of seal products. According to the AB, the commercial aspect of IC hunts, which is to earn income and make profits, resembles that of the banned “commercial” hunts. The resemblance between the two categories blurs the line between IC hunts and the prohibited “commercial” hunts, and constitutes an unacceptable degree of ambiguity in the requirements of the IC exception.³³

Another aspect that blurs the distinction between IC hunts and the purely “commercial” hunts, is the ambiguity of the “partial use”-criterion in Article 3(1)(b) of Commission Regulation (EU) No. 737/2010 (the Implementing Regulation). The “partial use”-criterion requires that, in order to qualify for the IC exception, seal products “[...] are at least partly used, consumed or processed within the communities according to their traditions [...]” The problem in this regard was

that the EU could not explain if the “partial use”-criterion is administered and enforced with respect to individual seals, particular hunts or the catch of an entire season. The AB was concerned that in cases where the “partial use”-criterion is not assessed with respect to individual seals, but rather individual hunters over an extended period of time, or, even members of an Inuit community, a substantial proportion of seal products might, in fact, not conform to the IC exception.³⁴ Thus, the AB was not convinced that the vague “subsistence” and “partial use”-criteria are fully suitable to prevent seal products originating from “commercial” hunts from entering the EU market under the IC exception.³⁵

The third discriminatory aspect identified is the unequal treatment of the Greenlandic Inuit and the Canadian Inuit. According to the AB, the IC exception is *de facto* only available to the Greenlandic Inuit, and “comparable efforts” had not been made to facilitate Canadian Inuit access to the EU market. A core problem is the requirement that in order to access the EU market, Canada must establish a “recognized body” entrusted with the task of ensuring that Canadian seal products truly originate from Inuit hunts and to issue periodic reports to the European Commission.³⁶ Rightfully so, the AB highlighted that the difficulties associated with the establishment of a “recognized body,” “may entail significant burdens in some instances.”³⁷

For these reasons, the AB found that the regime could not be justified under Article XX(a) of the GATT 1994.

The question confronting the EU now is how the “EU Seal Regime” can be amended in order to comply with the requirements of WTO law. The first issue that will have to be addressed is to clarify the scope of the “subsistence” and “partial use”-criteria, so that seal products derived from “commercial” hunts do not enter the EU market under the IC exception. Further, the EU must rethink the requirement that a “recognized body” has to be established in order for Canadian Inuit products to access the EU market. The establishment of a supervising body involves administrative and economic burdens, which surely constitute a significant market access barrier. The “easy” solution for the EU in this regard is to allow the import of seal products comprised by the targeted programme for purchasing Inuit products already in place in Canada.³⁸

However, it may prove difficult, if not impossible, for the EU to reconcile the IC exception with the objective of addressing EU public concerns about animal welfare. As indicated by the AB, it is possible to justify the IC exception under Article XX(a) of the GATT 1994, if efforts are made to “ensure that the welfare of seals is addressed in the context of IC hunts [...]”³⁹ In this regard, *Howse et al.* argue that “[t]he IC exception might [...] be made WTO-compliant with some modifications that would amount to gestures of good faith. Some steps could be taken to encourage improved welfare standards in IC hunts.”⁴⁰

It is, nevertheless, questionable whether it is possible in practice to improve animal welfare standards in IC hunts. The problem herein lies in the nature of seal hunting, and how to introduce more “humane” hunting methods. The difficulty of improving

animal welfare conditions in seal hunts has been acknowledged by the EU in the preamble to Regulation (EC) No. 1007/2009, recital 11:

Although it might be possible to kill and skin seals in such a way as to avoid unnecessary pain, distress, fear or other forms of suffering, given the conditions in which seal hunting occurs, consistent verification and control of hunters' compliance with animal welfare requirements is not feasible in practice or, at least, is very difficult to achieve in an effective way, as concluded by the European Food Safety Authority on 6 December 2007.

Further, as regards traditional Inuit hunts, which involve hunting methods often regarded as especially cruel by the general public, it might prove even more difficult to reconcile the IC exception with the objective of addressing animal welfare concerns. For instance, one especially offending hunting method used by the Inuit, known as “netting,” i.e. trapping seals with nets under water, causing the animals to slowly drown, would undoubtedly be on top of the list of issues to be addressed in order to improve the animal welfare aspects of IC hunts.⁴¹

Overall, the IC exception constitutes a significant carve-out from the general ban and undermines efficient protection of seal welfare. There is no doubt that a total ban on seal products, covering products originating from both “commercial” as well as IC hunts, would have been unproblematic to justify for the purpose of improving animal welfare conditions. Nevertheless, in its present form, the EU Seal Regime does not sufficiently improve animal welfare conditions, and the current inconsistencies of the regime are in violation of WTO law.

4. Assessment and conclusion

There is a noteworthy discrepancy between the judgment delivered by the European General Court in *Inuit Tapiriit Kanatami and Others v Commission* and the reports by the WTO Appellate Body in *EU – Seal Products*. In the former case, the General Court had no difficulty establishing that Regulation (EC) No. 1007/2009 is well suited to address consumer animal welfare concerns. But what the judgment lacks, is a critical assessment of whether the general ban, with its generous exception for seal products originating from IC hunts, *in practice*, constitutes an appropriate legal measure to address animal welfare concerns.

In light of the report of the AB in *EU – Seal Products*, there is good reason to question the efficiency and also the legitimacy of Regulation (EC) No. 1007/2009. Two arguments show that the partial ban has not substantially improved the functioning of the internal market by eliminating EU public animal welfare concerns.

Firstly, as pointed out by the AB, the EU Seal Regime leaves generous leeway for seal products to enter the European market under the IC exception. Drawing on the assumption laid down by the AB that seal products originating from IC hunts and “commercial” hunts raise the same moral quandaries, regulatory intervention by the European legislature offers little or no reassurance to consumers that undesired seal products have been completely removed from the market. Ample market access for IC products, as well as the free movement clause in Regulation (EC) No. 1007/2009,

which requires all EU Member States to allow the marketing of seal products in compliance with the IC exception, even in states where all seal products were previously banned, gravely undermine the objective of efficiently reassuring consumers that offending seal products have been removed.

Secondly, it is submitted that the current partial ban on seal products, is difficult to reconcile with the principle of subsidiarity. The essence of the principle of subsidiarity is that regulatory action at EU level must be considered and justified in light of the regulatory possibilities at national level.⁴² Under the present circumstances, the EU Seal Regime does in fact *liberalise and promote* trade in seal products covered by the IC exception, which significantly undermines the objective of diminishing animal welfare concerns in all EU Member States. If the EU were truly concerned about seal welfare, it would be more appropriate to ban seal products entirely, or, alternatively, admit that national legislators are in a better position to address this issue than the EU legislature.

In conclusion, it is argued that the present general EU ban on seal products does not promote animal welfare with sufficient efficiency to be justified under European and international trade law. If the EU wishes to take the protection of animal welfare seriously, the “easy” solution would be to ban the marketing of all seal products. However, doing so, would remove a means of livelihood for the Greenlandic Inuit, which would most certainly create controversy. A second option is to repeal the Seal Regime in its entirety, and let Member States decide for themselves whether to ban or allow seal products.

NOTES

1. Robert L. Howse and Joanna Langille, “Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Permit Trade Restrictions Justified by Noninstrumental Moral Values,” *Yale Journal of International Law* 37 (2012): 379–81.
2. Regulation (EC) No. 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products, O.J. 2009, L 286/36.
3. The term the “EU Seal Regime” is used by the WTO Appellate Body in *EC - Seal Products*, see WTO Appellate Body Reports: European Communities Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS400/AB/R (May 22, 2014) and European Communities Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS401/AB/R (May 22, 2014), and refers to both Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products, O.J. 2009, L 286/36 and Commission Regulation (EU) 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, O.J. 2010, L 216/1. The term the “EU Seal Regime” is used throughout this article with the same meaning.
4. Case T-526/10, *Inuit Tapiriit Kanatami and Others v Commission*, not yet reported in ECR-I. The judgment of the General Court has been appealed before the Court of Justice, Appeal Case C-398/13 P, *Inuit Tapiriit Kanatami and Others v Commission*, not yet decided.
5. Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, 47–390.
6. WTO Appellate Body Reports: *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R (May 22, 2014) and *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS401/AB/R (May 22, 2014).

7. Case T-526/10, *Inuit Tapiriit Kanatami and Others v Commission*, not yet reported in ECR-I, paras. 22–26.
8. *Ibid.*, para. 26.
9. Derrick Wyatt, “Community Competence to Regulate the Internal Market,” in *50 Years of the European Treaties: Looking Back and Thinking Forward*, ed. Michael Dougan and Samantha Currie (Oxford: Hart, 2009), 119–20.
10. Case C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419.
11. Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, O.J. 1992, L 213/9.
12. For an insight into the legislative history of the Tobacco Advertising Directive and a comprehensive analysis of Case C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419, see Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms*, 4th ed. (Oxford: Oxford University Press, 2013), 605–9.
13. Case C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419, para. 99.
14. Case T-526/10, *Inuit Tapiriit Kanatami and Others v Commission*, not yet reported in ECR-I, para. 35.
15. *Ibid.*, para. 39 with further reference to recitals 6–8 in the preamble to Regulation (EC) No 1007/2009.
16. Case T-526/10, *Inuit Tapiriit Kanatami and Others v Commission*, not yet reported in ECR-I, para. 26.
17. Barnard, *The Substantive Law of the EU*, 658–9.
18. Directive 2009/48/EC of the European Parliament and of the Council of 18 June 2009 on the safety of toys O.J. 2009, L 170/1.
19. Case T-526/10, *Inuit Tapiriit Kanatami and Others v Commission*, not yet reported in ECR-I, para. 39 with further reference to recitals 6–8 in the preamble to Regulation (EC) No 1007/2009.
20. Case T-526/10, *Inuit Tapiriit Kanatami and Others v Commission*, not yet reported in ECR-I, para. 56 with further reference to recital 8 in the preamble to Regulation (EC) No 1007/2009.
21. Case T-526/10, *Inuit Tapiriit Kanatami and Others v Commission*, not yet reported in ECR-I, paras. 39–40.
22. *Ibid.*, paras. 87–92.
23. *Ibid.*, para. 92.
24. *Ibid.*, para. 88.
25. *Ibid.*, para. 45 [emphasis added].
26. *Ibid.*, para. 46. The exception for seal products obtained from seals hunted by Inuit or other indigenous communities is conveniently referred to by the WTO Appellate Body as the “IC exception.”
27. WTO Appellate Body Reports: *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R (May 22, 2014) and *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS401/AB/R (May 22, 2014).
28. *Ibid.*, para. 5.131.
29. Case T-526/10, *Inuit Tapiriit Kanatami and Others v Commission*, not yet reported in ECR-I, para. 35.
30. WTO Appellate Body Reports: *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R (May 22, 2014) and *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS401/AB/R (May 22, 2014), para. 5.142.

31. Ibid., para. 5.320.
32. Ibid., paras. 5.322–5.328.
33. Ibid., para. 5.324.
34. Ibid., para. 5.325.
35. Ibid., para. 5.326.
36. Commission Regulation (EU) 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, O.J. 2010, L 216/1, Article 6.
37. WTO Appellate Body Reports: *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R (May 22, 2014) and *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS401/AB/R (May 22, 2014), para. 5.337.
38. Ibid., para. 5.330.
39. Ibid., para. 5.320.
40. Rob Howse, Joanna Langille, and Katie Sykes, “Sealing the Deal: The WTO’s Appellate Body Report in EC – Seal Products,” *American Society of International Law* 18, no. 12 (June 4, 2014). <http://www.asil.org/insights/volume/18/issue/12/sealing-deal-wto%E2%80%99s-appellate-body-report-ec-%E2%80%93-seal-products> (accessed March 24, 2015).
41. On Inuit hunting methods, see WTO Appellate Body Reports: *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R (May 22, 2014) and *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS401/AB/R (May 22, 2014), para. 5.240.
42. See Article 5 of the Treaty on European Union, OJ C 326, 26.10.2012, 13–390.