Nikolas Sellheim

LEGISLATING *the* BLIND SPOT

The EU seal regime and the Newfoundland seal hunt

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Abstract

In September 2009 the European Union adopted Regulation 1007/2009 on trade in seal products (Basic Regulation) due to concerns over the welfare of seals in the non-indigenous commercial seal hunts, particularly in Canada. Throughout the policy-making process these moral concerns were a crucial element of the political will to bar seal products from the EU market. Also research carried out as part of the preparatory works leading to the Basic Regulation appeared to support the claim that the seal hunt, unless conducted by indigenous communities, is cruel and unnecessary, calling for a legislative response in the European Union.

This dissertation screens the legislative process of the EU seal regime and considers in how far problem identification, goal setting and goal attainment are streamlined. Throughout this thesis it becomes obvious that also the claim of a European 'moral concern' is ambiguous although the Union successfully defended the regime under the 'moral exception' clause in international trade law. Even though animal welfare in general can be regarded as a Community value, the EU seal regime cannot be linked to other EU animal welfare laws as the regime does not have an impact on animal welfare in the seal hunts. Instead, the dissertation shows that, although the seal regime appears to be based on 'objective' scientific knowledge, it is based on an inherently biased approach towards the non-indigenous seal hunts.

Indicative for the neglect of remote coastal communities in which the seal hunt is carried out is the lack of recognition of its socio-economic and cultural value for the people involved in it. Based on ethnographic fieldwork in a seal hunting community and in the processing industry this dissertation shows how closely interlinked the seal hunt at sea is with the social fabric on land. Indeed, a lack of knowledge on conditions in the sealing industry existed prior to the seal regime's adoption although its impacts were expected to be drastic. In spite of this gap in knowledge the regime was adopted.

To my children.

Acknowledgements

Now I'm in the very final stages of writing a dissertation in law. Who would have guessed? I certainly would not and it is still somewhat unbelievable. But after all, this project took several years and without the continuous support of my colleagues, friends and family none of this would have materialised.

A special 'thank you' goes to my supervisors Prof Timo Koivurova and Prof Florian Stammler. Since our first meeting in 2007 when I came to Rovaniemi as a student of the Arctic Studies Program they have been able to keep me fascinated by the wealth of knowledge the Arctic holds. But not only academically have they been in so many ways opening my eyes, also on a private level their warm-heartedness and support also in times when circumstances were a little difficult – an unavoidable fact of doctoral research – are exemplary.

It is almost impossible to write an 'Acknowledgements' section without possibly making one or the other feel left out. In advance I would like to apologise for that and make clear that even the smallest means of support that I received throughout the time of my research have not gone unnoticed. So, bear with me when I stay in the geographical region where Timo and Florian are situated: my academic home town Rovaniemi.

I've always felt a special connection to this little town at the Arctic Circle. And the friendship and support I have experienced there are beyond recognition. Our Faculty's Dean and the leader of my doctoral programme Legal Cultures in Transnational World (LeCTra) Prof Juha Karhu and Prof Jaakko Husa deserve special mention because of their ability to guide a student without a legal background (like myself) through the multitudes of approaches to law. Of course the same goes to my fellow 'LeCTrarians' with whom I shared wonderful times and enlightening discussions. And the staff of the Arctic Centre have always made me feel welcome and as part of the family. Most notably I would like to thank the staff of the Northern Institute for Environmental and Minority Law (PYVI) with whom I not only share a history, but who have welcomed me in their homes and who have broadened my personal and academic horizons on numerous levels. The same can be said about my unofficial 'third supervisor' Prof Lassi Heininen who has supported the exposure of my research through his continuous support to get it into important conferences and seminars. His travel symposium, *Calotte Academy*, is legendary.

But there are two persons in Rovaniemi without whom my almost monthly visits would have been impossible: first of all, throughout the duration of my doc-

toral research and without hesitation Jussi Korpi let me stay in his home, 'Hotel Korpi,' whenever I needed to. My gratitude for this cannot be put into words. His home became mine and for a week or more during each trip we became roommates. Thank you, Jussi! Also my 'sister' Raisa Lehtola cannot go unmentioned here. Because her home has always been mine and a visit to the outskirts of Rovaniemi during each stay has always been a precondition.

A fundamental element of the research conducted for this dissertation relies on empirical data collected in sealing communities and in the processing sector in Newfoundland, Canada. First and foremost I express my gratitude to the sealers and industry workers who shared their homes and their lives with me: Dion Randell and the crew of *Steff&Tahn*, Bud and Selma Randell, Rex Hart, Keith Rogers, Hilary Haynes and all others at *Carino Processing Ltd.* But one cannot just go to Newfoundland, join a sealing vessel or work in the industry. The preparation and practical dimensions of my trips to Newfoundland would have never been possible without the continuous support of Dion Dakins who was responsible for providing accommodation, transportation and contacts for a smooth conduct of my field research. I cannot thank him enough. Also Frank Pinhorn played a crucial role in getting in touch with sealers and establishing trust. Jim and Sharron Winter on the other hand always had a 'bunk' and a glass of rum available in St. John's when I needed it. Thank you! John Gillett has always been available when I needed advise on specific issues. Through a continuous exchange of points of views, discussions, disagreements and common interests, also the seal hunting culture on the Magdalen Islands became better understandable to me although I was not able to visit them. Gil Thériault and Yoanis Menge played a fundamental role in this while Pierre-Yves Daoust provided insight into the animal welfare aspects of the seal hunt.

Of course an article-based dissertation needs plenty of commenting and language checking. Victoria Sweet, Eleanor Fuchs, Cécile Pelaudeix and Brian Roberts helped a great deal with regard to content and language in my articles. But the largest chunk of language checking was certainly with Dr Ian Stone, the Editor of *Polar Record* at the Scott Polar Research Institute, who proof-read the synthesis and who has helped me a great deal in navigating with, and through, the English language. Also Diana Wallis, Johan Svalby and the different information services and secretariats (EU Information Service, European Food Safety Authority, European Economic and Social Committee, Department of Fisheries and Oceans, North Atlantic Marine Mammal Commission, International Whaling Commission, Fur Institute of Canada, Statistics Greenland) must be thanked. Moreover, the countless interview partners for structured, semi-structured and unstructured interviews that I met along the way must be thanked. All have been invaluable sources of information.

And now is also the time to thank my mother for her continuous support over the years. This dissertation marks the end of a journey that has lasted some time –

to say the least. Especially when my 'Arctic career' started, she was there to provide assistance of all different kinds. Thank you very much! Luckily, my mother was not alone in having to stand my constant talks about seals and sealing. My sister and brother have also been very good listeners and avid discussants apart from giving me motivation and mental support when it was needed.

But the biggest 'thank you' goes of course to my wife Heli who has stood by my side throughout this dissertation and endured the countless hours of me sitting in front of my home computer yet without being home really. Also the constant trips up north and abroad would not have been possible if it had not been for her understanding for what I do. Without her and without our beloved children who saw the light of day during the course of this dissertation, life would only be half as wonderful. If it was even wonderful at all. Also my in-law-family and all my friends near and far must be thanked.

And to all family and friends I'd like to say this: I'm sorry I've been talking about seals so much. But at least I think you are all seal experts now.

Lahti, in the spring of 2016

Acronyms

AB	Appellate Body of the World Trade Organization
AC	Arctic Council
AG	Advocate General
AGRI	Committee on Agriculture and Rural Development of the European Parliament
AHDR	Arctic Human Development Report
CAD	Canadian Dollars
CBD	Convention on Biological Diversity
CCAS	Convention for the Conservation of Antarctic Seals
CCPFH	Canadian Council of Professional Fish Harvesters
CETA	Comprehensive Economic and Trade Agreement between Canada and the EU
CoE	Council of Europe
COSS	Committee on Seals and Sealing
COWI	Consultancy within Engineering, Environmental Science and Economics
CSA	Canadian Sealers Association
DFO	Department for Fisheries and Oceans Canada
DG	Directorate General of the European Commission
DSB	Dispute Settlement Body of the World Trade Organization
DSP	Dispute Settlement Process of the World Trade Organization
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
EEC	European Economic Community
EEZ	Exclusive Economic Zone
EFSA	European Food Safety Authority
EFTA	European Free Trade Agreement
E(U)GC	European General Court
ENVI	Committee on the Environment, Public Health and Food Safety of the European Parliament
EP	European Parliament
EU	European Union
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
HELCOM	Helsinki Commission / Baltic Marine Environment Protection Commission
HSI	Humane Society International
HSUS	Humane Society of the United States
IC	Indigenous communities
ICC	Inuit Circumpolar Council

ICES	International Council for the Exploration of the Sea
ICNAF	International Commission for the Northwest Atlantic Fisheries
ICRW	International Convention for the Regulation of Whaling
IFAW	International Fund for Animal Welfare
IGC	Intergovernmental Conference
IMCO	Committee on Internal Market and Consumer Protection of the European Parliament
INTA	Committee on International Trade of the European Parliament
IPM	Interactive Policy Making
ITK	Inuit Tapiriit Kanatami
IUCN	International Union for the Conservation of Nature
IVWG	Independent Veterinarians Working Group
JURI	Committee on Legal Affairs of the European Parliament
MEP	Member of the European Parliament
MMPA	Marine Mammal Protection Act
MMR	Marine Mammal Regulations
MRM	Marine Resource Management
NAFO	North Atlantic Fisheries Organization
NGO	Non-governmental organisation
PECH	Committee on Fisheries of the European Parliament
PETA	People for the Ethical Treatment of Animals
PPM	Process and Production Method
TAC	Total Allowable Catch
TEC	Treaty on European Community
TEU	Treaty on European Union
TFEU	Treaty on Functioning of the European Union
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
WCED	World Commission on Environment and Development
WTO	World Trade Organization
WWF	World Wildlife Fund

PART I – INTRODUCTION

1. General introduction

Hunting animals has been the most crucial element for human development and survival throughout history. Through domestication, farming and with the emerging industrialisation of western societies and its associated industrialised farming technologies, the hunt for survival has, especially in Europe and in North America, declined. Small-scale deer hunting in Germany, bird hunting in Finland or fox hunting in the United Kingdom have instead replaced the hunts based on which societies sustained themselves while large-scale abattoirs and intensive mass animal farming now reduce modern societies' hunger for meat and leather.

Only rarely is the public able to gain an insight into the conditions of these mass farming facilities. With our lifestyles of comfort and supermarkets that offer everything we hardly challenge ourselves, our practices and our culinary preferences to a degree that urge policy makers to act in order to initiate feasible and directly applicable legislative change.[1]

There are people in these industrialised countries that do pursue a different lifestyle. There are people that conduct large-scale hunting for a living. And there are people who have been exposed to significant public pressure and scrutiny with regard to their actions: the seal hunters of the Canadian East Coast, most notably on the island of Newfoundland. For decades their hunting practices and the necessity of the hunts have been the subject of campaigns to shut it down followed by legislative responses in the form of trade or import bans.

This dissertation explicitly focuses on one trade ban which was adopted as a direct result of perceived animal welfare shortcomings in the Newfoundland seal hunts: the seal regime of the European Union, adopted in 2009 and consisting of Regulation 1007/2009 on trade in seal products (henceforth referred to as 'Basic Regulation')[2] and Commission Regulation 737/2010 on implementing measures

1 This is of course not to say that there is no public outcry and no legislative response over rearing conditions in mass farming. The public's reaction, however, does not imply a wish for significant lifestyle-changes.

2 Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products (OJ L 286, 31.10.2009, p. 36–39).

(henceforth called 'Implementing Regulation').[3] As a characteristic similar to that of its predecessor, Council Directive 83/129/EEC of 1983,[4] the hunts conducted by Inuit and other indigenous communities are to be exempted from any barring measure in order to protect indigenous livelihoods.

In spite of this Inuit or indigenous exemption, Inuit, seal traders, processors and hunters unsuccessfully attempted to annul the seal regime to continue trading with European trading partners by initiating legal proceedings before the European Courts, i.e. the General Court and the Court of Justice. Moreover, Canada and Norway initiated the dispute settlement process (DSP) of the World Trade Organization to overturn the regime with only partial success. Especially the regime's adverse effect on Inuit livelihoods played an important role in these legal proceedings.[5]

Both discursively and legally, however, little mention is being made of the people involved in the Newfoundland, the so-called 'commercial', seal hunt and in the processing industry, the group of people most directly affected by changes in legislation and markets and most directly subject to psychological and physical attacks.[6] The 'commercial' seal hunters stand in contrast to indigenous hunters and their perceived 'subsistence' or 'traditional' hunts. While the latter is always linked to indigenous cultures, the former is merely linked to economic benefit devoid of a cultural contextualisation. As a consequence, a commonly found distinction is

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3 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 (OJ L 216, 17.8.2010, p. 1–10).

4 The so-called 'Seal Pups Directive' which bans the trade in skins stemming from harp and hooded seal pups (Council Directive 83/129/EEC of 28 March 1983 concerning the import into Member States of skins of certain seal pups and products derived therefrom (OJ L091, 9.4.1983, p.30–31)).

5 See for example ITK/ICC (Canada). Statement from the Inuit of Canada to EU Parliament concerning proposed EU-wide seal ban (4 May 2009), URL: https://www.itk.ca/media/statement/itkicc-canada-statement-inuit-canada-eu-parliament-concerning-proposed-eu-wide-seal (accessed 26 September 2014).

6 Hate mail towards sealing advocates, seal hunters, the political arm of the sealing industry as well as their families is a commonly found element of the seal dispute. Interview partners reported of phone calls, letters and emails and provided me with some received hate mail. For instance, an email received by a sealing representative after the death of four sealers in an accident in 2008 reads:

"I am so happy to hear of the deaths of 4 sealers on Saturday March 29, 08; although, it was a tragedy that more of them, if not all, were not killed in this fortunate accident. I'm sure many Canadains [*sic*] and other people from all over the world were very happy to receive this news too :) I can definitely sleep better tonight knowing that some of the most disgusting, barbaric, uncivilized 'human being' [*sic*] have been taken off the planet. Hopefully, these uncivilized horrible hunts will end, as it makes Canada appear to be nothing more than a 3rd world country…… how awful!!!!" (Field notes, April, May and November 2013; Sealing industry representative, personal communication 24 October 2013, email).

based on ethnicity, meaning that 'commercial' is linked to non-indigenous hunts and 'subsistence/traditional' to indigenous hunts. Throughout this dissertation the term 'commercial seal hunt' is used to refer to seal hunts that in the discourse are carried out by non-indigenous hunters, in particular on Canada's East Coast, even in spite of the highly cultural elements linked to this hunt. Given the fact that the hunt is carried out on small boats of only up to 65 ft (ca. 20 m), the term 'commercial' is somewhat misleading as the hunt is of a rather small-scale, livelihood-based nature that aims at sustaining everyday life than a large-scale, factory-like hunt with the sole aim of maximising profit. In general, little other than the tabloid knowledge provided by seal hunt opponents is known of the living conditions in sealing communities, in the processing industry and of the conditions within the seal hunt itself.

This dissertation aims to contribute to filling these gaps. It furthermore links empirical data with the EU seal regime and the narratives that have spun throughout its legislative process. Indeed, no dissertation is a concluding work and it would not come as a surprise that upon completion of this dissertation more questions have emerged than have been answered. In other words, there is a significant need for more research especially with regards to the empirical data collection carried out for this thesis.

2. Background of the dissertation

The emergence of the topic of this dissertation started with rumours in late 2010. At that time I was working for two different projects, the Arctic Footprint and Policy Assessment (AFPA) project[7] that was commissioned by the European Commission's DG Environment, and a project for the European Parliament which assessed the legal competencies of the EU in the Arctic.[8] Throughout the work on these projects the issue of the recently adopted seal ban emerged on several occasions and both projects touched upon the issue. Cavalieri et al. for instance, note that "[t]he adoption process for the EU seal regulation showed that there are no permanent venues for indigenous peoples from within or outside the EU or the

7 Cavalieri, S., E. McGlynn, S. Stoessel, F. Stuke, M. Bruckner, C. Polzin, T. Koivurova, N. Sellheim, A. Stepien, K. Hossain, S. Duyck and A. E. Nilsson. *EU Arctic footprint and policy assessment – Final report.* Berlin: Ecologic Institute (2010). URL: http://arctic-footprint.eu/sites/default/files/AFPA_Final_Report.pdf (accessed 8 October 2014).

8 Koivurova, T., K. Kokko, S. Duyck, N. Sellheim and A. Stepien. *EU competencies affecting the Arctic.* Brussels: European Parliament (2010). URL: http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/433793/EXPO-AFET_ET(2010)433793_EN.pdf (accessed 8 October 2014). The results of this study were furthermore published as Koivurova, T., K. Kokko, S. Duyck, N. Sellheim and A. Stepien. "The present and future competences of the European Union in the Arctic." *Polar Record* 48 (4) (2012), 361–371.

EEA to enable them to be meaningfully consulted on EU activities potentially affecting their livelihood and environment."[9] Koivurova et al. remark that "the ban on the marketing of seal products reveals the parties' lack of knowledge and supports the case for increasing cooperation between them and stronger involvement of the EU in Arctic governance." However, cooperation appears to be limited to merely the Arctic's indigenous peoples.[10]

The rumour that attracted my attention and in essence yielded this dissertation's focus on the commercial sealing industry was that the court cases before the EU Courts that were continuing at that time resulted in a suspension of the coming into force of the ban on trade in seal products. It was October 2010 and the official coming into force date of the ban, as stipulated in the implementation regulation, was 20 August 2010. So, was the trade ban in force or not? I was able to clarify with the EU Information Service that there may be a suspension on article 3 (1) – conditions for placing on the market – for those involved in the court cases, depending on the ruling of the President of the General Court after having heard all parties.[11] Ultimately, this suspension did not take place. But in the discussions with my colleagues, the vexation of the Inuit over this ban surfaced frequently. Especially a conversation with my supervisor Prof Timo Koivurova unveiled that when the Inuit are already aggravated about the ban, even in light of their exemption from the ban, how would non-Inuit, commercial sealers feel?

My perception on the seal hunt and the seal regime underwent dramatic changes from then on. I started to look more closely into the presentation of the seal hunt, looked into how, in very general terms, sealers are considered and in how far the discourse takes the human side of the seal hunt into consideration. It quickly became obvious that the human and cultural value is only connected with Inuit seal hunts – both in EU as well as Arctic deliberations. I conducted very superficial research on the non-Inuit seal hunt in early 2011 and was not able to find any peer-reviewed study on the socio-economic significance of the hunt for those communities conducting it. So upon what did EU policy-makers then base their judgement? And why does public discourse never mention commercial sealers, apart from being 'barbaric'?

9 Cavalieri et al., *supra* note 7, at 97.

10 Koivurova et al. 2012, *supra* note 8, at 362, 368.

11 EU Information Service, personal communication, 22 October 2010, email.

3. Research questions

The above led to the decision to write a doctoral dissertation on the issue with these questions in mind with EU Regulation 1007/2009 on Trade in Seal Products and its Implementing Regulation, Commission Regulation 737/2010, at its very core. The analysis of the seal regime, however, could not be confined to the actual laws themselves, but needed to significantly focus on the regime's preparatory works, *travaux préparatoires*, and the reflection of discourses, knowledge(s) as well as legal, environmental and cultural contexts.[12]

The primary research question, therefore, is:

> Is the EU seal regime based on, and responding to, objective knowledge on the seal hunt?

Addressing this question cannot occur in a single-file manner, but taking into account the human dimension of the seal hunt a two-tiered analysis is necessary. Consequently, the dissertation addresses two non-hierarchical questions that constitute the primary research objective:

> *What is the goal of the EU seal regime and how has it been communicated, addressed and implemented?*
>
> *How does the EU seal regime consider, reflect and respond to socio-economic contexts in sealing communities in Canada*?

The second question of the analysis requires some explanation and it must be asked why the EU *should* have considered and responded to socio-economic contexts in Canadian sealing communities in the first place. In principle, the European Union is not required to consider sealing communities – indigenous or non-indigenous – in the seal regime as it concerns merely the EU's internal market and is thus geared to the benefit of the EU's competitive environment. To exemplify this

12 This, in essence, corresponds to applied legal practice also within the European Courts when the preparatory works that lead to the adoption of a contested legal act undergo screening to determine its legal value (See for example the opinion of the Advocate General in *Quelle Schickedanz v Oberfinanzdirektion Frankfurt am Main*, Case C-80/96 [1997], ECR I–125). Also within the context of the WTO the *travaux préparatoires* in *EU – Seal Products* play a fundamental role in the reports of the Panel and the Appellate Body (*European Communities – Measures prohibiting the importation and marketing of seal products. Reports of the Panel,* WT/DS400/R, WT/DS401/R 25 November 2013 (2013); *European Communities – Measures prohibiting the importation and marketing of seal products. Reports of the Appellate Body,* AB-2014-1. AB-2014-2, 22 May 2014 (2014).

approach further, a glance at the EU's migration policies appears useful: unless the migrant is protected under the 1951 Refugee Convention,[13] Member States do not take the benefits to migrants into account, but evaluate them based on the benefits for a Member State's populace.[14]

Notwithstanding, the EU's reputation as a protector of human rights is surely impeded if no recognition of the Inuit or other indigenous people in the legislative process had occurred. While only three EU countries, Denmark, Netherlands and Spain, are parties to the Indigenous and Tribal Peoples Convention[15] and the EU itself is not, it is not legally bound to its clauses, for instance regarding free and prior informed consent. At the same time, the EU is a vocal supporter of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).[16] While not legally binding, it holds important provisions regarding the inclusion of indigenous peoples in matters affecting them, such as a ban on trade in seal products. To this end, Recital 14 of the Basic Regulation recognises the UNDRIP, making it an important soft law instrument for legally recognising indigenous sealing communities in Canada within the policy-making process of the EU seal regime.[17]

The situation with non-indigenous sealing communities is quite different and no international legal instrument exists that, either by hard or soft law, requires the EU to recognise them. Surely, an analysis of the human rights dimension would shed light on potential legal requirements for the EU to recognise non-indigenous sealing communities. This, however, would go beyond the purpose of this study, as explained below.

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13 Convention relating to the Status of Refugees of 28 July 1951, as amended (189 UNTS 150).

14 Aykaç, Ç. E. "What space for migrant voices in European anti-racism?" In Delanty, G., R. Wodak and P. Jones (editors). *Identity, belonging, and migration.* Liverpool: Liverpool University Press (2008), 120–133; Especially in asylum and refugee law the question of how to protect and for whose benefit has been an issue of academic debate for centuries. Dating back to Hugo Grotius in the 17th century, different arguments pertaining to interests, perspectives and notions of over- and underprotecting refugees and the nation state have been raised. As such, however, although in the European Union very liberal migration policies prevail – as reflected in the 'Freedom of movement clause' in Article 45 TFEU or the Schengen Treaty – the interest of the nation state prevails over the interest of the migrants themselves. In other words, the nation state maintains the right to deport those that harm national society (see Price, M. E. *Rethinking asylum. History, purpose, and limits.* Cambridge: Cambridge University Press (2009)).

15 Convention concerning Indigenous and Tribal Peoples in Independent Countries of 27 June 1989, C169 (328 UNTS 247).

16 United Nations Declaration on the Rights of Indigenous Peoples, Sixty-first session, A/61/L67 (13 September 2007).

17 While this may be the case, during the preparatory process the UNDRIP was not mentioned in the documents and first appears in the Basic Regulation.

This being said, the legal requirement to consult stakeholders is manifest in article 11.3 of the Treaty on European Union (TEU)[18] which requires the Commission to "carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent." It can be argued that this provision constitutes the basis for an appropriate consideration, reflection and response of a policy towards those directly impacted by it. Given this legal requirement, Canadian sealers, indigenous and non-indigenous, should indeed be part of the consultation processes as they are directly affected by the policy. Moreover, the European Union is currently developing its stand-alone strategy on the Arctic region. Thus far, the EU's Arctic policies have comprised different resolutions, communications and conclusions. All, however, stress the need for knowledge on Arctic living conditions, the protection of Arctic local and indigenous livelihoods as well as close cooperation and communication with Arctic communities. In this sense, if the EU had included the interests of *all* (sub-)Arctic sealing communities in the policy-making process, its legitimacy as an Arctic actor among Arctic residents may have benefitted.

In light of the above it appears reasonable to assume that the interests of those consulted are, at least to some degree, reflected in both the policy-making process and ideally in the final legal act. In how far that has occurred shall be examined in Part VI, Section 4.

4. The structure of the thesis

4.1. The articles

The dissertation contains five distinct articles with one particular topic each. Given the multidisciplinarity of the thesis this approach was favoured over a monograph. Each article has been published in a peer-reviewed international journal prior to inclusion into this dissertation while following the style guide of the respective journal. The articles are reproduced with permission of the publishers. While each article addresses the research questions from different angles due to their individual standing as a topical analysis, a certain degree of overlapping was unavoidable, especially with regard to basic information on the seal hunt and the EU seal regime. Including this information followed the recommendations by the anonymous reviewers. This being said, each article addresses one or several elements of the research question and contributes to the analysis of the seal regime and its consideration of the commercial sealing industry by providing new perspectives to the overall topic.

Although the main theme of the dissertation is the underlying research basis of each article, the dissertation can be divided into three sub-themes. The first

18 Consolidated version of the Treaty on European Union (OJ C 326, 6.10.2012, p. 1–390).

sub-theme is the legislative process of the current seal regime. Two articles focus extensively on different elements of the preparatory works, and their consideration of the commercial sealing industry: 'The neglected tradition? The genesis of the EU seal products trade ban and commercial sealing'[19] constitutes an analysis of the different steps of the preparatory process leading up to the adoption of the Basic Regulation in September 2009. Also 'Policies and influence. Tracing and locating the EU seal products trade regulation'[20] takes the drafting process under closer scrutiny and analyses the problems and actors involved in the process as well as the applied practices. It furthermore touches upon the seal regime's location within environmental regime contexts.

The second sub-theme of the dissertation is the degree of outward direction of the seal regime itself. Here, the question on the regime's goals and its goal attainment capabilities are addressed. The article 'The goals of the EU seal products trade regulation: from effectiveness to consequence'[21] focuses on the Basic Regulation and in how far the goals that were addressed during the *travaux préparatoires* are addressed and implemented in the final legislation. It also takes up the EU's ambitions in the Arctic by linking the ban with European Union documents pertaining to the Arctic region. The article appraises the effectiveness of the seal regime with regard to the goals identified.

The adjudication of the seal regime is the primary focus of the article '"Direct and individual concern" for Newfoundland's sealing industry? When a legal concept and empirical data collide.'[22] Here two disciplines are merged, legal studies and anthropology. The externality of the EU seal regime, meaning its impact on workers in Newfoundland's sealing industry, is assessed by analysing the legal standing, *locus standi*, requirements in two court cases before the EU General Court (EGC) and the European Court of Justice (ECJ) that aimed to annul the ban, namely Case T-18/10 and Case C-583/11. This article therefore establishes a connection between the seal regime and the sealing industry while it shows to what degree recognition of the people in the industry occurs or not. Ethnographic research, the third sub-theme of the dissertation, is consequently fundamental in establishing this link.

19 Sellheim, N. "The neglected tradition? The genesis of the EU seal products trade ban and commercial sealing." *The Yearbook of Polar Law* 5 (2013), 417–450 at 428.

20 Sellheim, N. "Policies and influence. Tracing and locating the EU seal products trade regulation." *International Community Law Review* 17 (2015a), 3–36 at 8.

21 Sellheim, N. "The goals of the EU seal products trade regulation: from effectiveness to consequence." *Polar Record* 51 (258) (2015b), 274–289.

22 Sellheim, N. "'Direct and individual concern' for Newfoundland's sealing industry? When a a legal concept and empirical data collide." *The Yearbook of Polar Law* 6 (2015c), 466–496.

In order to address the research question in a satisfactory manner, first-hand ethnographic data was collected in the seal hunt and in a sealing community in Newfoundland. The analysis focuses on the normative role of the sea and the seal for the people involved in the hunt and the socio-economic importance of the hunt for the community. The findings of the field research have been compiled in the article 'Morality, practice and economy in a commercial sealing community.'[23] The findings are contextualised with a broader understanding of exogenous forces shaping the moral and socio-economic fabric of a sealing community. Leaving the legal field, therefore, this ethnography engages in a discussion on affordances, values and economics of the community in which research was conducted.

4.2. The synthesis

The synthesis to the dissertation brings together the research findings of the articles in order to allow for a conclusion on the objectivity of the EU seal products trade regime. However, several issues could not be addressed in the articles themselves but are crucially important for adequately dealing with the topic. To this end, the synthesis is divided into three parts.

Part II, *Objectivity, morality and international trade*, touches upon the issue of 'objectivity' as it is applied throughout this thesis while delving into the legal reflection of the concept of 'morality,' both in European Union law as well as international trade law. Addressing this is important for two reasons: first, the EU seal regime was adopted in order to "to respond to the animal welfare concerns expressed by members of the public as to the possible introduction into the Community of seal products obtained from seals that might not have been killed and skinned without causing avoidable pain, distress and other forms of suffering."[24] In other words, moral concerns over the methods of the seal hunts served as the prime incentive for the adoption process. Second, the 'moral concern' clause was successfully defended before the Dispute Settlement Body of the WTO, with the Appellate Body's (AB) final report having been released only on 22 May 2014.

The synthesis also provides a brief overview of the main discursive focus of the debate surrounding the seal hunt – the harp seal (*Pagophilus groenlandicus*) in combination with a history of the sealing industry in Newfoundland. This excursion in Part III, *Seals and the seal hunt*, is necessary to deepen the understanding of the normative value of the industry for the island and to make the environmental

23 Sellheim, N. "Morality, practice and economy in a commercial sealing community." *Arctic Anthropology* 52 (1) (2015d), 71–90.

24 European Commission. Proposal for a regulation of the European Parliament and of the Council concerning trade in seal products, COM (2008) 469 final, 2008/0160 (COD), at 4, 5.

dimension of the hunt, which is in many occasions touched upon in the articles, better understandable.

The main outcomes of the work are presented in Part IV, *European legal responses to the seal hunt*. This part follows the two-tiered approach as presented earlier. This means that the articles are summarised, with the provision of additional information, under the two sub-questions of this dissertation. The outcomes of the two sub-questions are summarised in the conclusion, allowing for an evaluation of the utilisation of 'objective knowledge' in the EU seal regime. Moreover, the part provides a brief outlook into the future of the seal hunt and the seal regime as well as need for further research.

5. State of research

Ethnographic accounts on Newfoundland sealing are by and large of a descriptive nature and only one ethnographic study has thus far been undertaken. Most of the literature on the hunt is furthermore dated. Therefore, current research-based knowledge on seal hunting communities is sparse.[25]

The state of research on the current EU seal regime, which does not include the articles presented in this thesis, shows three distinctive traits, namely international trade, Inuit and indigenous peoples as well as a political sciences angle. Most of what has been written on the current seal regime relates to its international trade dimension. This is explainable due to the recently concluded dispute settlement process before the World Trade Organization's Dispute Settlement Body (DSB). This occurred primarily because of the reconciliation of justifying the EU ban on morality concerns with international trade law. This is possible through application

25 The history of the seal hunt in Newfoundland up to 1914 is depicted in detail in Ryan, S. *The ice hunters. A history of Newfoundland sealing to 1914*. St. John's: Breakwater Books Ltd (1994). Descriptive accounts on the hunt include England, G.A. *The greatest hunt in the world.* 4th printing. Montreal: Tundra Books (1924); Greene, W. H. *The wooden walls among the ice floes. Telling the romance of the Newfoundland seal fishery.* London: Hutchinson & Co. (1936); Mowat, F. and D. Blackwood. *Wake of the great sealers.* Toronto: McClelland and Stewart Ltd. (1973); Chantraine, P. *The living ice: The story of the seals and the men who hunt them in the Gulf of St. Lawrence.* Toronto: McClelland and Stewart Ltd. (1980); Dwyer, M. J. *Over the side, Mickey. A sealer's first hand account of the Newfoundland seal hunt.* Halifax: Nimbus Publishing (1998); Noseworthy, D. *Blue ice. The sealing adventures of artist George Noseworthy.* St. John's: Creative Publishers (2010); Gillett, J. *Leaving for the seal hunt. The life of a swiler.* St. John's: Flanker Press (2015); For the only ethnographic account, see Wright, G. *Swiling: An ethnographic portrait of the Newfoundland seal hunt.* M.A. thesis. St. John's: Memorial University of Newfoundland (1983). This was turned into the popular book Wright, G. *Sons & seals. A voyage to the ice.* St. John's: Institute of Social and Economic Research / Memorial University of Newfoundland (1984).

of the General Agreement on Tariffs and Trade (GATT)[26] and its article XX (a) which allows for trade barriers based on moral concerns. At the time of writing, three peer-reviewed studies on the WTO EU seals case and morality exist[27] in addition to a multitude of internet sources, such as commentaries, dealing with the issue. Focusing on the peer-reviewed articles, it becomes clear that there are strong arguments for and against the justification of the EU ban under the public morals exception of GATT article XX (a).

Pitschas and Schloemann[28] argue that the lack of an alternative to a complete ban that aims at diminishing 'inhumane' hunts justifies the application of GATT article XX (a) and therefore aligns the EU seal regime with international trade law. This stands in contrast to Nielsen and Calle[29] who argue in favour of a certification scheme, i.e. a seal regime which is based on process and production methods (PPM). In principle they do not contest animal welfare as a moral issue justifiable under the GATT, but the way the seal regime is designed can challenge its legality under international trade law. Given the absence of a mechanism in the regime which allows for non-cruelty in Inuit and marine resource management (MRM) hunts, the moral grounds of the ban appear shaky, calling for a PPM-based mechanism.[30]

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26 While originally concluded in 1947 the GATT was modified in 1994 in the so-called Uruguay Rounds, which established the World Trade Organization. Reference here is therefore made to the GATT of 1994 (General Agreement on Tariffs and Trade (GATT) of 14 April 1994 (55 UNTS 194)).

27 Howse, R. and J. Langlille. "Permitting pluralism: the seal products dispute and why the WTO should permit trade restriction justified by non-instrumental moral values." *New York University Public Law and Legal Theory Working Papers* 316 (2011), URL: http://lsr.nellco.org/cgi/viewcontent.cgi?article=1317&context=nyu_plltwp (accessed 29 September 2014); Pitschas, C. and H. Schloemann. "WTO compatibility of the EU seal regime: Why public morality is enough (but may not be necessary)." *Beiträge zum Transnationalen Wirtschaftsrecht* 118 (2012); Fitzgerald, P. L. "'Morality' may not be enough to justify the EU seal products ban: Animal welfare meets international trade law." *Journal of International Wildlife Law & Policy* 14 (2011), 85–136.

28 Pitschas and Schloemann, *supra* note 27.

29 Nielsen, L. and M. A. Calle. "Systemic implications of the EU – Seal Products case. *Asian Journal of WTO & International Health Law and Policy* 8 (2013), 41–75.

30 Nielsen and Calle do not engage in a more thorough discussion on PPMs under the WTO. As a general rule PPMs are by and large not of relevance: "[T]rade restrictions cannot be imposed on a product purely because of the way it has been produced [...]" (WTO. *Understanding the WTO.* Geneva: WTO (2011), at 66. URL: http://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf (accessed 29 September 2014)). It is thus the 'likeness' of a product, referring to the "physical nature and characteristics of the products themselves and how they relate competitively," (Fitzgerald, *supra* note 27, at 100.) which serves as a guiding principle of the WTO. In practice, however, PPMs do find application and a number of cases shows that the AB has indeed ruled taking PPMs into consideration (see Charnovitz, S. "The law of environ-

Howse and Langlille[31] consider the seal regime in full accordance with the GATT and base their primary argument on pluralism in international law. The argumentation rests on the assertion that findings of certain veterinarians of the seal hunt to be 'humane' do not go in line with findings of other veterinarians that ascribe the hunt a high degree of 'inhumanness.' The authors argue that given the multitude of global legal systems embedded in and based on different moral settings the EU is justified to impose trade barriers on products that are not in line with the morality of consumer behaviour in the Union.[32] Since the EU considers commercial seal hunting morally repellent it would therefore be justified to act on it by imposing a trade ban.

Fitzgerald[33] notes that although a ban in principle is justified under the GATT article XX (a) exception, similar to Nielsen and Calle outlined above, the inclusion of the Inuit and MRM exceptions puts the consistency with the GATT in jeopardy. He notes that "[t]he Inuit exception serves a moral purpose, namely the protection of indigenous communities, which, where in conflict, legitimately trumps – but otherwise does not question – animal welfare. The MRM exception [...] simply avoids unnecessary waste [...] and hence does not undermine the 'public morals' logic of the sales ban."[34] Fitzgerald therefore finds that the indigenous exemption constitutes a discriminatory trade barrier pursuant to article XX's Chapeau which is designed to avoid these. The Appellate Body of the WTO argues along the same lines and highlights that "the principal objective of the EU Seal Regime is to address EU public moral concerns regarding seal welfare, while accommodating IC [indigenous communities] and other interests so as to mitigate the impact of the measure on those interests."[35] It therefore "finds that the European Union has not demonstrated that the EU Seal Regime, in particular with respect to the IC exception, is designed and applied in a manner that meets the requirements of the chapeau of Article XX of the GATT 1994."[36]

Perišin[37] screens the ban under a trade perspective but takes the EU's legal competences and the regime's compliance with WTO law under closer scrutiny. In a similar vein to Nielsen and Calle as well as Fitzgerald, both on an EU as well as WTO level she takes issue with the inclusion of the indigenous exemption of

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mental PPMs in the WTO: Debunking the myth of illegality." *Yale Journal of International Law* 27 (59) (2002), 59–110).

31 Howse and Langlille, *supra* note 27.

32 *Ibid.*, at 384.

33 Fitzgerald, *supra* note 27.

34 *Ibid.,* at 22, 23.

35 *European Communities* AB Report, *supra* note 12 para. 5.167.

36 *Ibid.,* para. 6. 5.ii.

37 Perišin, T. "Is the EU seal products regulation a sealed deal? EU and WTO challenges." *International and Comparative Law Quarterly* 62 (2) (2013), 373–405.

the ban. An important observation here is that other trade measures that are based on animal welfare concerns did not hold such exemption. By referencing Council Regulation (EEC) No. 3254/91[38] ('Leghold Trap Regulation') she demonstrates that since there are no exceptions to the prohibition on leghold traps, the legal basis is justifiable both on a Union and WTO level. Since moral opposition towards seal hunting plays a pivotal role in the dispute settlement process "the EU would first have to prove that opposing seal hunts is part of its public morality. While preparatory documents support this, they also show that opposition to seal hunting is largely based on misconceptions."[39]

Beqiraj[40] analyses the court cases before the European Courts and the WTO and highlights the interrelatedness of issues addressed in the seal regime. She notes that "animal welfare still remains at the level of personal preferences and cultural choices."[41] In her study, Beqiraj touches upon the second primary course of research on the EU seal regime, namely its impacts on the rights of indigenous peoples. The concept of 'regulatory act' and 'legal standing' before the European Courts are analysed, followed by a human rights dimension that the seal regime touches upon. The difference between the systems under which the seal regime is administered makes different outcomes inevitable.

Both the trade as well as indigenous rights perspective are picked up by Hossain.[42] He argues that under WTO law the seal regime is difficult to uphold due to its failure to stand the 'necessity' test, i.e. to show that the regime is the only way to address its alleged primary objective of improving animal welfare. Without challenging the objective as such, Hossain's argument rests on the absence of PPMs, under which animal welfare in the hunts would fall, in WTO jurisprudence. Hossain further asserts that given the interlinkage of Inuit hunts and the cash economy, a trade ban in its current form deprives indigenous peoples of their rights to self-determination. Moreover, Hossain concludes that the seal regime

38 Council Regulation (EEC) No 3254/91 of 4 November 1991 prohibiting the use of leghold traps in the Community and the introduction into the Community of pelts and manufactured goods of certain wild animal species originating in countries which catch them by means of leghold traps or trapping methods which do not meet international humane trapping standards (OJ L, 9.11.1991, p. 1–4).

39 Perišin, *supra* note 37, at 403, 404.

40 Beqiraj, J. "The delicate equilibrium of EU trade measures: The seals case." *German Law Journal* 14 (2013), 279–320, URL: http://www.germanlawjournal.com/pdfs/Vol14-No1/PDF_Vol_14_No_1_279-320_Developments_Beqiraj.pdf (accessed 29 September 2014).

41 *Ibid.,* at 308.

42 Hossain, K. "The EU ban on the import of seal products and the WTO regulations: neglected human rights of the Arctic indigenous peoples?" *Polar Record* 49 (2) (2013), 154–166.

has applied an outdated notion of 'subsistence' and 'tradition.' It therefore does not correspond to international human rights standards.[43]

Cambou[44] follows up on Hossain's concerns of a breach of human rights standards and places the EU seal regime into context with the UNDRIP.[45] Through insufficient consultation during the legislative process of the seal regime and the absence of an environmental impact assessment she sees especially the principle of free, prior and informed consent breached while the seal regime encroaches significantly upon the right to self-determination. Linking the rights of indigenous peoples under the umbrella of the United Nations with the jurisprudence of the EU Courts in the *Inuit and others* court cases, Cambou shows that significant shortcomings exist in bringing EU jurisprudence and international human rights standards in unison.

The impact of the EU seal regime on the rights of Inuit in Greenland and Canada is furthermore the main theme of Elfving's[46] dissertation. In her treatise she engages in a comprehensive analysis of the economic dimension of Inuit seal hunting, their national rights to engage in the hunt and in how far their rights have been breached. She furthermore shows that despite the inclusion of an Inuit exemption in the EU seal regime, a *de facto* discrimination against Inuit has occurred due to the economic linkages between commercial and Inuit seal products, constituting a breach of WTO law. Elfving's findings concerning the incoherency of EU law and breaches of international rights of indigenous peoples mirror Cambou's assessment and challenge the feasibility of the Inuit exemption.

The third strain of research focuses on the political sciences dimension of the EU seal regime. Although focusing on the trade dimension of the seal regime, de Ville[47] argues that a violation of the WTO trade rules is based on the compartmentalisation of the EU, reflecting different sensitivities between institutions with regard to compliance to WTO rules. Although WTO compliance has emerged throughout the regime's legislative process, the weight of the European Parliament in the ordinary legislative procedure and the comparably little importance compliance has played have significantly weakened the European Commission's influence, leading to a most trade-restrictive regime.

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43 *Ibid.*, at 162, 163.

44 Cambou, D. "The impact of the ban on seal products on the rights of indigenous peoples: A European issue." *The Yearbook of Polar Law* 5 (2013), 389–415.

45 See UNDRIP *supra* note 16.

46 Elfving, S. *The European Union's animal welfare policy and indigenous peoples' rights: the case of Inuit and seal hunting in Arctic Canada and Greenland.* Unpublished doctoral dissertation. School of law, University of Surrey. Surrey: University of Surrey (2014).

47 de Ville, F. "Explaining the genesis of a trade dispute: The European Union's seal trade ban." *Journal of European Integration* 34 (1) (2012), 37–53.

Wegge[48] examines the arguments put forth in the EU decision-making process and applies four ideal types of arguments, based on the logics of consequentiality, appropriateness, arguing and justification. He shows how a shift from scientific enquiry towards values and concerns over re-election has occurred between the Commission's Proposal and the final regulation. Since the economic value of seal products on the European market was minimal, Wegge ascribes the decision-making process significant importance for understanding "dynamics of institutional decision-making" in the EU with regard to "(fundamental) principles pertaining to – *inter alia* – science, moral values and animal welfare."[49]

6. Scope and objectives of the study

Both the legislative process of the EU seal regime and the research conducted on the regime thus far show no trace of consideration of the commercial dimension of the sealing debate. In other words, empirical aspects, both with regard to the commercial sealing industry itself and in how far the seal regime affects the people involved in it, are not considered. The focus of the first research question has not been answered in a satisfactory manner as current research merely reveals that animal welfare goals have not been met, yet without further engagement in a discussion on the overarching goal(s) of the regime and its effectiveness. The focus of the second research question has not been addressed at all as the current focus, politically, legally and scientifically, lies on indigenous peoples and hunts. In this context it is important to highlight that also here no empirical research has been conducted. Instead, reliance on secondary material without first-hand ethnographic analyses shapes the findings of politicians and researchers.

This thesis engages in a further discussion on the objectivity of the EU seal regime and aims to fulfil a commonly neglected angle in the deliberations on the regime, namely its context within the non-indigenous, commercial sealing industry. Its primary objective therefore is to screen the policy-making process, the regime itself and its adjudication through a lens which focuses exclusively on the commercial sealing industry and the people involved in it. Inevitably, this objective and the scope of the dissertation have led to issues which are not addressed, but which are nevertheless highly relevant for a more comprehensive analysis of the regime.

The most significant shortcoming of this dissertation is the absence of a human rights angle towards the issue. While the adverse impacts of the seal regime on the Inuit could be considered a human rights issue especially pertaining to the rights

48 Wegge, N. "Politics between science, law and sentiments: Explaining the European Union's ban on trade in seal products." *Environmental Politics* 22 (2) (2013), 255–273.

49 *Ibid.*, at 271.

of indigenous peoples as stipulated in UNDRIP or based on article 27 of the International Covenant on Cultural and Political Rights (ICCPR),[50] the adverse impacts on non-indigenous sealers and industry workers could be screened through a property-rights lens or in the context of fundamental human rights. This being said, the human rights dimension in the political and legal contexts of the regime, i.e. the policy-making process and its adjudication under the European Courts, has not surfaced to a degree that justifies a closer analysis of European and international human rights regimes. This goes in line with the perceived precedence of assessing the role of the commercial sealing industry in the policy-making and legal deliberations over a considerably more academic analysis of human rights elements. It is however needless to say that the human rights dimension in combination with the commercial sealing industry is in need of further scrutiny.

7. Relevance

The relevance of this dissertation lies in its thorough analysis of a policy regime which has been considered as detrimental by seal hunters and as necessary by European policy makers. It sheds light on the reasons why especially the Canadian Inuit and other sealers have expressed opposition to the EU, inevitably leading to a denial of stable observer status of the EU in the Arctic Council.[51] By providing pilot empirical data on the sealing industry the human dimension of the commercial seal hunt is being included into the discourse. This is necessary if the EU wants to engage with the Arctic's population within the context of its Arctic aspirations.

While on a larger European scale the issue of the seals is certainly not on top of the political agenda, this case exposes the interplay between politics, emotion and law and in how far personal preferences *vis-à-vis* a knowledge-base become legally binding. It raises the question of whether other policies adopted by the European Union are based on misconceptions, prejudices and emotion-based understandings of specific contexts. This, of course, cannot be answered here. Moreover, as is shown in this dissertation the seal regime at first glance appears to be oriented towards problem-solving. A closer look reveals, however, that problems are not clearly identified nor strategies to solve them clearly formulated. Once again, is this regime the exception to the rule or are there other Community regimes which follow similar patterns?

50 International Covenant on Civil and Political Rights, 16 December 1966 (999 UNTS 171).

51 With the Joint Statement by Canada and the European Union on access to the European Union of seal products from indigenous communities in Canada in October 2014 Canada has officially withdrawn its opposition to EU observer status in the Arctic Council (Commission Decision of 18.8.2014 on the Joint Statement by Canada and the European Union on access to the European Union of seal products from indigenous communities in Canada (2014), para. 6).

This dissertation traces the major steps of a policy-making process. Starting from the very beginning of the legislative process, while touching upon issues prior to it, it follows the development through the different stages of the procedure and highlights the different turns the process takes. This approach enables the depiction of the different foci that resulted in a specifically shaped regime. It constitutes therefore an element in determining the different roles and weights of the European institutions in a policy-making process, making this thesis relevant for political scientists and legal scholars as well as anthropologists and social scientists alike. Also the Vienna Convention on the Law of Treaties[52] takes the *travaux préparatoires* into account as a 'supplementary means of interpretation', as stipulated in article 32. While it seems that the Vienna Convention does not pay sufficient tribute to the circumstantial developments of an act, in practice, treaty interpreters pay due regard to the drafting history and the circumstances under which it has been adopted.[53] In the case of the EU seal regime, the *travaux préparatoires* are indeed crucial for understanding the nature of the adopted regime, inevitably going beyond potential limitations of interpretation as stipulated in the Vienna Convention. Thus, for the purpose of this thesis, the *travaux préparatoires* are not to be considered merely 'supplementary means' of interpretation, but simply 'means of interpretation.' But the dissertation goes beyond the policy-making of the seal regime and also touches upon its adjudication by linking the legal concept of 'direct and individual concern' as interpreted and applied by the European Courts with the direct and individual concern of those most affected by the seal regime – workers in the sealing industry. The relevance in this case is twofold. First, it sheds new light on the role of empirical evidence and its possible argumentation before the EU Courts. Second, this dissertation is the first publication of any empirical data from the sealing industry, adding another dimension of legal impact of EU laws on certain people outside the laws' legal scope. This is of particular interest especially with regard to the EU's stakeholder consultation policy under the Union's Smart Regulation practices.[54]

The overall relevance of this dissertation therefore lies with its multidisciplinary approach towards an EU law on the one hand and the generation of new ethno-

52 Vienna Convention on the Law of Treaties of 23 May 1969 (1155 UNTS 331).

53 Mortenson, J. D. "The *travaux* of the *travaux*: is the Vienna Convention hostile to drafting history?" *The American Journal of International Law* 107 (4) (2013), 780–822; Klabbers, J. "Interpretation as the continuation of politics by other means." *Opinio Juris* (2009). URL: http://opiniojuris.org/2009/03/02/continuation/ (accessed 15 December 2015).

54 European Commission. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Smart Regulation in the European Union,* COM (2010) 543 final, 8 October 2010 (2010).

graphic data in this context. It could serve as a tool to identify stakeholders that are affected by an EU policy beyond those officially identified.

8. Approach and methodologies

The underlying methodological theory of the dissertation is that of transnationality of EU law. This means that an internal EU law, i.e. the Basic Regulation as an internal market harmonisation feature, affects peoples, people and regions outside its jurisdictional scope. The external dimension of the seal regime has already shown in its early appearances in the form of the Seal Pups Directive and the associated effects on the Inuit and sealing communities in Atlantic Canada. Throughout the legislative process of the current regime, the inclusion of stakeholders other than European organisations show its multifaceted character of transnationality as it touches upon a plethora of issues, ranging from animal welfare, environmental and cultural sustainability, economics to international trade. The inclusion of an Inuit exemption furthermore underlines the externality of this EU internal law.

While European Union law constitutes the core element of the dissertation it furthermore touches upon international environmental law, international trade law, and the rights of indigenous peoples. Yet, addressing the research questions furthermore combines several disciplines. This analysis of the EU seal products trade regime therefore goes beyond the legal but is rooted in a multidisciplinary research environment. This calls for innovative and multidimensional research methods. Consequently, the articles of this dissertation are *inter alia* based on political sciences analysing political processes within the EU, for example using Young's Institutional Diagnostics tool.[55] Furthermore, the analysis of the characteristics of the seal regime locates the policy in a context of problem-solving capabilities and thus analyses the degree of the 'problem of fit,' a common tool for the assessment of the interplay of institutions and environment. Hermeneutic and teleological analysis of EU legal and other documents served as a key method to assess discourses, trends and paradigms within European policies with regard to seal hunting and trade in seal products as well as normative perceptions of the seal hunt, such as the 'rational use' clause, in an Arctic and global legislative environment.

As shown above, the analysis of the *travaux préparatoires* of the seal regime quickly revealed that, on the one hand, empirical knowledge on the commercial seal hunt is sparse. On the other, European documents on which large parts of the

55 Young, O. R. "Building regimes for socio-ecological systems: institutional diagnostics". In Young, O. R., L. A. King and H. Schroeder (editors). *Institutions and environmental change – Principal findings, applications and research frontiers.* Cambridge: MIT Press (2008), 113–144.

Basic Regulation are built show a tilt towards basing their arguments on information provided by groups opposed to the hunt. This was reaffirmed through structured, semi-structured and unstructured interviews with key players in the sealing debate. Interview partners stemmed from the European Parliament and Commission, hunting organisations, Inuit representatives, commercial sealing industry representatives and environmental organisations.

The avoidance of a biased or a predetermined opinion regarding the significance of the commercial seal hunt in Newfoundland called for a gathering of first-hand information on the Canadian commercial seal hunt and industry, over which the controversy has, by and large, evolved. Multitemporal fieldwork of around 2 ½ months was therefore conducted in Newfoundland in April/May and November 2013 respectively based on 'participant observation:' First-hand information was gathered by actively engaging in the activities on site. 'Participant observation' is a commonly applied methodological tool for the generation of ethnographic data. During the first field trip empirical data was collected on a sealing vessel sailing from Woodstock, northern Newfoundland, during the sealing season 2013 in order to gather information on the cultural and identity-giving significance of the hunt for the hunters. Time spent in the community prior and after the hunt complements the picture. The second part of the April-field trip was conducted in southern Newfoundland, South Dildo, in the last remaining seal processing plant during the so-called 'wet season,' meaning during the time when new seal products stemming from the ongoing hunts were delivered. South Dildo served also as the basis for the November-field trip in which participatory observation was carried out in the plant and interviews with every single worker were conducted on a survey basis. That means that each worker was asked the same questions in order to get an understanding on the economic, cultural and identity-significance of the seal hunt and the sealing industry. This served further to understand the perception of the workers and communities on the role of the EU in their ability of 'fate control.'[56] The field trip was complemented by a week in one of the oldest sealing communities in Newfoundland, Twillingate, where the commercial seal hunt as well as other fishing activities have created a living cultural environment.

The outcomes of the field trips to Newfoundland were used in a two-fold manner. First, a first ethnographic account on the seal hunt and a sealing community was created, serving to fill gaps in knowledge on the hunt and its significance. Second, primarily building on the second field trip, results were put in a legal context.

56 This concept is used as an indicator in the Arctic social sciences to determine the ability to guide one's own destiny (Larsen, J. N., P. Schweitzer and G. Fondahl (editors). *Arctic social indicators – a follow-up to the Arctic Human Development Report.* Copenhagen: Nordic Council of Ministers (2010), at 129–147; Larsen, J. N., P. Schweitzer and A. Petrov (editors). *Arctic social indicators. ASI II: Implementation.* Copenhagen: Nordic Council of Ministers (2015)).

This occurred through an analysis of the judgements of the European General Court and the Court of Justice as well as the Opinion of the General Advocate in the context of the court cases to overturn the EU seal regime. It is especially the issue of *locus standi* before the courts which is the key element in this study. The notion of 'direct and individual concern' is analysed in this context using ECJ case law while empirical data from the case study of the Newfoundland sealing industry workers is used to show how the legal concept and the empirical findings contradict each other.

In light of the above it seems fair to say that this dissertation follows an "empirical-hermeneutical"[57] approach, yet without delving into legal doctrine as such. This means that the analysis of the degree of objectivity,[58] as will be shown in the following section, that led to the seal regime makes use of three methodological distinctions, as put forward by Van Hoecke: 1. It makes texts and documents its main research object which are then interpreted. It is therefore hermeneutic. 2. It is argumentative as it delves into the arguments shaping the documents which lead to a certain interpretation. 3. It is to a high degree empirical and challenges the arguments concerning their correctness based on data collected in the field. While the analysis does touch upon the fourth pillar of research, the explanatory dimension, within the policy-making process of the EU seal regime, it does not engage in a deepened discussion on *why* certain rules, perceptions or principles exist.[59]

57 Van Hoecke, M. "Legal doctrine: Which method(s) for what kind of discipline?" In Van Hoecke, M. (editor). *European Academy of Legal Theory: Methodologies of legal research: Which kind of method for what kind of discipline?* Oxford: Hart Publishing Ltd. (2011), 1–18, at 3.

58 In anthropological terms the concept of 'objectivity' is highly ambiguous as 'the truth' as such does not exist and different 'truths' compete with each other.

59 Van Hoecke (2011), *supra* note 57, at 4–7.

THE SYNTHESIS

PART II – ON OBJECTIVITY, MORALITY AND INTERNATIONAL TRADE

1. On objectivity and the law

Before presenting the findings that lead to an answering of the research questions it is necessary to delimit the scope of the thesis with regard to its engagement with 'objectivity.' First and foremost, the legal dimension of this thesis does neither engage in a solid philosophical discussion of objectivity nor in any psychological debate on the interrelationship between mind and environment.[60] Instead, it is aspired to create an account concerning the knowledge about the seal hunt and the European legal response to it. In this sense,

> [o]bjectivity can be understood in terms of the asymmetry between, on the one hand, beliefs about the facts of a domain and, on the other, knowledge of those facts. The asymmetry may be conceived of as the distance or the space that separates our thoughts from the domain in question. Such distance allows for the possibility of error: what we believe to be the case and what actually turns out to be the case may part company with one another.[61]

Therefore, this thesis is an attempt to link empirical and ethnographic data with the political and legal context in which Regulation 1007/2009 on Trade in Seal Products has developed. Following Van Hoecke's reasoning outlined above, the objectiv-

60 The only exception here is the concept of 'affordances' which serves as the primary argument of the article 'Morality, practice and economy in a commercial sealing community.' The concept was developed by James Gibson and describes an (human) animal's perception of a given element in its environment. For example, a stone can be perceived as a lifeless element, it can be perceived as a tool, an element of building a house, or a weapon. It therefore affords certain characteristics and it lies in the eye of the beholder to respond to these affordances. Gibson writes: "The affordances of the environment are what it offers the animal, what it provides or furnishes, whether for good or ill" (Gibson, J. *The ecological approach to visual perception.* Boston: Houghton Mifflin (1979), at 179).

61 Pavlakos, G. *Our knowledge of the law: Objectivity and practice in legal theory.* Oxford: Hart Publishing Ltd. (2007), at 18.

ity pertaining to the EU seal regime seems clear at first glance: the improvement of animal welfare in commercial seal hunts by banning seal products from the EU's internal market while exempting Inuit from this ban. Yet, as will be shown, "[i]t is the context, which creates the lack of 'objectivity'. In other words, the general scope of the legislative rule is a necessary, but not a sufficient condition for its 'objectivity'."[62]

While not engaging in the philosophical dimension of 'objectivity,' Hume's assertion that "[a]ll the perceptions of the human mind resolve into two distinctive kinds, which I shall call Impressions and Ideas"[63] in the sealing context cannot be disregarded. This is because of the involvement of non-state actors in the discursive, political and legal environments surrounding the seal hunt. A highly emotional debate has caused many to oppose the seal hunt and to reject its *raison d'être*. In essence, therefore, the analysis of the degree of objectivity in the preparatory works and the EU seal regime itself circles around the ontological, but predominantly epistemological objectivity of EU law makers with regard to sealing. Borrowing from Kramer, ontological objectivity describes the degree of mind-independence, determinate correctness and uniform applicability. Epistemological objectivity covers the transindividual discernability and impartiality. Yet, also the semantic objectivity, or truth-aptitude, is taken into consideration.[64]

This dissertation therefore challenges the notion of objectivity based on arguments and conclusions, as put forward by Rawls,[65] and the claim that "an 'objective' statement is one which is accepted by a large majority of the people concerned or, in most cases, is assuming that such a majority of reasonable people would accept that statement."[66] While this may be factually provable in the EU–seals context, it does not do justice to the people involved in the industry and itself challenges the purpose of the scientific studies that were conducted during the legislative process of Regulation 1007/2009.

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62 Van Hoecke, M. "Objectivity in law and jurisprudence," In Husa, J. and M. Van Hoecke (editors). *European Academy of Legal Theory Series: Objectivity in law and legal reasoning.* Oxford: Hart Publishing (2013), 3–20, at 5.

63 Original emphasis; Hume, D. *A treatise of human nature* (1739/40). Ebook, URL: http://www.davidhume.org/texts/thn.html (accessed 12 March 2015), at 1.

64 Kramer, M. *Objectivity and the rule of law.* Cambridge: Cambridge University Press (2007), at 2; Notwithstanding, the semantic dimension of objectivity shall only play a minor role here as it would go beyond the aspired scope of this dissertation. A linguistic-philosophical analysis of the EU seal regime and its *travaux préparatoires* is therefore absent from this thesis (on law and linguistics, see for example Klatt, M. *Making the law explicit: The normativity of legal argumentation.* Oxford: Hart Publishing Ltd. (2008)).

65 Rawls, J. *Political liberalism.* New York: Columbia University Press (1993), at 110 and 115.

66 Van Hoecke (2013), *supra* note 62 at 7.

Perišin is therefore correct in stating that knowledge of EU citizens concerning the seal hunt in combination with the scientific assessments commissioned by the European Commission leads to the conclusion that EU Regulation 1007/2009 is built on scientific facts.[67] Therefore, the seal regime appears to be founded on an ontological basis which allows for an impartial and scientifically objective legislation that addresses and responds to specific problems and contexts. El Karouni asserts that each scientific fact needs to be considered through "'paradigms', which in a sense are lenses through which one sees the world"[68] following Thomas Kuhn who writes: "Lack of a standard interpretation or of an agreed reduction to rules will not prevent a paradigm from guiding research."[69] Sam Harris even goes further and popularly argues that "the split between facts and values should look suspicious."[70] In that sense, therefore, the 'kaleidoscopic cultural view'[71] renders an 'objective objectivity' – in the El Karounian sense as explained below – obsolete.

Consequently, cultural paradigms feed into the process of law-making as well as their adjudication.[72] It can be argued that simplified and/or politically or emotionally charged information on which law and adjudication is built feeds furthermore into a limited view on empirical facts on which a law is founded.[73] The contrasting of objectivity *vis-à-vis* subjectivity therefore plays a fundamental role and it can be maintained that they are not mutually exclusive but instead constitute a gradual differentiation between one another. To this end, El Karouni has developed a model which frames the relationship between subjectivity and objectivity and their impact on the lens through which truth and reality are observed.

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67 Perišin, *supra* note 37, at 396.

68 El Karouni, M. "Legal science challenged by cultural paradigms: 'Subjective objectivity' in legal scholarship." In Husa, J. and M. Van Hoecke (editors). *European Academy of Legal Theory Series: Objectivity in law and legal reasoning.* Oxford: Hart Publishing (2013), 229–249, at 233.

69 Kuhn, T. *The structure of scientific revolution.* Chicago: The University of Chicago Press (1962), at 44.

70 Harris, S. *The moral landscape: How science can determine values.* New York: Free Press (2010), at 122.

71 Husa, J. "Kaleidoscopic cultural views and legal theory – dethroning the objectivity?" In Husa, J. and M. Van Hoecke (editors). *European Academy of Legal Theory Series: Objectivity in law and legal reasoning.* Oxford: Hart Publishing (2013), 197–212.

72 The mere existence of 'legal cultures' and 'legal traditions' underlines this. See for example Glenn, H. P. *Legal traditions of the world.* Fourth edition. Oxford: Oxford University Press (2010).

73 See also Cserne, P. "Objectivity and the law's assumptions about human behaviour." In Husa, J. and M. Van Hoecke (editors). *European Academy of Legal Theory Series: Objectivity in law and legal reasoning.* Oxford: Hart Publishing (2013), 171–193, at 184.

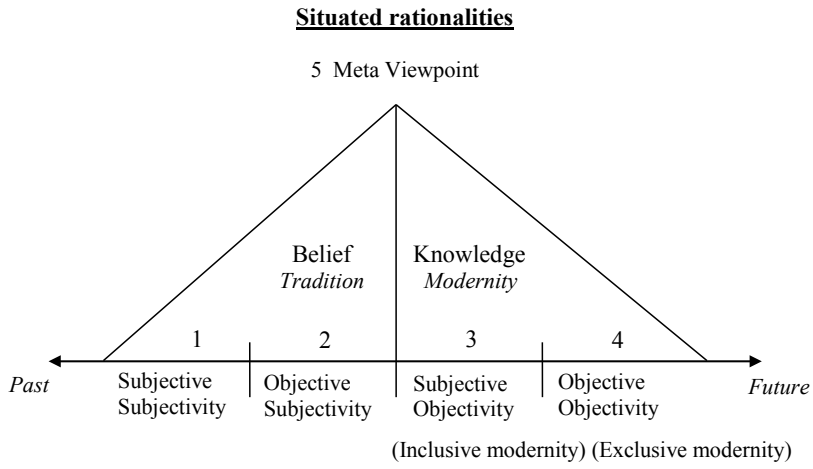

Fig. 1: Situated rationalities.
Reproduced from El Karouni, *supra* note 68, at 238.

While 'objective objectivity,' describing the absolute exclusion of any cultural or historical learning and merely focusing on arguably undisputable facts, and 'subjective subjectivity' describing the mere perception through believe or metaphysical systems devoid of knowledge-based facts, stand diametrically opposed to one another, 'objective subjectivity' constitutes the core of the debate surrounding EU Regulation 1007/2009 as a reflection of public morality or EU cultural values. This is due to the fact that although fact-finding endeavours have been undertaken in order to determine the (objective) state of the seal hunt as well as the impacts of a EU ban on those regions conducting it, the overall opposing stance towards seal hunting and the neglect of certain people and attributes within the sealing communities and scientific findings[74] have created a subjective environment.

'Objectivity' becomes a consequently highly disputable issue when circling around the understanding of culture, values and morals. Cultural and moral relativism, best exemplified by the anthropologist Franz Boas, whose school of thought established "that moral values, standards, and judgements have meaning and therefore validity only within a specific culture; that each of the world's many cultures is therefore a moral world entire to itself,"[75] must be considered in this context. This renders any claim of normativity, generality and objectivity *ad absurdum*. Yet, from an anthropological perspective, the claim of cultural and moral relativism

74 Such as the COWI-finding that knowledge on the seal hunt in general is virtually not existing.

75 Laidlaw, J. *The subject of virtue. An anthropology of ethics and freedom.* Cambridge: Cambridge University Press (2014), at 24.

has largely been dismissed and has been attacked by numerous scholars.[76] In law, cultural and moral relativism, it can be argued, can be translated as legal pluralism, implying the development of different legal orders and legal traditions, reflected in customary law and positive law. The interplay of objectivity, cultural/moral relativism and legal pluralism is touched upon by Benda-Beckmann who recognises the appearance of "a great complexity of cognitive and normative conceptions"[77] in different societies. While I argue that moral relativism from an anthropological perspective can to some extent be considered justifiable,[78] Benda-Beckmann notes that legal pluralism is also used and somewhat exploited in order to justify moral or political purposes that are not commonly accepted by a state.[79]

But what if legislators implement a rather subjectivity-based belief system rested on a generalised claim of morality although legal pluralism does imply different sets of moral standards?[80] In the context of this dissertation the issue becomes ever more prevalent given the moral concerns over the way seals are hunted in the commercial seal hunts. But what are these moral concerns and how are they measured? The link between these moral concerns and the actual legal response to these is not as easily to establish as it may seem, because, as will be shown, neither a legal basis nor a uniform definition of a 'European morality,' both relating to the seal hunt and in a very general manner, exist. This leads to a seal regime whose goals, scope and impact cannot be linked to these moral concerns. The difficulties on a European morality notwithstanding, the European Union has successfully argued before the World Trade Organization that the EU seal regime is a necessary tool to respond to the moral concerns of European citi-

76 Laidlaw himself refers to the "mirage of relativism" (*Ibid.*, at 23). The most famous attack on cultural and moral relativism stems from Bernard Williams who argued: "For standard relativism, one may say, it is always too early or too late. It is too early, when the parties have no contact with each other, and neither can think if itself as 'we' and the other as 'they'. It is too late, when they have encountered one another: the moment that they have done so, there is a new 'we' to be negotiated' (Williams, B. *In the beginning was the deed: Realism and moralism in political argument*. Princeton: Princeton University Press (2007), at 69). Indeed, this is the case in an explorer/explored dichotomy, but I argue in my article 'Morality, practices and economy in a commercial sealing community' that morality and culture are also linked to specific means of resource extraction. If the resource is no longer exploited, the moral and cultural environment change. In this sense, cultural and moral relativism or, what I have termed, 'segmented moral relativism,' is indeed justifiable.

77 Benda-Beckmann, F. v. "Who's afraid of legal pluralism?" *Journal of Legal Pluralism and Unofficial Law* 47 (2002), 37–82 at 38.

78 Sellheim (2015d), *supra* note 23.

79 Benda-Beckmann, *supra* note 77, at 45.

80 This study will not engage in the discussion to which degree and under which circumstances law and morality are interlinked. This has been done excessively by numerous scholars. It suffices to say in this context that the linkage between law and morality is existent and that different laws entail, govern and apply different sets of morality.

zens with regard to the killing of seals.[81] Without providing evidence pointing towards the solidity of the morality-claim, it is questionable on what grounds this claim is based. The question therefore arises what purpose the objectivity-generating, fact-generating studies, the EFSA[82] and COWI[83] studies, served. As will be shown, the degree of 'believing' and 'knowing' about the seal hunt, the sealing communities and industry is blurry. It seems as if the studies politically do not contribute to "the possibility that there are objective facts which, on occasion, might elude us."[84] Otherwise, shortcomings in generating knowledge should have been included in the shaping and drafting of the seal regime. Here, the political and legal interpretation of knowledge, albeit patchy, is important: 'objectivity' concerning the findings of EFSA and COWI is therefore not used to describe and respond to a given context, but it is evaluated and opportunistically used. 'Knowledge' and 'objectivity' are therefore not complementary, serving the purpose of truth-generation, but are rather used in order to serve a specific value system that is not substantiated through scientific enquiry.

2. On public morality

To underline its argument before the WTO Dispute Settlement Body, the European Union *inter alia* made use of the public morality clause in the GATT under article XX (a). This article as the primary basis for the establishment of barriers to free trade based on moral grounds has not been often invoked and, as will be shown later, there are only a few cases in which 'public morality' or concerns for it have been used as a successful justification for trade barriers. As its point of departure and as its primary source of justification the European Union argues that "[t]he EU Seal Regime seeks to address deep and longstanding moral concerns of the EU public with regard to the presence in the EU market of seal products. Those concerns arise from the fact that seal products may have been obtained from animals killed in a way that causes them excessive pain, distress, fear or other forms of suffering."[85] It is therefore that "[t]he EU Seal Regime seeks to uphold a standard of conduct according to which it is morally wrong for humans to inflict suf-

81 *EU – Seal Products* AB Report, *supra* note 12, para. 5.167.

82 EFSA. *Animal welfare aspects of the killing and skinning of seals. Scientific opinion of the Panel on Animal Health and Welfare.* Geneva: EFSA (2007).

83 COWI. *Potential impact of a ban of products derived from seal species*, Copenhagen: COWI (2008); COWI. *Study on implementing measures for trade in Seal products. Final report.* Copenhagen: COWI (2010).

84 Pavlakos, *supra* note 61, at 15.

85 *European Communities – Measures prohibiting the importation and marketing of seal products. Reports of the Panel. Addendum.* WT/DS400/R/Add. 1, WT/DS401/R/Add. 1 (2013), B-40 at 17.

fering upon animals without sufficient justification."[86] *Argumentum e contrario*, if the infliction of suffering upon animals stands the necessity test it is morally justifiable. But what is a public moral? Can public morality be measured and if so, how? Does public morality correspond to a supreme, even universal, moral principle?

These questions have been dealt with extensively in the literature and they have been a century-, even millennia-old challenge for and of moral philosophy. Aristotle, Plato, Kant, Marx, Nietzsche, just to name a few, have tackled the issue from different perspectives and in different times and places with different and contradicting outcomes. Smith therefore, as a logical consequence, claims that it can be established that morality and moral and ethical structures change over time and space.[87] Yet, there are indeed moral virtues that can be found in the world's religious writings. One of these, as Smith points out, is the so-called Golden Rule 'Always treat others as you would like them to treat you' which can be found in Christianity, Judaism, Hinduism, Buddhism, Confucianism as well as in pagan Greek religions[88] and which Kant in essence expanded into his 'categorical imperative,' stating: 'Act only according to that maxim whereby you can, at the same time, will that it should become universal law.'

Notwithstanding, the Golden Rule as an egalitarian, universal moral principle can be challenged in a deductive manner by accepting that an individual violates the rights and interests of others for his or her own good.[89] In other words, in practice the Golden Rule is broken by individuals or groups of individuals for their own benefit. But does this imply that the rule is not applicable at all, or is this an exception to this rule? Neither shall be positively or negatively answered here. Instead, it seems fair to say that this dilemma leads to the assumption that public morality may as such exist, but may not be applied in practice. It therefore depends on the *justificantia*, that is the points of reference with which morality and moral actions are measured, that serve as the main indicators for 'public morality.' Bearing this in mind it cannot be justified to speak of 'public morality,' but rather of 'public moralities' as it cannot be stated in full confidence that a person who acts contrary to the Golden Rule in one particular case can be generally considered an immoral person. Indeed, this argument bears highly controversial significance in the inhumane treatment of people and animals and it is particularly relevant in the seal hunting context. This is due to the fact that, as observed by the author, Newfoundlanders in support of, or actively engaged in, the seal

86 *Ibid.*, B-46 at 41.

87 Smith, D. M. *Moral geographies. Ethics in a world of difference.* Edinburgh: Edinburgh University Press (2000), at 34.

88 *Ibid.*, at 40.

89 Gewirth, A. *Reason and morality.* Chicago and London: The University of Chicago Press (1978), at 19.

hunt or the industry are directly or indirectly considered an immoral people by seal hunting opponents. Environmental activist Paul Watson writes, for example, that "[a]rmoured by the philosophy of dominion, all killing is sanctioned, and all morality is bartered away for denial" and further asks "[w]hat sensitive, sane soul can stand in the presence of such insanity and do nothing?"[90] For sealers, on the other hand, the most moral thing to do is not to destroy markets for seals and in the end make the hunt more wasteful per animal, but rather help creating markets in order to be able to use as much of the seal as possible.[91]

A highly contentious and inescapable issue when dealing with 'morality' is the interplay within the triarchy of morality, reason and emotion. In the seal hunting debate, the claim of 'moral judgement' of seal hunting opponents is countered by seal hunting proponents of it being merely emotional and devoid of reason, indicating a proneness to contradiction. Reason in the context of morality therefore indicates that "if one is [...] justified in believing that one ought to do X, then, at least so far as concerns the ascertainable grounds for one's action, one is conclusively justified in doing X."[92] Expressed negatively and extended to subsequent actions relative to a particular context: if one is justified in believing that one ought *not* do X-1, then, at least so far as concerns the ascertainable ground for one's action, one is conclusively *not* justified in doing X-2. Following this logic, when the public or members of the public are morally opposed to the killing of seals as such[93] it appears unreasonable to morally justify the killing of other animals. While at first glance this reasoning and logical argumentation seems conclusive, it neglects an overly human character trait: a need for religion and belief. Hindus, following the chain of reason, should be opposed to the killing of all animals since they are opposed to the killing of cows. This, however, does not take historical and socio-cultural developments into consideration. In addition, humans are indeed attracted to the aesthetic which itself generates moral virtues.[94] By somewhat ritualising anti-sealing protests, sealing opponents often point to the 'innocence' and 'purity' of seals and their natural environment, while using terminology as 'baby seal' or 'seal nursery.' Broad application of this terminology in combination with either still or moved graphic

90 Watson, P. *Seal wars. My Twenty-five year struggle to save the seals*. London: Vision Paperbacks (2004), at 234.

91 Sellheim (2015d), *supra* note 23.

92 Gewirth, *supra* note 89, at 23.

93 Indeed, Recital 10 of the Basic Regulation reads: "[...]Since the concerns of citizens and consumers extend to the killing and skinning of seals *as such*, it is also necessary to take action to reduce the demand leading to the marketing of seal products [...]" (own emphasis).

94 Tuan sketches the development of moral virtues *vis-à-vis* their aesthetic, i.e. architectural, reflexion as well as their perception in different times and places, yet with a special emphasis on Chinese parks (Tuan, Y. *Morality and imagination: paradoxes of progress.* Madison: University of Wisconsin Press (1989)).

imagery does not miss its signal value and could be considered to "not only label but reaffirm and rejuvenate the moral values of the community."[95]

Determining public morals or public moralities puts especially the legislator before difficult tasks and in the European Union there are laws in place which express public morality, best exemplified by the Union's strong and rigorous stance against the death penalty and torture as enshrined in the Charter of Fundamental Rights of the European Union.[96] The relevance of this prohibition and its translation into national laws became evermore relevant in two specific cases in Germany in which public morality as reflected in public opinion called for the abolition of these fundamental rights. In the first case, an 11-year old banker's son was abducted. While the police held the kidnapper in custody and evidence was overwhelming, the whereabouts of the boy, who was considered to be in immediate danger, remained unknown. In order to save the boy, the deputy police president of Frankfurt and a police constable threatened the kidnapper with torture. The kidnapper as a consequence to this pressure led the police to the already dead boy. The district court of Frankfurt subsequently sentenced both police officers to a fine of around 10,000€ and 3,000€ respectively for violating human dignity as stipulated in article 1.1 of the German Constitution,[97] pursuant to European human rights conventions.[98] While from a legal perspective the policemen's behaviour is relatively clear, public opinion in general did not morally condemn the threat of torture and the case spawned a public debate on a possible justification of torture. Human rights organisations such as Amnesty International or the German Humanist Union along with the Green Party condemned the actions of the policemen. Other politicians showed understanding for the actions, given the intensity of the situation. Then-leader of the Social Democratic Party, Oskar Lafontaine, even went so far as to stating that the policemen acted "according to the most elementary ethical codes of our rule of law" and that one should not "let an innocent child painfully die, just because one sticks to formal constitutional provisions."[99] The threat of torture in Lafontaine's opinion consequently stood the

95 Wilson, E. O. *On human nature.* New York: Bantham Books (1979), at 187.

96 Charter of Fundamental Rights of the European Union, 2000/C 364/01, arts. 2, 4.

97 Deutsches Grundgesetz, Article 1.1.: Die Würde des Menschen ist unantastbar. Sie zu schützen ist Verpflichtung aller staatlichen Gewalt. [Human dignity shall be inviolable. To respect and protect it shall be the duty of all public authority; own translation].

98 Landgericht Frankfurt am Main. *Schriftliche Urteilsgründe in der Strafsache gegen Wolfgang Daschner. Presseinformation* [*Written reasons for sentence in the case Wolfgang Daschner;* own translation]. Frankfurt am Main: Landgericht Frankfurt am Main (2005), at 23.

99 See Bourcarde, K. *Folter im Rechtsstaat? Die Bundesrepublik nach dem Entführungsfall Jakob von Metzler* [*Torture in the rule of law? The Federal Republic of Germany after the kidnapping of Jakob von Metzler*; own translation]. Giessen: Bourcarde (2004), at 14. URL: http://www.bourcarde.eu/texte/folter_im_rechtsstaat.pdf (accessed 18 October 2014).

necessity test. While most lawyers did not ascribe to a legal possibility of justifying torture under national and international law, Brugger argued even before the Metzler-case that under specific circumstances, especially in the context of averting terrorist attacks, torture is not only legal, but even required.[100] In 2005/06 also Germany's then-Minister of the Interior, Wolfgang Schäuble, was quoted calling for the utilisation of information extracted under circumstances outside the rule of law.[101] A public survey conducted by the German opinion research centre *Forsa* which was commissioned by the German newspaper *Stern* revealed that 63% of the respondents considered the policemen innocent, while only 32% demanded a sentencing.[102]

Another case which symbolises the difficulty of reconciling law and public morals also refers to the fundamental rights to life and the protection of human dignity and was initiated by the provincial governments of Bavaria and Hessen. These aimed at making the Minister of Defence the sole decision-maker in the extended utilisation of force in case of shooting down kidnapped planes that are intended to be used as weapons, as happened in the terror attacks of 11 September 2001 in New York. While the shooting down is in principle allowed, the Constitutional Court ruled that in urging cases it must be decided by the whole German government to take this step. However, the ruling is not spared from controversy: given the small aerial space of Germany the court recognises that the country's populace does not experience significant protection from this ruling while the two fundamental rights – the right to life and human dignity – are impaired for those being kidnapped in a plane.[103] In this case, it is in essence the question over the morality of killing a few for the sake of others, as also argued by Brugger. While it seems morally justifiable to sacrifice one for the sake of 100, the giving-up of fundamental rights inevitably leads from this scenario into endless constellations, such as: is it morally justifiable to kill 1,000 for the sake of 1.001? Or 100,000 for the sake of 1,000,000? Public opinion as reflected in the media as an indicator for public morality therefore can be easily deceived. Interestingly, however, according to a survey of the opinion research centre *Infratest dimap* and commissioned by

100 Brugger, W. "Vom unbedingten Verbot der Folter zum bedingten Recht auf Folter?" ["From an absolute prohibition of torture towards a limited right to torture?"; own translation] *Juristenzeitung* 44 (4) (2000), 165–216.

101 Steiger, D. *Das völkerrechtliche Folterverbot und der 'Krieg gegen den Terror'* [*The prohibition of torture under international law and the 'war against terror'*, own translation]. Heidelberg: Springer (2013), at 487.

102 "Stern: Mehrheit der Bundesbürger akzeptiert Folter-Androhung in Verhören" ["Stern: Majority of citizens accepts threat of torture in interrogations"; own translation], *Presseportal*, 26. February 2003. URL: http://www.presseportal.de/pm/6329/424061/stern-mehrheit-der-bundesbuerger-akzeptiert-folter-androhung-in-verhoeren (accessed 18 October 2014).

103 Bundesverfassungsgericht, 2 PBvU 1/11, Beschluss vom 3. Juli 2012.

the public German TV channel ARD, 63% of the respondents voted against the government's competency to shoot down kidnapped passenger planes.[104]

Public morality, policies, politics and the law are therefore not easily reconcilable. While a primary focus in the seal regime lies on the 'concerns of members of the public,' what would the number of these members be to render a legal response necessary? Would 'members of the public' that are opposed to same-sex marriage be reason enough to deny couples this right? These questions will not find answers in this dissertation, but merely serve as a sign to show the unreliability of 'public morals' as a policy-determinant.

3. On animal welfare as a morality issue in the EU

What the Constitutional Court in the above case touches upon is the interplay between morality and public benefit. This is particularly interesting in the linkage of morality and animal welfare, one of the key issues in the seal hunting debate. Countless works signal towards an ethical treatment of animals, both in the wild and in captivity in order to reach and maintain the "moral high ground" of the "animal movement."[105] The Treaty on the Functioning of the European Union (TFEU)[106] recognises animals as sentient beings and that therefore full regard shall be paid to their welfare when formulating and implementing policies.[107] Pursuant to GATT article XX (a), the TFEU enables the establishment of trade barriers in order to *inter alia* protect public morals or the "health and life of humans, animals or plants."[108] Effective protection of animal welfare has been included into the Community's core treaties based on Protocol No. 33 on the protection of animals to the Treaty establishing the European Community in 1997 which was later amended to become the TFEU under the Treaty of Lisbon. Apart from making animal welfare, i.e. the reduction of suffering for animals, a core issue on a Community level in the TFEU, the protection of animals and concerns over the well-being of animals, both with regard to their suffering and with regard to their

104 "Mehrheit gegen Abschuss entführter Flugzeuge" ["Majority against the shooting down of kidnapped planes"; own translation], *Die Welt*, 21 September 2007. URL: http://www.welt.de/politik/deutschland/article1201800/Mehrheit-gegen-Abschuss-entfuehrter-Flugzeuge.html (accessed 14 January 2015).

105 Linzey, A. *Why animal suffering matters. Philosophy, theology, and practical ethics.* Oxford: Oxford University Press (2009), at 2.

106 Consolidated version of the Treaty on the Functioning of the European Union (OJ C 326, 26.10.2012, p. 47–390), article 13.

107 Although not explicitly specified, it can be assumed that 'animals' in this context refers to mammals.

108 TFEU, *supra* note 106, article 36.

conservation status, have yielded an extensive net of laws and regulations within the European Communities / European Union.

In the 1970s, the Council of Europe (CoE) adopted two conventions which explicitly made reference to the well-being of animals used for human consumption: the European Convention for the Protection of Animals kept for Farming Purposes[109] and European Convention for the Protection of Animals for Slaughter.[110] While the former entered into force on a Community level in 1978, the latter entered into force in the European Community only in 1988.[111] By the 1990s and pursuant to the adoption of the CoE Conventions a set of regulations was put into place that set minimum standards for farmed animals and animals in meat production. Also the protection of animals at the time of slaughter or killing became legally recognised[112] while animals should be spared from avoidable pain and suffering. But it was as late as the 2000s that the issue of animal welfare as a matter of public concern was embedded into the legal frameworks of the Union. For example, Recital 4 of the new Regulation on the Protection of Animals at the Time of Killing[113] reads: "[...] The protection of animals at the time of slaughter or killing is a matter of public concern that affects consumer attitudes towards agricultural products [...]" while at the same time recognising that "[a]nimal welfare is a Community value." To this end, the Union has set in place Animal Welfare Action Plans in order to further improve the welfare of animals for human consumption.

Animal welfare in the European Union, albeit being a 'Community value' and being of moral concern,[114] therefore does not equate with protection in the sense of non-utilisation of animals. Instead, the relationship of human domination over animals persists and even while improving conditions this relationship does not change.[115] Hence it is morally and 'sufficiently' justifiable to keep animals in captivity for human consumption and utilisation since public benefit outweighs

109 European Convention for the Protection of Animals kept for Farming Purposes of 10 March 1976 (1976 CETS 87).

110 European Convention for the Protection of Animals for Slaughter of 10 May 1979 (1979 CETS 102).

111 See Official Journal L 323, 17/11/1978, p.14–22 and L 137, 02/061988, p. 27–38, respectively.

112 Council Directive 93/119/EC on the Protection of Animals at the Time of Slaughter or Killing of 22 December 1993. (OJ L 340, 21.12.1993, p. 21–34).

113 Council Regulation (EC) No. 1099/2009 on the Protection of Animals at the Time of Killing of 24 September 2009 (OJ L 303, 18.11.2009, p. 1–30).

114 Thomas, E. M. "Playing chicken at the WTO: Defending an animal welfare-based trade restriction under GATT's moral exception." *Boston College Environmental Affairs Law Review* 34 (3) (2007), 605–637 at 609; Howse and Langlille, *supra* note 27, at 9, 10.

115 Waldau, P. *Animal rights – What everyone needs to know.* Oxford: Oxford University Press (2011), at 96, 97; Sellheim (2015b), *supra* note 21, at 277.

a normative change in human-animal relations. Linzey notes that "[n]one of us are untouched by our use of animals, and all of us, directly or indirectly, benefit from it."[116] Ethical considerations with regard to animals therefore merely aim at improving the conditions of the dominated animals, making human benefit a substantial *justificandum* in the animal welfare and morality debate in the European Union.

Apart from the seal regime which was concluded as a response to moral concerns over the way seal hunting is conducted and which stands in contrast to mass farming,[117] two more regulations need mentioning which are to some degree comparable to the seal regime: The 'Leghold Traps Regulation'[118] and the 'Cat and Dog Fur Regulation.'[119] The Leghold Traps Regulation was already adopted by the Council in 1991 as a means to implement the Convention on the Conservation of European Wildlife and Habitats (Bern Convention) 1979.[120] Based on article 8 of this convention "all indiscriminate means of capture and killing and the use of all means capable of causing local disappearance of, or serious disturbance to, populations of a species"[121] should be avoided for certain species. The European Communities therefore introduced a ban on products stemming from countries applying methods not in accordance with international trapping standards, such as the leghold trap. Like the seal regime, the Leghold Traps Regulation is a moral regulation that challenges the methods applied in specific hunts. Contrary to the seal regime, however, the regulation does not challenge certain hunts as such. Countries that still used banned hunting methods, Canada, the US and Russia, initially were given four years to phase out these hunting techniques and to adapt to European standards in order to be able to continue trade in these products with the Community. Through bilateral agreements, these four years were extended and leghold traps were phased out or brought in accordance with European animal welfare standards.[122] Ultimately, it is the welfare of animals which were formerly

116 Linzey, *supra* note 105, at 58.

117 Indeed, Reinert refers to mass farming as the "industrial choreography of death" (Reinert, H. "The pertinence of sacrifice – Some notes on Larry the Luckiest Lamb." *Borderlands e-Journal* 6 (3) (2007). URL: http://www.borderlands.net.au/vol6no3_2007/reinert_larry.htm (accessed 11 March 2015), no pagination).

118 Leghold Traps Regulation, *supra* note 38.

119 Regulation (EC) No 1523/2007 of the European Parliament and of the Council Banning the Placing on the Market and the Import to, or Export from, the Community of Cat and Dog Fur, and Products containing such Fur of 11 December 2007, (OJ L 343, 27.12.2007, p. 1–4).

120 Convention on the Conservation of European Wildlife and Habitats of 19 September 1979 (1979 CETS 104).

121 *Ibid.*, article 8.

122 Charnovitz, S. "The moral exception in trade policy." *Virginia Journal of International Law* 38 (689) (1998), 1–49 at 23.

killed using leghold traps in combination with their conservation status[123] that improved through the fostering of non-utilisation of such traps, while a fostering of *absence of killing* of these animals did not occur.

The Cat and Dog Fur Regulation of 2007 appears to be entirely based on moral grounds. This concern, according to Recital 1 of the regulation, stems primarily from the fact there is "a possibility that [consumers] could buy cat and dog fur, and products containing such fur" and that "cats and dogs are considered to be pet animals and therefore it is not acceptable to use their fur or products containing such fur." It is therefore not the keeping or killing methods of cats and dogs, but the killing and utilisation of cats and dogs *per se*. Moreover, the regulation stipulates that "[t]here is no tradition of rearing cats and dogs for fur production in the Community."[124] The absence of a tradition of cat and dog fur utilisation and the non-utilitarian approach towards pet animals therefore locates this regulation within an entirely emotional context. Here, I dare to make a distinction between 'moral concern' and 'emotional concern,' because it appears difficult to see a 'morality' or an ethical code within the notion of 'not wanting' something, just because one does not want it. It is thus the complete absence of a chain of reason for a moral evaluation of a given treatment of animals – such as cruel hunting or rearing methods – that hints towards a more religiously connoted context of morality in this case: as in the Hindu/cow context which bears traditional reasons not to kill and use cows, there is equally no tradition of killing and using cats and dogs for human consumption in the European Union. Therefore, there is indeed an *absence of killing* of cats and dogs for human consumption that this regulation strives to achieve irrespective of conservation or animal welfare. Consequently, the primary argument against the utilisation of cats and dogs must be placed in a subjective-subjective environment.

123 Leghold Traps Regulation, *supra* note 38, Preamble.

124 Cat and Dog Fur Regulation, *supra* note 119, Recital 11; In Switzerland the prohibition of the consumption of dog and cat meat is based on the 2005 directive of the Department of the Interior (EDI) on foodstuffs of animal origin of 23 November 2005 (Verordnung des EDI über Lebensmittel tierischer Herkunft vom 23. November 2005). While in article 2 this directive excludes cats and dogs from food production in general, article 2.4. (a) of the Law on foodstuffs and basic commodities limits the scope to merely commercially traded products (Bundesgesetz über Lebensmittel und Gebrauchsgegenstände, Lebensmittelgesetz, vom 9. Oktober 1992, 817.0). Private consumption of cat and dog meat is therefore legally still possible.

4. On morality and European jurisprudence

The seal products trade regime, the Leghold Traps Regulation as well as the Cat and Dog Fur Regulation constitute legislation which seem to correspond to the moral concerns of the European public regarding certain goods and activities. Although argued by the EU in the WTO dispute settlement procedure, the notion of a European 'public morality' is not easily defendable. Also official positions of the EU or the European Commission in different contexts are somewhat contradictory.

As an important element in the seal hunting debate, reference is often made to polls and surveys that serve as an indicator for the majority of the European public being for or against something. For example, animal welfare organisations commissioned a survey in 2011, indicating that 72% of the respondents are in support of the seal products trade ban.[125] At the same time, sealing industry supporters commissioned a survey in 2014 which indicates that 57% of the respondents think that the EU ban sets a dangerous precedent for other animal products.[126] These survey outcomes are easily interpreted as indicating the public opinion about a certain issue within the entire European Union.[127] Also the survey carried out by the European Commission as an element of the preparatory works of the Basic Regulation showed that the majority of respondents was opposed to the seal hunt for commercial purposes, although COWI notes the survey is not to serve as an indicator for public opinion.[128] The surveys and their interpretations quickly lead to the assumption that policies respond to public morals as being the majority opinion of the public. However, already in the addendum to the Panel Report of the WTO, the European Union clarifies that "the Panel's task should be limited to examine whether, in so far as the policy choices which are reflected in the measure at issue purport to be based on science, such choices can find adequate support on qualified scientific opinions, irrespective of whether they represent the majority view."[129] The Appellate Body Report summarises the European Union's appeal argument with regard to the translation of public morality into law as follows:

125 Ipsos MORI. *Majority of public supports EU's ban on seal products* (2011), URL: http://www.ipsos-mori.com/researchpublications/researcharchive/2824/Majority-of-Public-Support-EUs-Ban-on-Seal-Products.aspx (accessed 14 January 2015).

126 Abacus. *European opinion on animal use and trade* (2014), URL: http://abacusdata.ca/wp-content/uploads/2014/05/TradeFairness_Report_EN.pdf (accessed 14 January 2015).

127 See for example "Poll shows most Europeans back seal hunt: Fur Institute," *CBC News*, 21 May 2014. URL: http://www.cbc.ca/news/canada/newfoundland-labrador/poll-shows-most-europeans-back-seal-hunt-fur-institute-1.2649815 (accessed 14 January 2015).

128 COWI (2008), *supra* note 83, at 125, 126; See also Sellheim (2013), *supra* note 19.

129 *EU – Seal Products* Panel Report addendum, *supra* note 85, B-42 at 17.

> The European Union takes issue with the Panel's finding on the basis that the 'standards of right and wrong' that make up a Member's public morals 'do not necessarily have to be held by a majority of members of a community.' Instead, the European Union argues that these standards 'can be set by a Member's authorities *on behalf of* a community, in accordance with that Member's *own system* of government.' The European Union submits that '[i]t is … the task of legislators and regulators to translate the broader moral concerns of the public into precise requirements, by relying on their superior knowledge of the specific factual circumstances.'[130]

In other words, from a legislator's perspective surveys or polls carried out to reflect the public opinion's stance on a certain issue are not of relevance and that it is the knowledge that the legislator, and not the public, holds that are relevant for policy decisions. In how far this reflects a significant democratic deficit shall not be debated here. It remains to be said, however, that the interpretation of 'broader moral concerns' is also not further elaborated upon. It seems therefore that, according to the EU in this case, conclusions on the specifics of 'moral concerns' are drawn by the legislator. Although science is of importance, as shown in the Panel Report, it remains questionable which other sources serve as a basis to establish moral concerns.

Cases concerning the protection of public morals within the European Union/ European Communities with regard to trade have also been dealt with in the European Court of Justice. Article 36 TFEU (ex article 30 TEC) grants member states the right to impose trade restrictions *inter alia* based on grounds of public morality. Yet, there are not many cases in which the 'public morality' clause has been invoked in order to establish a solid body of Community case law. Two landmark cases can be referenced when challenging the notion of a 'European public morality' on legal grounds.

In the preliminary ruling case *Regina v Henn and Darby*,[131] two men were convicted for importing and spreading pornographic and child pornographic material in the United Kingdom based on criminal charges and for spreading indecent or obscene articles contrary to UK law. The men appealed against their conviction stating that the UK's laws are not consistent with regard to the notion of 'indecent and obscene' articles and that therefore a coherent legal framework for 'public morality' does not exist. Thus, the House of Lords referred to the ECJ for a preliminary ruling. The Court made reference to the fragmented nature of the laws pertaining to public morality in the UK as an interpretation of the notion of 'inde-

130 Original emphasis, footnotes omitted; *EU – Seal Products* AB Report, *supra* note 12, para. 2.157.
131 *Regina v Henn and Darby*, Case 34/79 [1979], ECR 3797.

cent or obscene' by stating that "these laws, taken as a whole, have as their purpose the prohibition, or at least, the restraining, of the manufacture and marketing of publications or articles of an indecent or obscene character. In these circumstances it is permissible to conclude, on a comprehensive view, that there is no lawful trade in such goods in the United Kingdom."[132] Also the European Commission in this case notes that "[t]he fact that certain differences exist between the laws enforced in the different constituent parts of a Member State does not thereby prevent that State from applying a unitary concept in regard to prohibitions on imports imposed, on grounds of public morality, on trade with other Member States."[133] The court concludes in this case that public morality is determined by each member state according to its own scale of values.[134]

While referring to fragmented laws and legal grounds for the imposition of import restrictions based on public morality, no reference is made to the grounds of public morality. This issue is dealt with in the preliminary ruling case *Conegate v Customs and Excise*.[135] In this case a preliminary ruling was sought by the High Court of Justice in the UK on the interpretation of arts. 36 and 234 EEC after the seizure of inflatable dolls from Germany by UK customs authorities. The grounds of seizure were based on the dolls' 'indecent and obscene' character, constituting a violation of UK customs laws. Here, the Court ruled that public morality is indeed infringed upon when a member state has laws in place that prohibit the manufacturing and trade in 'indecent and obscene' like articles on its territory.[136] This means that in this case the UK should have laws in place that prohibit the manufacturing and marketing of inflatable erotic dolls. Since this was not the case in the UK, a seizure of the dolls based on public morality could not hold ground in the sense of article 36 EEC. Interestingly, the European Commission argues in its opinion in this case that "Member States are free to establish their own standards concerning public morality."[137]

'Public morality' in Community case law appears to be shaped predominantly by a nation state-based character and no reference is made to a 'European public morality.' Along the lines of the ECJ's argument in *Regina v Henn and Darby* the adoption of laws of some member states prohibiting the trade in seal products could point towards national opposition against the seal trade. But taken together these laws could reflect a Community-wide stance against the trade. This, in principle, mirrors the Commission's argumentation with regard to market harmonisa-

132 *Ibid.*, at 3815, para. 21.
133 *Ibid.*, at 3813 para. 16.
134 *Ibid.*, at 3813 para. 15.
135 *Conegate v Customs and Excise*, Case 121/85 [1986], ECR 1007.
136 *Ibid.*, para. 16.
137 *Ibid.*, para. 12.

tion for seal products. In that case, however, it is the minority of member states, those having banned seal products, which steers the overall course of the market.

In order to assess in how far European-wide scales of morality and legal interpretation of this concept are applied beyond possible market considerations, it is necessary to look at the European Convention on Human Rights (ECHR)[138] and the case law of the European Court of Human Rights (ECtHR). Contrary to the European functional treaties – the Treaty on European Union and the Treaty on the Functioning of the European Union – in which 'morality' is only marginally touched upon, the ECHR makes 'morality' an elementary part of its provisions as it restricts certain freedoms set forth under the Convention in the interest of morals. Moreover, the appointment of judges to the European Court of Human Rights, the monitoring and enforcement body of the ECHR, aims to ensure that judges are of "high moral character."[139]

Five fundamental freedoms under the ECHR are restricted in the interest of morality: freedom of movement (article 2.3), the right to respect for private and family life (article 8.2), freedom of thought, conscience and religion (article 9.2), freedom of expression (article 10.2) and the freedom of assembly and association (article 11.2). On the other hand, the right to a fair trial is guaranteed *inter alia* by excluding the public and the media "from all or part of the trial in the interests of morals, public order or national security in a democratic society."[140] A closer definition of what 'morals' entail is absent and the Court has not shown consistent ruling concerning the issue.[141]

Two landmark cases must be mentioned in the context of the protection of 'morality' under the ECHR. First, *Handyside v United Kingdom*[142] and second, *Müller v Switzerland.*[143] In the former, a book publisher, Handyside, published a book entitled *The Little Red Schoolbook* which in a section for pupils entitled 'Be yourself' held references to sexual activities and which was aimed to be published in the United Kingdom. More than 1,000 copies of the book were seized along with fliers and other materials of advertisement. Handyside was subsequently taken to court on the basis of violating British laws prohibiting the possession of obscene material for financial gain. The case was subsequently taken to the

138 Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, as amended (1950 CETS 5).

139 *Ibid.*, article 21.1.

140 *Ibid.,* article 6.1.

141 Nowlin, C. "The protection of morals under the European Convention for the Protection of Human Rights and Fundamental Freedoms." *Human Rights Quarterly* 24 (1) (2002), 264–286 at 264.

142 *Handyside v The United Kingdom,* 5493/72 [1976].

143 *Müller and others v Switzerland*, 10737/84 [1988].

ECtHR based on the claim that Handyside's right to freedom of expression as enshrined in article 10 of the ECHR was violated. In its judgement the Court did not find a violation of article 10, because of its application of the 'margin of appreciation' which "is given both to the domestic legislator ('prescribed by law') and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force."[144] While this is the case, the Court included a landmark statement into its judgement which can be considered highly relevant for the seal hunting context and the moral justification of the Basic Regulation and which justifies offensive material in the name of protecting pluralism: in paragraph 49 the Court holds that freedom of expression "is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broad-mindedness without which there is no 'democratic society'."[145] At the same time, the Court holds that, in recourse to article 10 of the Human Rights Convention, "it is not possible to find in the domestic law of the Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place [...]."[146]

Another case which dealt with the potential breach of article 10 and the enshrined freedom of expression *vis-à-vis* public morals was *Müller v Switzerland*. Here, an artist, Müller, publicly displayed several paintings of a sexual character that were considered 'grossly offensive' and as arousing 'repugnance and disgust' by Swiss courts and therefore were to be destroyed. The ECtHR indeed supported the national courts in their assessment of the paintings and concluded that they were "liable grossly to offend the sense of sexual propriety of persons of ordinary sensitivity."[147] This, as in *Handyside*, was because the Court saw it as justifiable under the 'margin of appreciation' clause under article 10 ECHR that the "Swiss Courts were entitled to consider it 'necessary' for the protection of morals to impose a fine on the applicants for publishing obscene material."[148] At the same time, almost verbatim from *Handyside*, the Court concludes in paragraph 33 that "it is not possible to find in the legal and social orders of the Contracting States a uniform conception of morals."

For the sake of completion must be noted that the notion of 'morality' was not put to the test in the court cases before the EU General Court and EU Court of

144 *Handyside, supra* note 142, para. 48.
145 *Ibid.*, para. 49.
146 *Ibid.*, para. 48.
147 *Müller, supra* note 143, para. 36.
148 *Ibid.*, para. 36.

Justice aiming to annul the seal regime.[149] The plaintiffs did not challenge the moral implications of the regime, but instead relied on other rather elements enshrined in the EU Treaties and international human rights law.[150] This is surprising as the controversy surrounding 'morality' became very vocal, especially in Canada, only in the WTO context. As the above paragraphs show, a challenge of the Basic Regulation on the basis of a lack of a legal basis for the adoption of trade restriction based on a 'European morality' before the EU Courts may have yielded different results.

4.1. The moral expression of law

Thus far, the analysis has taken primarily a nation state-based approach. In other words, each Member State of the European Union is entitled to its own moral standards relating to specific issues, making a European-wide moral standard not determinable. This being said, in principle this does not rule out the possibility of the European Union as a stand-alone polity to generate its own moral principles or to develop its own moral bases to legislate upon. The issue of animal welfare exemplifies this in several ways. First, each Member State has its own animal welfare laws pertaining to the treatment of domestic and wild animals.[151] To this end, each Member State establishes its own rules unless these are trumped by animal welfare regulations on a Union level, which then are based on potentially different moral foundations as regards the treatment of animals than those in the Member States. Under the TFEU, animal welfare falls under the shared competence of the Union and the Member States. While not exclusively formulated as a distinct field of shared competence in article 4 TFEU, article 13 TFEU clarifies that the well-being of animals is to be taken into account when "formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies," all being areas of shared competence.

Second, the example of bullfighting, albeit from an animal welfare perspective highly controversial, cannot be banned in a top-down manner by the Union since the activity is considered part of the cultural heritage of Spain and is thus considered an exclusive competence of the Member State. Notwithstanding, especially in this case the expressive character of European Union law-making and fund appropriation rises to the surface: although considered a Spanish cultural heritage, in October 2014, the European Parliament voted against the appropriation

149 *Inuit Tapiriit Kanatami and others v Parliament and Council*, Case T-18/10, Case C-605/10 P (R), Case C-583/11 P, Case T-526/10 and Case C-398/13 P.

150 Cambou, *supra* note 44, at 407–414; Sellheim (2015c), *supra* note 22, at 288–300. Beqiraj, *supra* note 40.

151 For example, in Germany the Tierschutzgesetz (Tierschutzgesetz, BGBI. I S. 1277, 24 July 1972, as amended) or in Finland the Eläinsuojelulaki (Eläinsuojelulaki, 4.4.1996/247, as amended) respectively.

of European Union funds that are "used for financing lethal bullfighting activities" given that "such funding is a clear violation of the European Convention for the Protection of Animals kept for Farming Purposes (Council Directive 98/58/EC)."[152] Irrespective of the EU's legal competence, therefore, the EU Parliament sets specific standards pertaining to the treatment of animals by scrapping the EU's support for an activity considered a violation of an EU law.

The expressive character of the decision not to support financially the Spanish bullfight anymore cannot be denied. Translated into law, the expressive character of legal acts must also be considered. Famously argued by Sunstein,[153] law therefore does not inevitably follow specific goals, but furthermore has an implicit function of setting certain standards or norms that influence or alter human behaviour. Thus, while not following a specific moral standard, the law-making polity frames its laws as a moral statement that influences social norms instead of merely 'speaking.' As a consequence, laws respond to a specific norm that they explicitly – as in the case of bullfighting or trade in seal products – label as bad and that they aim to change in a way that they deserve to be replaced by a new norm.[154] In this sense, it is irrelevant to ask what law is, but rather what it does[155] – a critical element in legal anthropology. A reasonable conclusion to draw is that while law may react to specific actions or practices, it is not confined to be of a purely reactive character. Instead, it also acts as a proactive agent that itself influences and shapes the moral landscape of a polity.[156]

With the change of the moral order within a polity, reputational benefits or losses follow suit. In the case of capital punishment or torture, for example, the European Union has taken a stringent stance opposing its application. Whether or not these practices do have a deterrent or crime-solving effect is irrelevant since their abolition as manifested in the Treaties and other acts, must be considered a moral statement of its own that expresses the rejection of state-imposed death or torture.[157] And whether or not the European public supports or dismisses the application of torture or capital punishment is equally irrelevant as with a stringent

152 European Parliament. Resolution of 22 October 2014 on the Council Position on the Draft General Budget of the European Union for the Financial Year 2015 P8_TA(2014)0036, Wednesday, 22 October 2014 (2014).

153 Sunstein, C. R. "On the expressive function of law." *University of Pennsylvania Law Review* 144 (1996), 2021–2053.

154 *Ibid*. at 2028, 2031.

155 See for example Gulliver, P. H. "Case studies of law in non-western societies." In Nader, L. (editor). *Law in culture and society*. First paperback 1997. Berkeley: University of California Press (1969), 11–23 at 17.

156 See also Pirie, F. *The anthropology of law*. Oxford: Oxford University Press (2013).

157 Sunstein, *supra* note 153, at 2023.

anti-torture and anti-capital punishment stance, the reputation of the European Union experiences a significant boost as a defender of fundamental human rights.

Laws that serve as a moral statement address certain aspects of social life and locate them within a moral compass. As argued by McAdams, law thus functions as a means to communicate the degree to which specific practices or actions are socially approved. However, in order for law to effectively be able to change social norms, its focal points must be clear, meaning "(1) the situation the law addresses includes an element of coordination […]; (2) the law is sufficiently public; (3) the law is sufficiently clear, and; (4) there are no other competing focal points."[158] The change that socially (dis-)approved norms, based on changes in the law, experience can be referred to as 'norm cascades.'[159] If and when these occur, however, remain rather unpredictable, constituting one of the main points of criticism of the expressive character of law. In other words, when a law is adopted that is aimed – explicitly or implicitly – at changing social behaviour, it cannot be said with certainty that social behaviour will change. At the same time, the expressive character of a law cannot be ascribed to every legal act adopted. Drawing from examples from the ancient world, this makes McGinn conclude that "not all law is expressive and not all expressive law."[160] In the case of the seal regime, however, its expressive character cannot be denied, as will be laid out in Part VI, Section 3.4.

5. On the 'moral concern' in international trade law

As established in European jurisprudence, albeit the presence of 'moral' clauses in the EU functional treaties and the ECHR, a coherent European conception of morals is difficult to establish when not taking into account the different polities within the European Union. In other words, *the* European moral standard cannot, in a satisfactory manner, be maintained or established in the first place, thus not enabling the European courts to impose a uniform moral standard upon the Member States. Instead, a margin of discretion is allowed that takes into consideration moral standards of the Member States as well as those upon which the EU as a polity legislates. Notwithstanding, the EU argues before the WTO Dispute Settlement Body that the ban on trade in seal products in the EU is based on public morals and also the WTO Appellate Body, in line with the Panel, reaches the conclusion that "the principal objective of the EU Seal Regime is to address EU public moral concerns regarding seal welfare, while accommodating IC [indigenous

158 McAdams, R. "The focal point theory of expressive law." In Parisi, F. (editor). *Production of legal rules*. Cheltenham: Edward Elgar Publishing (2012), 167–184 at 170, 171.

159 Sunstein, *supra* note 153, at 2033.

160 McGinn, T. A. J. "The expressive function of law and the *lex imperfecta*." *Roman Legal Tradition* 11 (2015), 1–41 at 41.

communities] and other interests so as to mitigate the impact of the measure on those interests."[161] This implies that a general, EU-wide social disapproval of the seal hunt exists. As established above, this claim cannot be supported in full confidence. The question therefore arises whether the seal regime is justifiable under the 'moral exception' clause under the GATT as set forth in article XX (a).[162]

5.1. International trade law and the 'moral exception'

In international trade law the moral exception, meaning the imposition on trade barriers based on moral concerns, has not been invoked on many occasions although it has been an integral part of international trade policies for decades. Contrary to the cases in European jurisprudence presented here, 'morality' in international trade law goes beyond the notion of the sexual, as will be shown, and includes issues of human well-being, animal welfare, alcohol or gambling. Already in 1815 in the Declaration Relative to the Universal Abolition of the Slave Trade[163] it was noted that the slave trade "has been considered by just and enlightened men of all ages as repugnant to the principles of humanity and universal morality."[164] While in the context of abolishing the slave trade morality and humanity became a recurring issue also in subsequent anti-slavery treaties, only one convention in the 19th century reflected 'morality' as a practice in international trade in general, the Treaty on Peace, Friendship, and Commerce between Madagascar and the United States.[165] This treaty sets forth "that any other articles of an injurious nature, tending to the injury of health or morals of Her Majesty's subjects, are being imported, Her Majesty's Government shall have the right to control, restrict or prohibit the importation in like manner, after giving due notice to the United States Government."[166]

Yet, it was not until 1927 with the conclusion of the International Convention for the Abolition of Import and Export Prohibitions and Restrictions[167] that

161 *EU – Seal Products* AB Report, *supra* note 12, para. 5.167.

162 Although the WTO was established in 1995, a change in the adjudication of GATT article XX before and after the WTO's establishment cannot be noted. Case law before 1995, i.e. case law of the GATT Dispute Settlement Panels, is still evenly referenced in the WTO dispute settlement process.

163 Declaration Relative to the Universal Abolition of the Slave Trade of 8 February 1815 (Consolidated Treaty Series, Vol. 63, No. 473).

164 Charnovitz (1998), *supra* note 122, at 10.

165 Treaty on Peace, Friendship, and Commerce of 13 May 1881; Although under French rule, Madagascar experienced French as well as British hegemony during the 1800s and 1900s. This treaty was concluded when Madagascar was under British influence.

166 *Ibid.,* article IV.9.

167 International Convention for the Abolition of Import and Export Prohibitions and Restrictions of 8 November 1927.

trade exceptions based on morality linked with humanitarian elements became a predominant feature in international trade law. Although this convention did not enter into force, Charnovitz shows how a large body of international trade treaties incorporated morality clauses, either as interlinked with humanitarian causes or without.[168] The recent embedment of a moral clause into a trade context occurred in the failed negotiations on the International Trade Organization (ITO) in whose Charter the exception 'necessary to protect public morals' was inserted by the United States government. The legislative history of this 'moral exception,' however, does not shed any light on the basis of the moral values applied, except for reference to alcohol. This exception, notwithstanding, was taken over verbatim into the GATT, although a general discussion on its scope was absent.[169] During the Uruguay Rounds which led to the establishment of the WTO, a second trade regime was established, the General Agreement on Trade in Services (GATS),[170] which furthermore included the 'public morals' exception and added the Chapeau of GATT article XX to become GATS article XIV (a). However, the provision to 'maintain public order' as well as an explanatory footnote were added. The footnote reads: "The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society."[171]

Given the absence of a clear scope of the 'moral exception' under GATT article XX (a), it is necessary to look at the case law provided by the Dispute Settlement Body. Here an interesting merger between 'morality' and production methods occur which is especially relevant for cases brought before the DSB pertaining to the environment and, as Charnovitz characterises, 'inwardly-directed' and 'outwardly-directed' provisions: while the former addresses standards and morals within a country's territory, the latter is to do the same for other countries.[172] This becomes highly relevant in the context of processes and production methods (PPMs) which, as a general rule, are not to be considered under WTO rules. The WTO itself thus explains that "trade restrictions cannot be imposed on a product purely because of the way it has been produced [...]" and that a "country cannot reach out beyond its

168 Charnovitz (1998), *supra* note 122, footnote 123.

169 Charnovitz explains this lack of discussion surrounding the scope of the 'moral exception' by highlighting that it was considered similar to those exceptions embedded in other commercial treaties. Since the GATT was in essence based on other treaties, Charnovitz considers these as *travaux préparatoires* for the GATT which in turn would explain an absence of a more sophisticated discussion on the scope of the 'moral exception' under GATT article XX (a) (*Ibid.,* at 8.).

170 General Agreement on Trade in Services (GATS) of 15 April 1994.

171 *Ibid.*, article XIV (a), fn. 5; See also Wu, M. "Free trade and the protection of public morals: An analysis of the newly emerging public morals clause doctrine." *Yale Journal of International Law* 33 (215) (2008), 215–251 at 220.

172 Charnovitz (1998), *supra* note 122, at 4.

own territory to impose its standards on another country."[173] It is thus the 'likeness' of a product, referring to the "physical nature and characteristics of the products themselves and how they relate competitively,"[174] which is the guiding principle applied by the WTO, much to the dismay of animal welfare or environmentalist groups.[175] However, the outwardly-directed imposition of norms and standards is nevertheless possible when applying the correct legal basis.[176] Yet, in principle it remains questionable if and how international human and labour rights standards are reconcilable with international trade law given the principal absence of PPMs under the WTO. Furthermore, the imposition of religiously motivated trade bans, such as Israel's ban on the importation of non-Kosher meat products, is not easily justifiable under the general exceptions clauses as established in GATT article XX. It is thus that Wu argues that the 'public morality' clause serves to provide "legal cover for maintaining existing domestic laws under the new international trade regime."[177] On the other hand, the United Nations High Commissioner for Refugees (UNHCR) interprets the 'public morals' clause as encompassing international human rights.[178]

Given the principle of 'likeness' of products under WTO law, animal welfare concerns over the means and ways of production are, at least in principle, excluded from legitimate exceptions of free trade. In essence, alleged cruelty in the seal hunts, meaning concerns over the PPMs, should not serve as a basis to impose trade restrictions. This, critics argue, places commercial interests over that of animal welfare and it is those countries with the lowest standards that therefore set the standards.[179] This was especially true with regard to GATT Panel rulings before the establishment of the WTO which favoured the free trade doctrine of

173 WTO, *supra* note 30, at 66.

174 Fitzgerald, *supra* note 27, at 100.

175 Thomas, *supra* note 114, at 609.

176 Howse and Langlille, *supra* note 27, at 9, 10; Charnovitz (2002), *supra* note 30, at 60.

177 Wu, *supra* note 171 at 218.

178 *Ibid.,* at 223, 224.

179 Indeed, Scully writes that "the problem is that in our dealings with sovereign countries trade and import policies are just about the only means we have of asserting moral standards where we find things that are cruel, corrupt and unconscionable. They can be highly effective means, as the sealers will attest." He continues, "[f]ree trade under the WTO has become not just a principle but a kind of mania, not just a good but the highest good, levelling standards in both human rights and animal welfare to the lowest common denominator and reducing all moral problems to questions of economic advantade" (Scully, M. *Dominion. The power of man, the suffering of animals, and the call to mercy.* New York: St. Martin's Press (2002), at 183, 184.) More cautiously, Linzey notes, "[b]oth the WTO and the GATT are, of course, hugely controversial and may not stand the test of time. But as long as such agreements exist, they have the capacity to influence all international trading agreements in relation to animals and animal products" (Linzey, *supra* note 105, at 141).

the GATT.[180] Here, especially the *Tuna – Dolphin I*[181] and *II*[182] cases are landmark cases. In these cases, Mexico and the European Economic Community (EEC) / Netherlands as intermediary nations respectively launched proceedings under the GATT Dispute Settlement Panel based on the allegation that the United States impose outwardly-directed trade restrictions based on US catching methods which conform to the Marine Mammal Protection Act (MMPA)[183] with regard to protecting dolphins. In other words, the United States were accused of imposing trade restrictions based on the assumption that the applied PPMs do not conform with US standards. The Panels ruled in favour of Mexico and the EEC / Netherlands in these cases, although the reports were never adopted. Similarly, in *Shrimp – Turtle*[184] PPMs with regard to shrimp fishery that adversely affected turtles became an issue. Here, the United States were challenged by India and other Asian countries for imposing trade restricting based on US standards for turtle-friendly shrimp fishery and proceedings were launched under the DSB of the newly established WTO. Contrary to the *Tuna – Dolphin* cases, however, the US defeat in this case was not based on the imposition of PPM-based trade restrictions, but rather on the import restrictions being discriminatory in nature as they favoured Caribbean over Asian nations. The Appellate Body in *Shrimp – Turtle* with regard to PPMs and species protection made unmistakably clear:

> [...] [W]e wish to underscore what we have *not* decided in this appeal. We have *not* decided that the protection and preservation of the environment is of no significance to the Members of the WTO. Clearly, it is. We have *not* decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should. And we have *not* decided that sovereign states should not act together bilaterally, plurilaterally or multilaterally, either within the WTO or in other international fora, to protect endangered species or to otherwise protect the environment. Clearly, they should and do.[185]

180 Thomas, *supra* note 114, at 610.

181 *United States – Restrictions on imports of tuna*, Report of the Panel, DS21/R (1991).

182 *United States – Restrictions on imports of tuna*, Report of the Panel, DS29/R (1994).

183 Marine Mammal Protection Act (MMPA) of 21 October 1972 (16 USC Chapter 31).

184 *United States – Import prohibition of certain shrimp and shrimp products*, Appellate Body Report, WT/DS58/AB/R.

185 *Ibid.*, para. 185, original emphasis; Charnovitz accordingly notes that "it is one thing for the Unites States to demand that the shrimp it imports be caught in a turtle-safe way so as to safeguard turtles. Yet it is an entirely different matter to seek to 'level the playing field' by insisting that foreign producers use the same production practice as U.S. shrimpers so as to offset any regulatory cost differences between domestic and foreign producers. This latter motivation

Moreover, the *Shrimp – Turtle* ruling enables the protection of species under article XX (g) as being an 'exhaustible natural resource:' if therefore a country invokes a general exception on free trade, WTO law does indeed allow for the imposition of trade restrictions if the conservation status of a certain species is adversely affected by free trade.[186]

From the above it becomes clear that the interpretation and scope of the 'public morals' exception under the GATT is not clear and adjudication of the general exceptions clause of article XX may become a complex web of PPMs, public morals, human and animal health[187] as well as environmental protection.[188] Notwithstanding, Wu shows that up until 2008 more than 100 bi- and multilateral trade treaties had included a 'moral exception' to free trade, including the European Free Trade Agreement establishing the European Free Trade Association (EFTA),[189] yet without any nearer specification. Also under the WTO the public exceptions clause has been invoked on numerous occasions to justify trade barriers.[190] It must be noted that only on very few occasions has the 'public morality' exception been challenged. The *EU – Seal Products* case is therefore one of the very scarce cases in which the issue of public morality has become prominent in a WTO context again and the EU seal regime falling within the scope of being 'necessary to protect public morals' is challenged by Canada and Norway.[191]

The first direct challenge of the imposition of trade barriers based on 'public morality' occurred only in 2004 in *US – Gambling*[192] after more than 50 years of a 'dormant' 'public morality' clause in international trade law.[193] Here, the United States enacted laws that prohibited cross-border gambling and betting, severely

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should not be shielded by GATT Article XX" (Charnovitz (2002), *supra* note 30, at 106, footnote omitted).

186 *Shrimp – Turtle*, AB Report, *supra* note 184, paras. 127–142.

187 As in *European Communities – Measures affecting asbestos and products containing asbestos*, DS135 (1998).

188 Regarding animal welfare and animal protection, it is therefore GATT article XX (a) (protection of public morals), (b) (protection of health of humans, animal and plant life) and (g) (protection of exhaustible natural resources) that are of relevance (see also Thiermann, A. B. and S. Babcock. "Animal welfare and international trade." *Scientific and Technical Review of the Office International des Epizooties* 24 (2) (2005), 747–755 at 749.

189 Convention establishing the European Free Trade Association of 4 January 1960, article 13, which reads: "The provisions of Article 7 [Quantitative restriction on imports and exports, and measures having equivalent effect] shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality [...]."

190 See Wu, *supra* note 171, at 250, 251.

191 *EU – Seal Products* Panel Report, *supra* note 12, paras. 7.626–7.629.

192 *United States – Measures affecting the cross-border supply of gambling and betting services*, WT/DS285.

193 See Wu, *supra* note 171, at 217.

affecting Antigua and Barbuda where the online gambling industry constituted a significant part of the country's GDP. It is this case in which the WTO DSB for the first time engaged in a discussion on the scope and application of the 'public morality' exception by stating that they are justified only if based on "standards of right and wrong conduct maintained by or on behalf of a community or nation."[194]

5.2. EU – Seal Products *and the 'moral exception'*

Several cases have been brought before the Dispute Settlement Body of the WTO in which trade restrictions had been challenged in the context of GATT article XX. It has become practice of the Panels or the Appellate Body to conduct a two-tiered test in order to determine whether or not a trade restrictive measure is justifiable under the general exceptions clause of GATT article XX. In the context of *EU – Seal Products* the Appellate Body conducted a two-tiered analysis in recourse to WTO jurisprudence in which it examines, firstly, whether or not the EU seal regime falls within one of the subparagraphs of article XX and is thus justified thereunder and, secondly, whether the trade measure is justifiable under the Chapeau of the article.[195]

As stated above, following the analysis by the Panel, the Appellate Body found that indeed the EU seal regime is a regime which addresses EU public moral concerns with regard to seal hunting.[196] The Panel undertook a long assessment to determine whether or not the seal regime indeed addresses the EU's public morality. Here, it followed the Appellate Body's report in *US – Clove Cigarettes*[197] and screened the European Union's evidentiary contributions as to whether they show "(a) the existence of the EU public's concerns on seal welfare and/or any other concerns or issues that the European Union seeks to address; and (b) the connection between such concerns, if proven to exist, and the 'public morals' (i.e. standards of right and wrong) as defined and applied in the European Union."[198] To this end, both the *travaux préparatoires* as well as the Basic Regulation itself were analysed. Based on the latter, the panel discerned three main concerns that the Basic Regulation addresses: 1. harmonisation of the EU's internal market with

194 *United States – Measures affecting the cross-border supply of gambling and betting services*, WT/DS285, Report of the Panel (2004), para. VI.11; See Wu, *supra* note 171, for a discussion on the case.

195 *EU – Seal Products* AB Report, *supra* note 12, para. 5.169.; Charnovitz adds a third element to this analysis by noting that the 'necessity' of a measure is to be examined as well (Charnovitz (1998), *supra* note 122, at 20). However, in *EU – Seal Products* the Appellate Body includes the 'necessity' test into both tiers of its analysis.

196 *EU – Seal Products* AB Report, *supra* note 12, para. 5.167.

197 *United States – Measures affecting the production and sale of clove cigarettes*, DS406 (2010), WT/DS406/AB/R (2012).

198 *EU – Seal Products* Panel report, *supra* note 12, para. 7.384.

regard to seal products; 2. concerns about welfare of seals; and 3. protecting the interests of the Inuit, however, the main goal of the regime being to address the public's concern over the welfare of seals.[199]

Based on the preparatory works of the seal regime, the Panel concluded that an underlying feature has indeed been to address moral concerns of the public. Here, the Panel also relied on the Panel Report in *US – Gambling*, which establishes that "the contents of these concepts ['public morals' and 'public order'] for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values."[200] Therefore, the documents within the legislative process of the seal regime making direct or indirect reference to the ethical concerns of the EU public with regard to seal welfare[201] served as proof for the Panel that these concerns do exist.[202] As a second step, the Panel undertook an analysis of "whether the public concerns on seal welfare are anchored in the morality of European societies."[203] Here the Panel accepts the European Union's claim that the multitude of animal welfare and animal protection laws in the European Union Member States and on Community level, the embedment of animal welfare in the European Treaties, the Common Agriculture Policy, and the Council of Europe conventions reflect that animal and seal welfare are a part of European public morality.[204]

In order to fall within the scope of article XX (a), however, the 'necessity' test needs to be conducted. Relying on the practice established in *Korea – Beef*,[205] *EU*

199 *Ibid.*, para. 7.387 and 7.401; While the Basic Regulation addresses these issues, it remains questionable in how far it effectively tackles them. Sellheim states that the meta-goal of the Basic Regulation and the seal regime in general is to end the commercial seal hunt – otherwise the exemptions are not reconcilable with the concerns over the welfare of seals (Sellheim (2015b), *supra* note 21, at 278). A cost/benefit consideration in the WTO context seems to be the underlying paradigm as concerns over the welfare of seals is seen *vis-à-vis* the benefit to humans. If "the suffering inflicted upon animals is outweighed by the benefits to humans (such as Inuit and other indigenous communities)" (*EU – Seal Products* Panel Report, *supra* note 12, para. 7.299) animal welfare concerns appear to be negligible.

200 *US – Gambling* Panel Report, *supra* note 194, para. 6.461.

201 The linkage between seal welfare and the need for policy-responses are indeed manifold in the *travaux préparatoires* and shall not be reproduced in its entirety here. Yet, for example the European Commission's Proposal and its accompanying document holding an impact assessment on several occasions make reference to 'ethical concerns' of the European public (Commission Proposal, *supra* note 24, at 2, 3, 12, 13). Moreover, also the Council of Europe Recommendations on seal hunting indicates that animal "cruelty has generated a public morality debate in Europe" (Council of Europe Recommendation 1776 (2006) of 17 November 2006, para. 9). See also Sellheim 2013, *supra* note 19.

202 *EU – Seal Products* Panel Report, *supra* note 12, para. 7.404.

203 *Ibid.*, para. 7.404.

204 *Ibid.*, paras. 7.405–7.409.

205 *Korea – Measures affecting imports of fresh, chilled and frozen beef*, DS161 (1999).

– *Asbestos* and most importantly *US – Gambling*, the 'necessity' test includes an appraisal of three factors: 1. whether societal interests and values need protecting; 2. whether the challenged measure contributes to this protection; 3. whether an alternative measure exists.[206]

The question that therefore needs answering is whether or not the EU public is at risk and whether it is therefore necessary to impose the given measure for its protection. Here, 'necessity' equates with the contribution to the objective in combination with potential alternative measures. In its analysis the Panel embedded the seal regime into the context of a means necessary to protect the public moral good of animal welfare and therefore protecting the public from being exposed to products stemming from inhumanely killed seals.[207] In its analysis the Appellate Body relied on the Appellate Body Report in *Brazil – Retreaded Tyres*.[208] In this case, Brazil imposed a ban on the importation of retreaded tyres originating in the European Union, which launched the dispute settlement process, in order to protect human and animal health from waste tyres. The Appellate Body noted that trade restrictions can justifiably be imposed under the general exceptions clauses of article XX in the interest of a broader policy scheme although immediate effects are not directly provable at the time of presenting evidence. Therefore, the Appellate Body in *Brazil – Retreaded Tyres* holds that trade restrictions can be considered necessary when the "measure is *apt to make a material contribution* to the achievement of its objective."[209]

In line with the Appellate Body in *Brazil – Retreaded Tyres,* the Appellate Body in the present case maintained, in line with the Panel, that given the very recent implementation of the seal regime at the time of the dispute settlement process, it was not possible to appraise the *actual* contribution of the measure to the policy objective, but rather generating its necessity through its *aptness* of making a contribution and to "induce changes over time in the behaviour and practices of commercial actors in a manner contributing to the objective."[210] Since, as established in *Brazil – Retreaded Tyres*, a quantified assessment of a measure for the establishment of 'necessity' is not a prerequisite, given the capability of the seal regime to reduce the demand for and availability of seal products both on the European market and globally,[211] the Appellate Body argues that it is "capable of making and

206 *US – Gambling* Panel Report, *supra* note 194, paras. 6.492–6.494.

207 *EU – Seal Products* Panel Report, *supra* note 12, para. 7.637.

208 *Brazil – Measures affecting imports of retreaded tyres,* DS332 (2005).

209 Original emphasis; cited in *EU – Seal Products* AB Report, *supra* note 12, para. 5.213.

210 *Ibid.*, para. 5.224.

211 This finding by the Panel was contested by Canada and Norway. This is largely based on the claim that a reduction of trade as reflected in trade data does not necessarily mean a reduction in demand. While the appellants argued that products from the commercial Canadian and Nor-

does make some contribution to its stated objective of addressing public moral concerns."[212]

The second tier of the test applied by both the Panel and the Appellate Body refers to the existence of a reasonably available alternative measure. Here, the Panel relied on the definition of a 'reasonably available alternative measure' as identified by the Appellate Body in *US – Gambling*:[213]

> An alternative measure may be found not to be 'reasonably available', however, where it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties. Moreover, a 'reasonably available' alternative measure must be a measure that would preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued under paragraph (a) of Article XIV.3.

As proclaimed by the appellants, a reasonably available alternative measure which would be less trade restrictive, but which would equally address the EU public's concern on animal welfare shortcomings in the seal hunts would be that of a certification system – in lieu with the animal welfare-based approach of the Commission Proposal for a trade measure. The problem of certification had already been taken up in the *travaux préparatoires* of the legislation and European policy makers did not consider it a feasible alternative to a total ban. As reflected in the report of the responsible committee of the European Parliament, the Internal Market Committee (IMCO), a certification scheme provided for in the Commission Proposal was rejected on the basis that "certificates and labels would raise a lot of practical problems and would fail to meet the requirements asked for by European citizens and the European Parliament. The rapporteur therefore considers the Commission's proposal unenforceable and argues that the European public morals can only be sufficiently protected by a full ban on trade in seal products

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wegian hunts were likely to be replaced by products from Greenland under the Inuit exemption, the Panel, underscored by the Appellate Body's findings, held that the available data does not point towards a replacement by Greenlandic products. Inferring therefore from declining trade towards the EU in seal products and the central role the EU market had previously played in the trade environment of seal products, both the Panel and the Appellate Body hold that it seems fair to conclude that the measure contributes to the reduction of global demand for seal products (*EU – Seal Products* AB Report, *supra* note 12, paras. 5.244–5.254.)

212 *EU – Seal Products* Panel Report, *supra* note 12, para. 7.460; *EU – Seal Products* AB Report, *supra* note 12, para. 5.225.

213 *United States – Measures affecting the cross-border supply of gambling and betting services*, WT/DS285. Report of the Appellate Body, AB-2005-1 (2005), para. 308.

with a limited exemption for Inuit communities [...]."[214] The Panel argued along the same lines and points to the fact that although seals that would enter the European market would have been killed humanely, they would nevertheless stem from hunts in which other seals would have been killed inhumanely. Thus,

> a certification system limiting market access to products from humanely killed seals would need to be capable of distinguishing between seals killed in accordance with the relevant standard of animal welfare, and those killed inhumanely. A certification system that did not make this distinction would undermine its own capability of assuring that animal welfare (and by extension public moral concerns) were being addressed.[215]

Moreover, the Panel maintained that a certification scheme which was based on stringent animal welfare requirements would run into application problems in which sealers themselves do not follow these rules. This finding is based on a statement of a Canadian government official within the Department of Fisheries and Oceans (DFO) resource management branch to a radio station who indicated that stringent requirements would trigger non-compliance among sealers.[216]

In light of the Panel's and Appellate Body's finding of a successful test on the 'necessity' of the seal regime in combination with a lack of alternative measures and the fact that it indeed addresses moral concerns of the EU public with regard to seal hunting, in recourse to established WTO case law, the regime is justified under GATT article XX (a). The *EU – Seal Products* case is therefore a landmark case as it enables international trade to be restricted by claims of a 'European morality' even though European jurisprudence does not support a uniform existence of such.

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214 ENVI. "Opinion of the Committee on the Environment, public health and Food Safety." In IMCO. *Report on the proposal for a regulation of the European Parliament and of the Council concerning trade in seal products.* A6-0118/2009 (2009), 32–54 at 33; See also Sellheim (2013), *supra* note 19, at 436.

215 *EU – Seal Products,* Panel Report, *supra* note 12, para. 7.497.

216 *Ibid.*, para. 7.496 and its footnote 798; Problematic in this finding is that hardly any unbiased knowledge exists on the commercial seal hunt and on the hunters. Basing fundamental elements of the validity and feasibility of a potential alternative measure on official statements of the DFO does not mean that it is empirically justifiable. This is due to the fact that also within the DFO the commercial seal hunt does not find unlimited support and that there are strong elements which aim to shut it down. The validity of the statement of the DFO official and its subsequent utilisation in the Panel and Appellate Body reports furthermore neglects the will of sealers to abide to the regulations out of economic reasons, as non-abidance leads to drastic fines, as well as reputational reasons. In order to justify the Panel Report's claim, therefore, *in situ* research is necessary (see Sellheim, N. "Living with 'Barbarians' – Within the commercial sealing industry." In Northern Research Forum, *Climate change in northern territories, 7th NRF Open Assembly, Conference Proceedings,* Akureyri: Northern Research Forum (2014a). URL: http://www.rha.is/static/files/NRF/OpenAssemblies/AKUREYRI2013/nikolas_sellheim.pdf (accessed 14 January 2015)).

PART III – SEALS AND THE SEAL HUNT

But what is the subject of the dispute? What is the commercial seal hunt that the European Union's policy-makers have concluded the seal regime over? Primarily reference is made to the hunt conducted on the Canadian East Coast, predominantly in the waters of the 'Front'[217] northeast of the island of Newfoundland. This section provides some basic information on the main prey of this hunt, the harp seal (*Pagophilus groenlandicus*), the history of the hunt in Newfoundland and some basic characteristics of the industry.

1. General background – Newfoundland, the harp seal and the Newfoundland seal hunt

The controversy surrounding the seal hunt and the main focus of this dissertation lie on the hunt conducted in Newfoundland. Contrary to the European lands on the same latitude as Newfoundland (approximately 47–53° North), the Gulf Stream does not provide the island with as warm a climate as its European counterparts, but its absence makes the climate of sub-Arctic character. The Labrador Current, which flows from the Arctic Ocean along the east coast of Canada, takes Arctic sea ice to the east coast of Labrador and Newfoundland, before it mixes with warmer waters from the Atlantic in a relatively shallow area south-east of Newfoundland known as the Grand Banks. Additionally, less solid ice than that coming from the Arctic forms off the coast of Labrador.

Six seal species can be found in Canadian waters and also in the waters around Newfoundland: 1. harp seal; 2. hooded seal (*Cystophora cristata*); 3. ringed seal (*Pusa hispida*); 4. harbour seal (*Phoca vitulina*); 5. bearded seal (*Erignathus barbatus*); and 6. grey seal (*Halichoerus grypus*). Seals are dependent on sea ice which they use for whelping and hunting. Apart from seals, the waters in Newfoundland are rich in other marine species, such as several species of whales and dolphins, cod, turbot, capelin, salmon as well as crabs and shrimps.

217 The term 'front' has for several hundred years served as a means to differentiate between the seal hunts carried out in the Atlantic and the Gulf of St. Lawrence, referred to as the 'back' (Kirwin, W. J. and G. M. Story. *Dictionary of Newfoundland English.* Second Edition. Toronto: University of Toronto Press (1990), at 203; England, *supra* note 25, at 40; Newfoundland sealer, personal communication, 10 March 2015, email).

Fig. 2: Newfoundland.
Screenshot from Google Maps®

1.1. Harp seal distribution and physiology

The harp seal is considered the most abundant seal species in the North Atlantic[218] and can be found in the Davis Strait and the Gulf of St. Lawrence, in the South of Greenland and in Icelandic waters. The species is furthermore abundant in the Norwegian and White Seas, with its northernmost ranges up to Svalbard and Franz-Josef-Land (Russ.: Земля Франца-Иосифа, Zemlya Frantsa-Iosifa). The

218 Stenson, G. and M. Hammill. *Living on the edge: Observations of Northwest Atlantic harp seals in 2010 and 2011.* Ottawa: Fisheries and Oceans Canada (2009), at 1; Lavigne, D. "Harp seal – *Pagophilus groenlandicus.*" In Perrin, W., B. Wursig and J. G. M. Thewissen (editors). *Encyclopedia of marine mammals.* Burlington: Academic Press (2009), 542–546, at 543.

harp seal population is divided into three separate breeding stocks. The largest, Western North Atlantic stock can be found in the 'Front' and the Gulf of St. Lawrence, the second stock in the ice of Eastern Greenland, and the third stock in the ice of the White Sea.[219]

Fig. 3: Harp seal range.
Reproduced from National Marine Fisheries Service, Office of Protected Resources, March 2009. URL: http://www.nmfs.noaa.gov/pr/pdfs/rangemaps/harpseal.pdf (accessed 11 March 2015).

219 Kovacs, K. (IUCN SSN Pinniped Specialist Group). "*Pagophilus groenlandicus.*" In IUCN. IUCN Red List of Threatened Species. Version 2014.2 (2008). URL: http://www.iucnredlist.org/details/41671/0 (accessed 18 September 2014).

The seal hunt as conducted in Newfoundland targets the seals of the Western North Atlantic stock. Seals of this stock migrate south along the Labrador Current from the Arctic down to the 'Front' and the Gulf of St. Lawrence with the beginning of the Arctic winter in September/October. Once reaching the southerly waters, in December the herd splits up and they whelp in late February on the ice in the 'Front' and in the Gulf. In April the herd begins its migration to northerly waters.[220]

The time of whelping usually lasts only for a few days and occurs in very large numbers in a fairly limited area. Pregnant females climb onto the ice and give birth to pups with a white fur ('whitecoats'), on average once annually. While weighing around 9–10 kg at birth, they gain weight quickly during the 2–3 week lactation period – around 2.2 kg per day. The mother abandons the pup thereafter to mate with other males and the pups now weigh around 35 kg. During lactation, the whitecoats moult their fur to put on a darker, silvery fur with black spots. During moulting, the young harps are referred to as 'raggedy jackets' while upon completion of the moult, they are now 'beaters' – the main target of the Newfoundland seal hunt. After 13–14 months in the 'beater' stage, the seal undergoes a second moult and is now referred to as 'bedlamer' which it retains until it reaches sexual maturity. The harp seal reaches sexual maturity roughly at around 5 years of age. The typical harp-like marking, from which this species derives its name, then appears on the back of both male and female harp seals and although moulting continues, is retained throughout the seal's life. Life expectancy of a harp seal is 30+ years.[221]

1.2. Feeding patterns

Harp seals feed on several species abundant in Canadian waters. There is scientific consensus on predated species such as capelin (*Mallotus villosus*), Arctic cod (*Boreogadus saida)* or Polar cod *(Arctogadus glacialis*) as well as crustaceans and shrimps.[222] There is, however, an important dispute over the role of the Atlantic cod (*Gadus morhua)* – one of the most important commercial fish species in Newfoundland – in the harp seal's dietary behaviour: While scientists ascribe Atlantic

220 Caldow, J. E. *Of men and seals – A history of the Newfoundland seal hunt.* Ottawa: Environment Canada/Canadian Parks Service (1989), at 14; Lavigne, *supra* note 218, at 542, 543; NOAA. *Harp Seal* (Pagophilus groenlandicus). *Western North Atlantic Stock* (2013). 351–358. URL: http://www.nmfs.noaa.gov/pr/sars/2013/ao2013_harpseal-wna.pdf (accessed 18 September 2014).

221 Lavigne, *supra* note 220, at 544, 545; Bonner, W. N. *Seals and man – A study of interactions.* Seattle and London: University of Washington Press (1982), at 37.

222 Lavigne, *supra* note 220, at 543; Kovacs, *supra* note 219; DFO. *Seals and science at Fisheries and Oceans Canada.* (nd. (a)).URL: http://www.dfo-mpo.gc.ca/fm-gp/seal-phoque/facts-faits/facts-faitsa-eng.htm#harp (accessed 18 September 2014).

cod a minor importance on the dietary plan of the harp seal,[223] a common narrative in Newfoundland maintains that harp seals prey on the species and significantly contribute to species decline. Already England has documented this trait and notes that the seal plays "havoc with various food fishes, especially the cod. Anybody who knows the voracity of a seal can imagine what a million or two of them will do to our fish."[224]

A detrimental effect of a large harp seal population can be used as an argument to conduct sealing for a reduction of the seal herds[225] and indicates the competitiveness between seals and humans with regard to the same fish species.[226] The argument becomes increasingly important in the context of the collapse of the Atlantic cod stocks in Eastern Canada in the early 1990s. While overfishing has been considered a primary factor in the collapse, leading to a moratorium on the commercial cod fishery in 1992, arguments also pointed to the low fishing yield and the simultaneous collapse of non-commercial fish species as indicators for fisheries not being the sole reason.[227] Fishermen also put the blame on the increasing harp seal population as a reason for the collapse of the cod stocks, which to this day has failed to recover fully with the moratorium on the fishery still in place. Furthermore, former Canadian Fisheries Minister Brian Tobin declared in 1996 that "[t]here is only one major player fishing that stock. And his first name is harp. And his second name is seal."[228] However, although the harp seal is a major player in the marine ecosystem, a direct correlation between an increasing seal population and decreasing cod stocks from a scientific perspective has yet to be established, as other complex contributing environmental factors are not fully understood.[229]

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223 Lavigne, *supra* note 220, at 543; Kovacs, *supra* note 219.

224 England, *supra* note 25, at 47.

225 Caldow, *supra* note 220, at 189.

226 Henke, J. *Seal wars – An American viewpoint.* St. John's: Breakwater Books Ltd. (1985), at 79; "A scientific look at the seal hunt." *New York Times*, 3 April 1984. URL: http://www.nytimes.com/1984/04/03/science/a-scientific-look-at-the-seal-hunt.html?pagewanted=2 (accessed 19 September 2014).

227 Hutchings, J. A. "Spatial and temporal variation in the density of northern cod and a review of hypotheses for the stock's collapse." *Canadian Journal of Fisheries and Aquatic Sciences* 53 (1996), 943–962 at 955.

228 Cited in Dauvergne, P. *The shadows of consumption: Consequences for the global environment*. Cambridge & London: MIT Press (2010), at 195.

229 Chassot, E., D. Duplisea, M. Hammill, A. Caskenette, N. Bousquet, Y. Lambert and G. Stenson. "Role of predation by harp seals *Pagophilus groenlandicus* in the collapse and non-recovery of northern Gulf of St. Lawrence cod *Gadus morhua*." *Marine Ecology Progress Series* 379 (2009), 279–297.

1.3. Population status

The population of the harp seal can be considered stable and the International Union for the Conservation of Nature (IUCN) lists this seal species with its different subpopulations under 'Least Concern' although the decrease in sea ice crucial for whelping due to climate change is "almost certainly going to be negative for harp seals in the future."[230]

Unfavourable ice conditions and increased pup mortality are also confirmed by the Department of Fisheries and Oceans Canada. The DFO estimates the harp seal population to be at 7.3 million. Even in spite of the bad ice conditions in the last few years it is claimed that a likely possibility for pup mortality is not decreasing sea ice, but rather the reaching of the environmental carrying capacity for the seals, meaning that the ecosystem is not anymore able to sustain the increasingly growing seal population.[231] Carrying capacity may also be the reason why a decline in pup production has been documented. While this can be one reason, another reason may be earlier documented, yet unexplained, interannual variability in pup production. This may be of significance as given the past changes in the climate the endurance of the harp seal throughout the centuries may indicate an elevated resilience in the face of climate-related environmental changes.[232] A means to adapt to changing environmental conditions may lead to the harp seal migrating to more northerly areas for whelping, therefore leaving traditional whelping grounds.[233] Irrespective of the different nature of current and future threats to the harp seal, other estimates for 2012 ascribe the Northwest Atlantic Herd a population of around 7.1 million animals.[234]

230 Kovacs, *supra* note 219.

231 DFO (nd. (a)), *supra* note 222.

232 Stenson, G. and N. J. Wells. *Current reproductive and maturity rates of Northwest Atlantic Harp Seals, (*Pagophilus groenlandicus*).* Ottawa: Fisheries and Oceans Canada (2010), at 4.

233 Stenson and Hammill, *supra* note 218, at 4, 5.

234 NOAA, *supra* note 220, at 352.

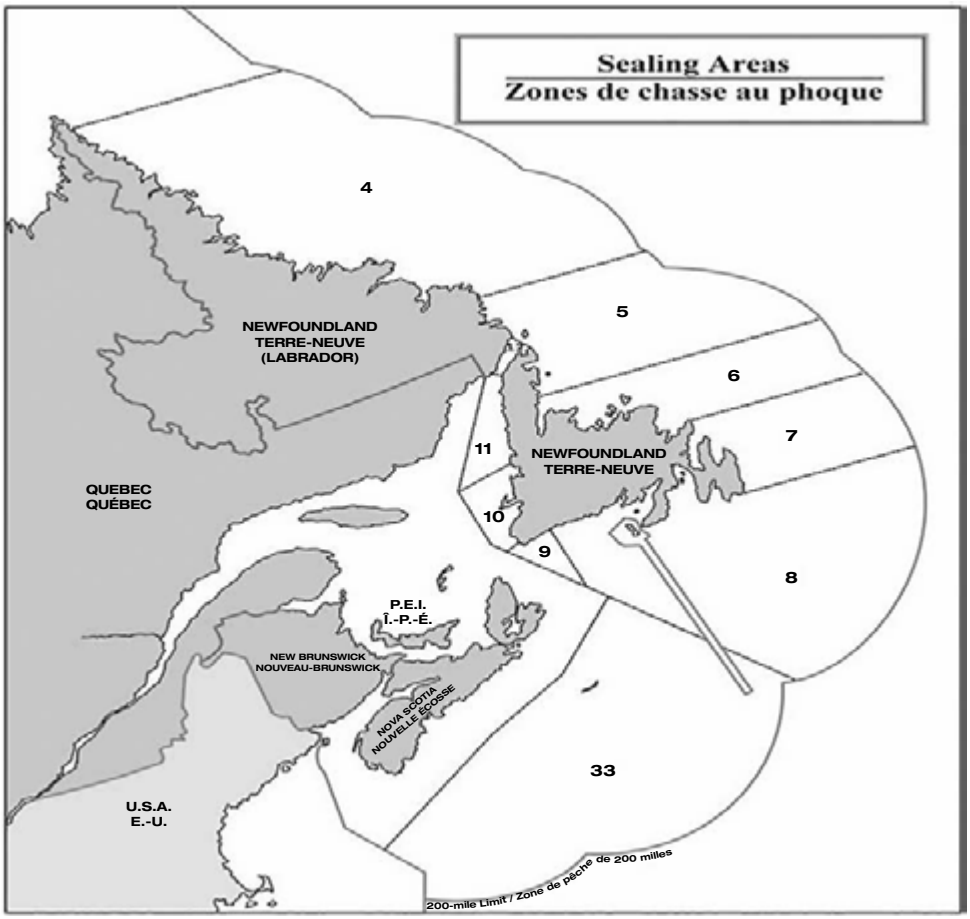


Fig. 4: Sealing areas.
Reproduced from DFO (2011), *supra* note 219.

1.4. The legal framework and killing methods

The Canadian seal hunt falls under the 1993 Marine Mammal Regulations (MMR)[235] of the Fisheries Act. Under Part IV of the MMR the seal hunt is regulated and according to article 27 of the MMR it is illegal to "sell, trade or barter a whitecoat or blueback," thus effectively outlawing the commercialisation of harp and hooded seal pups. The marine areas of Atlantic Canada are subdivided into sealing areas each of which is allocated a specific TAC in combination with opening and closing times. Each vessel, depending on its size, is furthermore allocated a total quota while no vessel is to exceed the hunt of 400 seals per day.

Three different types of sealing licenses exist for the hunt as stipulated in MMR article 26.1: for personal use; for commercial use; and for the hunt of so-called nui-

235 Marine Mammal Regulations, SOR /93-56, of 4 February 1993, as amended.

sance seals. A prerequisite for obtaining a sealing license is participation in a training course on *Humane Harvesting of Seals* provided by the Canadian Council of Professional Fish Harvesters (CCPFH) and the Canadian Sealers Association (CSA).


Professional Fish Harvesters Certification Board
Newfoundland and Labrador

This is to recognize that

Nikolas Sellheim

has attended an information workshop in

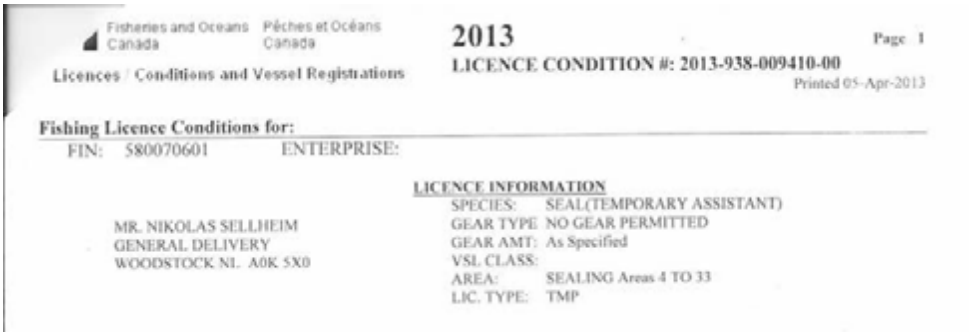
HUMANE HARVESTING OF SEALS

April 2, 2013

Canada

Fig. 5: The author's workshop certification.

Since 2004 a freeze on the issuance of new professional sealing licenses is in place in order to further professionalise the hunt. This freeze was implemented on request of the industry.[236] In order to be able to participate in the hunt as a deckhand, assistant sealer licenses are issued which, however, do not entitle the license holder to apply the first blow or shot to the seal.


Fisheries and Oceans Canada / Pêches et Océans Canada

Licences / Conditions and Vessel Registrations

2013

Page 1

LICENCE CONDITION #: 2013-938-009410-00

Printed 05-Apr-2013

Fishing Licence Conditions for:

FIN: 580070601 ENTERPRISE:

MR. NIKOLAS SELLHEIM
GENERAL DELIVERY
WOODSTOCK NL A0K 5X0

LICENCE INFORMATION

SPECIES: SEAL(TEMPORARY ASSISTANT)
GEAR TYPE: NO GEAR PERMITTED
GEAR AMT: As Specified
VSL CLASS:
AREA: SEALING Areas 4 TO 33
LIC. TYPE: TMP

Fig. 6: The author's sealing license.

236 DFO. *2011–2015 Integrated Fisheries Management Plan for Atlantic Seals.* Ottawa: Department of Fisheries and Oceans (2011). URL: http://www.dfo-mpo.gc.ca/fm-gp/seal-phoque/reports-rapports/mgtplan-planges20112015/mgtplan-planges20112015-eng.htm#c2 (accessed 11 March 2015).

Articles 28 and 29 of the MMR outline the animal welfare requirements in the seal hunt and since 2009 the so-called 'three-step-process' has been made mandatory. The three-step-process entails the stunning, checking and bleeding of a seal before it is pelted. In practice, as observed in the 'Front'-seal hunt in 2013, this means that the seal is shot to the head by a professional sealer. The seal is then gaffed on board where quickly repeated blows are applied to the seal's head in order to crush both sides of the cranium entirely. The seal's front is then cut open from its snout to the anus. Both axillary arteries are cut and the seal is turned to its stomach for ca. 30 seconds to fully bleed out. The pelting of the seal then constitutes the final step. During the time before pelting it occurs regularly that the seal moves in spite of it being irretrievably unconscious. This movement is referred to as 'swimming reflex' and is a reaction to acute lethal trauma to the brain.[237]

2. The history of the seal hunt in Newfoundland

The hunt of seals and other marine mammals in Newfoundland is neither a recent development nor a development of the commercial trade systems. It is closely linked to the history and society of the island and can be traced back to the archaic peoples that settled in Newfoundland and Labrador, whose population interacted, intermingled and shared (or competed over) the same resources. Busch writes that "[a]s long as there has been man in Newfoundland, there has been sealing."[238] As many other (sub-) Arctic peoples, Newfoundlanders of different origins have subsisted on the abundant marine mammals and changes in their habitats had significant consequences for human communities and cultural survival.[239] From early settlement on, people have made use of these resources and have significantly contributed to maritime cultures. Several different ethnic groups have at a given time in history settled in Newfoundland and Labrador.[240] An important element

237 Smith, B., C. Caraguel, A. Crook, P.-Y. Daoust, J. L. Dunn, S. Lair, A. Longair, J. Philippa, A. Routh and A. Tuttle. *Improving humane practice in the Canadian harp seal hunt – a report of the Independent Veterinarians' Working Group on the Canadian harp seal hunt*. Saskatoon: CCWHC (2005). URL: http://www2.ccwhc.ca/publications/IVWG_Report_new_website.pdf (accessed 11 March 2015), at 13.

238 Busch, B. C. *The war against the seals – A history of the North American seal fishery*. Kingston and Montreal: McGill-Queen's University Press (1985), at 41.

239 Hovelsrud, G. K., M. KcKenna and H. P. Huntington. "Marine mammal harvests and other interactions with humans." *Ecological Applications* 18 (2) Supplement (2008), 135–147 at 138.

240 Rankin, L. "Chapter I – Native peoples from the Ice Age to the extinction of the Beothuk (c. 9.000 years ago to AD 1829)." In Newfoundland Historical Society. *A short history of Newfoundland and Labrador*. Portugal Cove-St. Philip's: Boulder Publications (2008), 2–22 at 13; Pastore, R. T. "Palaeo-Eskimo Peoples." In *Newfoundland and Labrador Heritage.* St. John's: Memorial University of Newfoundland and C.R.B. Foundation (1998). URL: http://www.heritage.nf.ca/aboriginal/palaeo.html (accessed 18 September 2014); Tuck, J. A. "Maritime Archaic Tradi-

of these cultures is the dependency on the marine resources, and in particular on seals. Archaeological findings show that the sea played a dominant role in the identity and survival of these cultures.[241]

2.1. The rise of the seal hunt as an industry until 1900

Permanent European presence can be traced back to the early 16th century, when boats from the western ports of England ventured to the east coast of Newfoundland to make use of the vast cod stocks in Newfoundland waters.[242] Already in 1502, the first English vessel, *Gabriel,* is recorded as sailing to Newfoundland to catch and dry cod.[243] Additionally, Newfoundland waters hold a great abundance of different species of whales which led Biscayan whalers to frequently visit Newfoundland waters to catch whales from the 1530s on. They were followed by English, French and Dutch whalers in the second half of the 16th century, leading to a significant decline in the whale stocks by 1600.[244] Also the West England fishing fleet had increased to 200 ships by the turn of the century, providing European markets in Spain, Italy and England with salted cod.[245] During this time, first sporadic European settlements could be found on Newfoundland's East Coast, when whalers and fishermen overwintered on the island, while in England plans for the colonisation of Newfoundland were made by 1600.[246] Busch claims that the first documented vessel equipped for the sole purpose of hunting seals sailed from Britain to Newfoundland in 1593.[247]

At this time, French fishermen had discovered a vast richness of fish stocks on the Grand Banks whose potential the English failed to recognise. Yet, in the first half of the 17th century, namely in 1610, John Guy of the *London-Bristol Company* was made responsible for the establishment of a permanent colony in Newfoundland. By the mid-16th century, permanent European settlements could therefore be found on the Avalon Peninsula and in Conception Bay. The arrival of fish merchant

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tion." In *Newfoundland and Labrador Heritage.* St. John's: Memorial University of Newfoundland and C.R.B. Foundation (1998). URL: http://www.heritage.nf.ca/aboriginal/maritime.html (accessed 18 September 2014); Caldow, *supra* note 220, at 21, 22.

241 Rankin, *supra* note 240 at 12; Kristensen, T. J. and J. E. Curtis. "Late Holocene hunter-gatherers at L'Anse aux Meadows and the dynamics of bird and mammal hunting in Newfoundland." *Arctic Anthropology* 49 (1) (2012), 68–87 at 80, 81.

242 Ryan, *supra* note 25, at 25.

243 Pope, P. E. "Chapter II – Newfoundland and Labrador, 1497-1697." In Newfoundland Historical Society. *A short history of Newfoundland and Labrador*. Portugal Cove-St. Philip's: Boulder Publications (2008), 23–48 at 26.

244 Tønnessen, J. N. and A. O. Johnsen. *The history of modern whaling*. London: C Hurst & Company (1982), at 101.

245 Ryan, *supra* note 25, at 26.

246 Pope, *supra* note 243, at 33.

247 Busch, *supra* note 238, at 46.

David Kirke and the establishment of his base in Ferryland on Avalon Peninsula marked the beginning of permanent European settlement of Newfoundland.[248]

In the late 16th century, the number of independent fishing business amounted to around 1,500 and Ferryland functioned as the *de facto* capital of the colony. However, French settlement in Placentia, southern Newfoundland, continuing winter raids on the new colonies from the well-protected settlements in Placentia, as well as Newfoundlanders' involvement in wars in Europe caused significant hardships for the young colony.[249]

At that time, a market for seal products had not yet developed in Europe, as seal oil had not been discovered as a resource and a valuable product, but rather whale oil from Greenland was of interest for European merchants. Instead, seal skins and seal meat were used and consumed locally, especially during the times of conflict.[250] With the Treaty of Utrecht in 1713,[251] which ended the wars in Europe, France withdrew from Newfoundland and gave up any claims to the island while French fishermen were still allowed to fish on the north-western shores of Newfoundland.[252] With the return of peace and the introduction of the potato as a staple food, the population in Newfoundland grew and settlements spread further north. The seal hunt emerged as an industry and contributed to the economic stability of the colony.[253]

The quantity of seal oil was first statistically recorded in 1723 and in subsequent years it showed that the yield of seal oil, contrary to cod oil, was subject to serious fluctuations due to the difficult climatic conditions. However, the emerging sealing industry was dominated by the small outports in the north of Newfoundland and had become an integral part of the local economy by the late 18th century.[254] The launch of the commercial sealing industry can be dated at 1793, when a St. John's merchant successfully sent two vessels to the ice to search for seals, followed by four schooners from St. John's and several more from Conception Bay in 1796.[255] Several factors contributed to the establishment of a thriving sealing

248 Ryan, *supra* note 25, at 29; Pope, *supra* note 243, at 36.

249 Ryan, *supra* note 25 at 31; Pope, *supra* note 243, at 42, 43.

250 Busch, *supra* note 238, at 46; Ryan, *supra* note 25, at 49.

251 The Treaty of Peace and Friendship between the most Serene and most Potent Princess Anne, by the grace of God, Queen of Britain, France, and Ireland, and the most Serene and most Potent Prince Lewis the XIVth, the most Christian King, concluded at Utrecht the 11 day of April 1713.

252 Commonly referred to as the 'French Shore.'

253 Busch, *supra* note 238, at 47; Caldow, *supra* note 220, at 23; Ryan, *supra* note 25, at 31; Pope, *supra* note 243, at 43; Janzen, O. U. "Chapter III – The 'Long' Eighteenth Century, 1697–1815. In Newfoundland Historical Society. *A short history of Newfoundland and Labrador*. Portugal Cove-St. Philip's: Boulder Publications (2008), 59–76 at 51.

254 Ryan, *supra* note 25, at 50, 51.

255 Coleman, J.S. "The Newfoundland seal fishery and the Second World War." *Journal of Animal Ecology* 18 (1) (1949), 40–46 at 42; Wright (1984), *supra* note 25, at 10; Ryan, *supra* note 25, at 55.

industry in Newfoundland in the early 19th century: the recognition of seal oil as a cheap alternative to whale oil, which experienced a decline; the growing demand for seal oil as a fuel for street lights in European (and in particular English) cities; and utilisation of seal oil in soaps and in the leather tanning business provided significant economic opportunities for the Newfoundland sealing industry.[256] On a technical side, the introduction of larger boats, schooners, made the hunt for larger numbers of seals possible.[257] It is thus that during the first half of the 19th century, even in spite of the early disruptions due to the Napoleonic Wars, the economy of Newfoundland was based to one third on the sealing industry.[258] Moreover, seal products amounted to 24% of Newfoundland's exports.[259] This, although ice conditions allowed the seal hunt to be conducted only for a short period of time, is reflected in the public perception of the seal hunt: "Never, in our time, never, perhaps, in the history of the country, was a good fishery of such vital importance, or hoped for with such feverish longing expectation."[260]

The economic importance of the seal hunt, which in Newfoundland is referred to as the 'seal fishery,'[261] and the inherent power of the merchants who sold the products and provided the ships led to a formation of three social classes: The merchants as the highest class; the 'planters,' independent fishing businesses, as the second social class; and fishermen/sealers working on the ships as the third. No statement on the role of women in defining these social classes can be made. The concentration of monetary and also political power in the merchant class solidified in the mid-1800s with the introduction of the more costly, yet more efficient steam ships into the seal hunt. Already in 1855 the benefits of steamers were recognised, and they were officially introduced in 1862/63.[262]

In the latter half of 19th century, the sealing industry was concentrated in St. John's and Conception Bay and fewer men were employed as the larger and more efficient ships were purchased and engaged in the seal hunt. Ultimately, a monopoly of merchants controlled the industry and eight companies located in St. John's were in control of the entire sealing industry, which at that time employed up to 14,000 people (of a population of 146–220,000 between 1869 and 1901) and with

256 Ryan, *supra* note 25, at 67–86.

257 Bonner, *supra* note 221, at 41.

258 Caldow, *supra* note 220, at 30; Ryan, *supra* note 25, at 98.

259 Busch, *supra* note 238, at 50.

260 Newfoundlander, reproduced in Ryan, *supra* note 25, at 103.

261 The term 'seal fishery' is still commonly used and stems from the times when seal were still regarded as fish (see for example England, *supra* note 25, at 39).

262 Coleman, J. S. "The present state of the Newfoundland seal fishery." *Journal of Animal Ecology* 6 (1) (1937), 145–159 at 150; Coleman (1949), *supra* note 255, at 42; Bonner, *supra* note 221, at 41; Busch, *supra* note 238, at 52; Caldow, *supra* note 220, at 41; Ryan, *supra* note 25, at 149.

an annual average catch of approximately 300,000 seals.[263] Two elements challenged the sustainability of the industry: first, the vast number of annual catches and the increased accessibility to formerly untouched herds put immense pressure on the overall seal population and with the progressing century the populations started to dwindle. Second, with the rise of hydrocarbon resources and competition from other regions of the world, the demand for Newfoundland seal oil decreased. The value for seal skins, however, rose and became therefore increasingly important for Newfoundland's economy.[264]

2.2. The sealing industry in the 20th century

The new century was marked by decreases in the seal hunt and the cod fishery due to increasing centralisation, decline of the markets and dwindling stocks. Yet, the introduction of iron-clad steamers in 1906 was considered to provide the remedy for harvest problems and due to the early successes of these new vessels, the merchants invested strongly. Ryan, however, identifies this new technology to be "the final phase in the evolution of the sealing fleet"[265] as heavy investments into the purchase and maintenance of the steel steamers stood eyeball to eyeball with decreasing revenues from the hunt.[266]

During the First World War the sealing industry experienced a near break-up as the steamers were used in the service of Britain. By the end of the war, merely three steamers were still capable of going sealing and many companies formerly engaged in the industry withdrew, leaving only two firms, *Bowring Brothers* and *Job Brothers*, as the main stakeholders in the Newfoundland sealing business.[267] Yet, although the number of seals that was caught was small, in 1916–18 the revenues were high and contributed significantly to family income.[268] Throughout the mid-1920s, the cod and sealing industries both lost relative value for the economy of Newfoundland, when new industries, forestry and mining, gained importance. Between 1915 and 1936, only on six occasions did the annual catch exceed 200,000 seals.[269]

The inter-war period was marked by a steady decline of the industry: in the 1920s, around 2,000 sealers were engaged in the hunt, whereas 1932 counted 731 sealers.[270] Also the number of seals that was hunted dropped to an annual average

263 Caldow, *supra* note 220, at 44; Ryan, *supra* note 25, at 157; Hiller, J. "Chapter IV – The Nineteenth Century, 1815–1914." In Newfoundland Historical Society. *A short history of Newfoundland and Labrador*. Portugal Cove-St. Philip's: Boulder Publications (2008), 77–102 at 84, 89.

264 Ryan, *supra* note 25, at 85, 86.

265 *Ibid.*, at 187.

266 Coleman (1949), *supra* note 255, at 43; Busch, *supra* note 238, at 78.

267 Busch, *supra* note 238, at 90; Caldow, *supra* note 220, at 45.

268 Coleman (1937), *supra* note 262, at 156.

269 *Ibid.*, at 153.

270 Caldow, *supra* note 220, at 48.

of 150,000 between 1914–1939.[271] However, the intention for an even larger hunt of seals and as a means to mitigate the low catches an aerial spotting service was established in 1921/22, which however lasted merely until around 1930 due to the inability of the vessels to penetrate thicker ice.[272]

It was around 1913 that the seal grounds started to trigger Norwegian interests. Norway had for long been engaged in the hunt for seals in the waters around Jan Mayen Island as well as in the White Sea. However, dwindling stocks in the traditional Norwegian hunting grounds led to increasing Norwegian presence in the Gulf of St. Lawrence and at the 'Front.' Operating both from Norway and from Nova Scotia, albeit many of the ships sailing under the Canadian flag, the crews consisted largely of Norwegian sealers and also during the Second World War Norwegian ships were present at the 'Front.'[273] Newfoundland sealing, however, experienced a steady decline during the 1930s as a result of the depression of the global economy. During WWII and for the first time in 150 years it ceased altogether in 1943 as the large ships were used elsewhere.[274]

With the introduction of the motor vessel, the seal hunts grew after the war, because smaller ships were now also able to participate in the hunt again, making it evermore possible for individual hunters to engage in the hunt. This furthermore led to the de-centralisation of the industry, up to 1942 in the hands of aforementioned two companies *Bowring* and *Job Brothers*, and spread into smaller ports in northern Newfoundland.[275] This also meant that the landsmen hunt, a hunt from small boats based on daily trips to the ice, became more successful and important for the industry itself: while accounting for 25% in the early post-war period it formed 50% of the total allowable catch by the late 1970s.[276]

In the 1950s, the sealing industry changed significantly due to the introduction of 35–65 feet vessels ('longliners') into the sealing industry, and because of Newfoundland becoming part of Canada in 1949. Therefore, social benefits became an important support mechanism in the former colony. In 1957, fishermen were considered eligible under unemployment insurances, leading to fewer fishermen going out to sea, reflecting the low wages the sealing industry yielded.[277] Given the low economic impact of the sealing industry, an increasing number of sealing companies dropped out and shifted their focus to the fishing sector. This newly

271 Barry, D. *Icy Battlegound: Canada, the International Fund for Animal Welfare, and the seal hunt*. St. John's: Breakwater Books Ltd (2005), at 15.

272 Caldow, *supra* note 220, at 78–86; England *supra* note 25, at 217–225.

273 Barry, *supra* note 271, at 15; Caldow, *supra* note 220, at 52.

274 Coleman (1949), *supra* note 255, at 44.

275 Coleman (1949), *supra* note 255 at 45; Caldow, *supra* note 220, at 108, 109.

276 Barry, *supra* note 271, at 15.

277 Caldow, *supra* note 220, at 109.

opening void was filled with firms, especially from Norway, that shifted their sectors of operation from Norway to Newfoundland and Nova Scotia. Ultimately, by the 1970s, more than half of the vessels leaving port for the seal hunt were Norwegian.[278] By 1971, the seal hunt quota of 200,000 seals, which had been provided by the International Commission for the Northwest Atlantic Fisheries (ICNAF) since 1966, was evenly split between Canada and Norway. The former carried out its hunt in the Gulf of St. Lawrence and at the 'Front,' the latter merely at the 'Front.'[279] Responding to the growing movement countering the seal hunt due to conservation concerns, the Canadian government shut down the whitecoat hunt in the Gulf in 1970, prohibited the hunt by vessels larger than 65 ft in 1972 and set up a Committee on Seals and Sealing (COSS) in 1971 to advise the Fisheries Minister on all aspects of the sealing industry. The COSS recommended the phasing out of the commercial seal hunt by 1974 and the imposition of a ban on all commercial hunting until 1980 to enable the seal population to recover. This recommendation, however, was not followed by the government.[280]

Due to the high involvement of foreign ships in fisheries carried out in Canadian waters, calls for bringing fisheries under Canadian control grew. Ultimately, this was also based on the Norwegian presence in the seal hunts. Canada introduced its 200 nautical mile limit and established its Exclusive Economic Zone (EEZ) in 1977, in essence replacing the ICNAF as the prime regulator of the seal resource.[281] In the previous year, the harp seal population of the northwest Atlantic herd was estimated to be around 1.2 million animals marking a significant increase from 1971/72,[282] when the United States implemented the MMPA.[283]

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278 Wright (1984), *supra* note 19, at 18; Caldow, *supra* note 220, at 11, 112.

279 Barry, *supra* note 271, at 34.

280 Caldow, *supra* note 220, at 121; Barry, *supra* note 271, at 35.

281 Dunn, D. L. *Canada's east coast sealing industry 1976 – A socio-economic review*. Fisheries and Marine Service Industry Report 98. Ottawa: Department of Fisheries and the Environment (1977), at 1; Wright (1984), *supra* note 25, at 18; Caldow, *supra* note 220, at 123; Barry, *supra* note 271, at 39; DFO (nd. (b)). *Canada's ocean estate – A description of Canada's maritime zones*. Ottawa: Department of Fisheries and Oceans Canada (nd.). URL: http://www.dfo-mpo.gc.ca/oceans/canadasoceans-oceansducanada/marinezones-zonesmarines-eng.htm#ex (accessed 18 September 2014).

282 Dunn, *supra* note 281, at 2.

283 See MMPA, *supra* note 183; The MMPA was as a result of multiple issues which shall not be discussed here. It is however worth noting that international protests against the whale and seal hunt contributed to the creation of this regime, as manifested in section 2.6 which reads: "marine mammals have proven themselves to be resources of great international significance, aesthetic and recreational as well as economic, and it is the sense of the Congress that they should be protected [...]." (see also Epstein, C. *The power of words in international relations – Birth of an anti-whaling discourse.* Cambridge: MIT Press (2008), at 107, 108). Therefore, *all* marine mammals, even though their population status may not be endangered, are protected under the MMPA and consequently all commercial activities including import into the US are prohibited.

Yet, protests grew throughout the late 1970s. By then the sealing industry was to a large extent dependent on seal pelts, which became an important element in the anti-fur and thus anti-seal hunting protests. In 1976 4,200 Newfoundlanders were directly employed in the sealing industry and household earnings benefitted around 18,000 people altogether.[284] In light of the growing protest movement, in 1982 the Canadian Sealers Association (CSA) was founded in order to represent the interests of the sealers.

Moreover, given a looming international boycott on Canadian fish products initiated by the International Fund for Animal Welfare (IFAW), the Canadian government established a commission to appraise all aspects related to the seal hunt in Canada.[285] The report, which was chaired by Quebecois Judge Albert Malouf, was released in 1986. This extensive report documents the social, cultural and economic importance of the different kinds of seal hunting in Canada, occurring in different regions. The Malouf Commission *inter alia* recommended the banning on the hunt on whitecoats[286] which the Canadian government implemented in 1987, marking the shift of focus of the Canadian seal hunts on older seals, i.e. 'beaters.' Notwithstanding, throughout the 1990s and the 2000s anti-sealing protests continued, resulting in the adoption of trade bans on seal products.

In the 2000s the seal hunt has not lost its socio-economic importance for small communities in Newfoundland although the decreasing market demand for seal products limits its economic value while influencing its social value, as will be shown below. However, the pride in being able to master the difficult and dangerous marine environment and in making a living from the centuries-old practice of seal hunting cannot be underestimated and even in light of low economic revenues, the hunt itself, albeit for subsistence purposes, is likely to continue.[287]

Currently, the TAC for harp seals has been set at 400,000 by the DFO. In 2014, unofficial numbers state that merely 50,000 seals were landed, a decline of 40,000 from the previous year.[288]

The bans imposed by the MMPA do not apply to indigenous peoples provided the hunt has occurred for subsistence purposes. Especially in the case of whaling this exemption has proved to be particularly sensitive. The struggle of the Makah to re-open their traditional whale hunt exemplifies this (see for example Stoett, P. J. *The international politics of whaling*. Vancouver: UBC Press (1997), at 120).

284 Dunn, *supra* note 281, at 25.

285 Barry, *supra* note 271, at 92.

286 Malouf, A. H. Royal Commission on Seals and the Sealing Industry in Canada report. Ottawa: Supply and Services Canada (1986), at 576–579.

287 Sellheim (2015d), *supra* note 23.

288 Sealing industry representative, personal communication, November 2014; Sellheim (2015b), *supra* note 21, at 284, 12.

PART IV – EUROPEAN LEGAL RESPONSES TO THE SEAL HUNT

The hunts in Newfoundland have been the target of repeated and heated campaigns by groups aiming to shut it down. The IFAW, for example, was founded with the core aim to end the commercial seal hunt.[289] The tactics employed by anti-sealing organisations aimed at raising awareness and at causing cascading effects in terms of calling for boycotts of Canadian sea food and fish. To this end, anti-sealing protests were also taken to the European continent.

1. Council Directive 83/129/EEC – 'Seal Pups Directive'

Campaigns in the European Communities first started to appear in the 1970s, primarily carried out by the IFAW in order to destroy European markets for seal pelts. The involvement of celebrities, such as the actress Brigitte Bardot who visited the ice floes in 1977, put enormous public pressure on western European governments. Italy was the first country to ban the pelts of seal pups from entering its markets in 1979 with France and the Netherlands following one year later. Also the German government was in preparation of legislation making the import of skins from seal pups more difficult.[290]

Much of the anti-sealing protests took place in Britain. To this end, a British MEP tabled a motion for a Community-wide ban on trade in products stemming from seal pups in April 1980. The concerns of environmental organisations such as the IUCN, which consists of nation states, governments and intergovernmental organisations, as well as the non-governmental WWF over the sustainability of the Canadian seal hunt were crucial in this motion. The resolution for the motion was drafted on behalf of the Environment, Public Health and Consumer Protection Committee of the European Parliament and released in the report by *rapporteur* Johanna Maij-Weggen on 25 November 1981.[291] Although the report was

289 Barry, *supra* note 271, at 30, 31.

290 *Ibid.*, at 54–56 .

291 European Parliament. *Report drawn up on behalf of the Committee on Environment, Public Health and Consumer Protection on Community trade in seal products and in particular in products deriving from the whitecoat pups of harp and hooded seals (pagophilus groenlandicus and Cystophora cristata),* Document 1-738/81, 25 November. 1981 (1981); The report was accepted at first reading, but then withdrawn by the plenary during its session of 20-22 January 1982 and replaced with a slightly amended version on 27 January. European Parliament. *Second Report drawn up on behalf*

faced with resistance from Canada, the European Parliament voted in favour of it on 11 March, calling upon the Commission to draft a legislative proposal for a trade ban on seal pup products.[292]

On 28 February the Environment Council of the European Community adopted a directive banning the trade in products stemming from harp and hooded seal pups – whitecoats and bluebacks respectively – making the German legislative process to exacerbate the importation of seal skins obsolete. This Council Directive, Seal Pups Directive, was initially set to be in force until 1985, when it was extended until 1989 and then indefinitely.[293]

Throughout the legislative process, several issues became obvious as the primary objective for a ban. While the Directive itself merely highlights concerns over conservation statues of seals,[294] the second Maij-Weggen Report remarks that it is furthermore the perceived cruelty of the killing of newborn and defenceless pups which stirred a public outcry and which called for a trade ban.[295] Notwithstanding, the Preamble of the Directive notes that "the exploitation of seals […] is a natural and legitimate occupation and in certain areas of the world forms an important part of the traditional way of life and economy."[296]

Although the Seal Pups Directive also held an exemption for Inuit hunts in article 3, its consequences were drastic for Canada's Arctic communities given the decades-long cultural and economic interaction of Inuit with the western world and the resulting sale of seal products through commercial trade routes. The Malouf Report notes:

> The continuation of the "traditional hunt" by Inuit is not in jeopardy *in principle*, but weak markets for surplus seal pelts present a major difficulty

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of the Committee on the Environment, Public Health and Consumer Protection on Community trade in seal products and in particular in products deriving from the whitecoat pups of harp and hooded seals (Pagophilus groenlandicus and Cystophora cristata), Document 1-984/81, 15 February 1982, (1982).

292 Barry, *supra* note 271, at 61.

293 Seal Pups Directive, *supra* note 4; Through Council Directives 85/444/EC and Council Directive 89/370/EEC respectively. The European Commission notes that reasons for the indefinite extension of the ban included: "Doubts about the effects of non-traditional hunting on the conservation of harp seals in the East Atlantic, the Barents Sea and the White Sea; Renewed public pressure; The negative consequences that could be expected should the Directive not be extended" (European Commission. *Background information on Seal Pups Directive* (nd. (a)). URL: http://ec.europa.eu/environment/biodiversity/animal_welfare/seals/index_en.htm (accessed 13 September 2014)).

294 Seal Pups Directive, *supra* note 4, Preamble.

295 European Parliament (1982) *supra* note 291, at 5.

296 Seal Pups Directive, *supra* note 4, Preamble.

> for those who depend on some cash returns from the hunt to provide fairly basic necessities of life and to furnish items for hunting other animals.[297]

Wenzel writes that "the architects of 83/129/EEC attempted to acknowledge aboriginal sealing, but their conception of Inuit subsistence was out of date."[298] This resulted in significant plummeting of revenues for Inuit communities in Canada and in Greenland. While the Greenlandic Home Rule government was able to buffer the effects through state subsidies, Canadian Inuit were affected drastically. DeLancey shows, for example, that in Resolute Bay, Northwest Territories (now Nunavut), a collective of 100 hunters that earned CAD 54,000 in 1982 was only able to earn CAD 1,000 after the adoption of the ban.[299] Generally it is estimated that in 1983/84 the total revenue from sealing was only 15% of that in 1981/82.[300] 18 out of 20 Inuit villages lost up to 60% of their annual income while traditional social patterns that were to a large extent based on the hunt for seals started to dissolve.[301] Kalland and Sejersen note that also the cultural environment and social fabric in Inuit communities may have been affected by the ban. Although a direct link is not possible to establish they refer to an increase of violence in Inuit communities.[302]

The Seal Pups Directive aimed to ban products stemming from harp and hooded seal pups only yet the markets for seal products in general declined. Newfoundland was hit by the trade ban culturally and economically. For the first time in history, Newfoundland sealing practices were an important reason for the adoption of a trade barrier. Sealers' practices and to some degree sealers themselves became demonised with their ways of life, their traditional knowledge on the sea and the seals and the hardships they endured being devalued.[303]

Although in general the contribution of the seal hunt to the economy of Newfoundland barely exceeded 1%, the strongly localised hunts resulted in specific

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297 Original emphasis; Malouf, *supra* note 286, at 140.

298 Wenzel, G. *Animal rights, human rights. Ecology, economy and ideology in the Canadian Arctic.* Toronto: University of Toronto Press (1991), at 128, 129.

299 DeLancey, D. "Trapping and the aboriginal economy." *Information North* (Winter) (1985), 5–12, at 10.

300 Malouf, *supra* note 286, vol. 2 at 213.

301 Myers, H. "Seal Skin Directive." In Nuttall, M. (editor). *Encyclopedia of the Arctic*. New York and London: Routledge (2005), 1862–1863 at 1863; Wenzel, *supra* note 298, at 128–133.

302 Kalland, A. and F. Sejersen (with contributions from Beyer Broch, H. and M. Ris). *Marine mammals and northern cultures.* Edmonton: CCI Press and NAMMCO (2005), at 203; The negative effects of declining markets and especially of the Seal Pups Directive were manifold and will not be reproduced here in detail. For an assessment of the socio-cultural and socio-economic effects, see Malouf, *supra* note 286, vol. 2, 245–256.

303 See for example Gillett, *supra* note 25.

communities being severely hit by the ban. While in 1981 around CAD 13 million stemmed from the seal hunt in Eastern Canada and on average a Newfoundland sealer earned CAD 2,000 with the hunt, after the imposition of the ban by 1983 the income dropped to CAD 400 per year and the seal hunt's contribution to the economy dropped to CAD 3 million. All in all "[t]he landed value of pelts in Atlantic Canada in 1984 was less than 10% of that in 1981, reflecting a sharp drop in both price and landing."[304] The decline of the seal hunt automatically triggered unemployment benefits to compensate the monetary loss in the declining industry.[305] In how far the cultural and social welfare of the sealing communities were affected at that time cannot be ascertained with confidence, although a decline in self-respect and dignity was noted.[306] Given the comparably high economic value of the seal hunt at that time and the important contemporary socio-cultural role it plays nowadays for coastal communities it can be assumed that the socio-economic well-being of sealing communities was strongly affected by the Seal Pups Directive, accelerating or even triggering community dissolution and vulnerability.

More drastic were the effects on workers in the seal processing industry, however. All over Atlantic Canada and especially in Newfoundland jobs in the industry were affected. The seal skin processing sector was more affected by market declines as seal meat processors than the latter primarily served the regional markets while the former were dependent on international markets. Consequently, several existing plants stopped buying pelts and were forced to cease operations.[307] The current situation with the EU seal regime in force has had, as fieldwork has shown, the same effect.

2. The EU seal regime in perspective

In the process leading to the adoption of the Seal Pups Directive the goal setting *vis-à-vis* problem-solving capabilities were in essence coherent: overhunting of seals called for a reduction in the numbers traded in. While the hunting methods did occur throughout the process of the Seal Pups Directive, the adoption of the current seal regime was predominantly based on repulsion towards the killing methods in the commercial seal hunts. Taking the seal regime under close scrutiny, however, generates three hypotheses which constitute the basis for finding suitable answers to the research questions.

304 Malouf, *supra* note 286, at 269.

305 *Ibid.,* at 342; Lynge, F. *Arctic wars, animal rights, endangered peoples.* Hanover & London: University Press of New England (1992), at 31, 32; Myers, *supra* note 301, at 1863.

306 Malouf, *supra* note 286, at 372.

307 Malouf, *supra* note 286, at 371–374.

2.1. Hypothesis 1: A clearly defined goal is missing

The welfare of seals can be considered the pivotal element in triggering the legislative process leading to the adoption of the seal regime, which recognises seals as "sentient beings that can experience pain, distress, fear and other forms of suffering."[308] It, in principle, therefore follows a longer-standing policy of the EU that considers the well-being of animals, as outlined above, with the possibility of establishing trade barriers based on animal welfare concerns.

Bearing this in mind, a logical consequence would be the establishment of a trade barrier on seal products with the direct aim of improving animal welfare standards in the seal hunts. Given the absence of any reference to how animal welfare is improved by the seal regime, i.e. in how far the regime contributes to fulfilling the primary goal of improving animal welfare in the seal hunts, the *de facto* goal cannot be related to animal welfare. As outlined in Part II, Section 3 this stands in stark contrast to other animal welfare laws in the EU which establish a direct cause-and-effect relationship between the laws' provisions and the well-being of animals.

The confusion concerning the absence of animal welfare in the final regime is further emphasised by the judgement of the EU General Court of 25 April 2013 in case T-526/10 in which the court clarifies what goal the seal regime aims to achieve: "[T]he Basic Regulation does in fact have as its object the improvement of the conditions for the functioning of the internal market"[309] while "taking into account the protection of animal welfare."[310] These are significant differences and shed a light on the seal regime which goes beyond the creation of conditions that allow for a continuation of commercial seal hunting if concretely proposed animal welfare requirements are met, as will be shown later. Thus, internal market harmonisation which aims at streamlining the trade environment for seal products in the EU is the primary goal of the seal regime according to the EU General Court.

While appearing to be a rather clear objective, the Appellate Body of the World Trade Organization interprets the seal regime differently and as addressing EU public moral concerns regarding seal welfare.[311] Thus, while the welfare of seals is addressed, it is not the improvement of the welfare of seals as such, which the Appellate Body considers as the prime objective, but addressing the public's concerns *relating to* the mistreatment of seals.

With the absence of the primary trigger to adopt a ban on seal products to increase the welfare of seals in the seal hunts and different interpretations of institutions that constitute sources of EU and international trade law, the goal that is

308 Basic Regulation, *supra* note 2, Recital 1.

309 EGC (General Court of the European Union), Judgment of the General Court (Seventh Chamber), 25 April 2013. Case T-526/10, para. 64.

310 *Ibid.,* para. 83.

311 *EU – Seal Products* AB Report, *supra* note 12, 5.167

to be achieved by the seal regime is difficult to determine and by no means clear. Consequently, this has repercussions on the legal basis the regulation is based on.

2.2. Hypothesis 2: A clearly discernible policy-context does not exist

With the absence of a clear-cut goal a clearly discernible policy context does not exist. At least four policy areas could be possible under which the EU seal regime could fall. Firstly, the European Commission makes all documents pertaining to the accessible on its website under the rubrics of 'Environment' and 'Animal Welfare.'[312] Environmental considerations, meaning the seal within specific ecosystems, has only occurred in the very early phases of the policy-making process, namely in the EU Parliament Declaration and the CoE Recommendation which both make reference to the conservation status of seals and possible conservation concerns due to overhunting. The EU Parliament Declaration therefore raises the concern of overhunting by stating that "[...] the last time the annual number of seals now being killed was slaughtered in the 1950s and 1960s the seal population was reduced by two thirds."[313] The Council of Europe Recommendation also expresses slight concerns over the population status of seals as it invites

> member and observer states practising seal hunting [...] to ensure that the populations of seals and other marine mammals are afforded effective protection and their numbers maintained and pursue such a conservation policy as part of an overall approach geared to the sustainable management of natural heritage and the protection of wildlife.[314]

While the adoption of the Seal Pups Directive was directly linked to the conservation status of harp and hooded seals, the EFSA study was not commissioned to conduct research on the conservation status of seals, but merely focus on the killing and skinning methods. As shown earlier, also internationally the conservation status of the harp seal as the main target of the commercial seal hunt in Canada is not debated. Therefore, linking the EU seal regime to the European Union's overall environmental policies under the auspices of the Directorate General Environment seems arbitrary. Merely the fact that seals are not held in captivity but roam freely in the wild seem to justify an environmental linkage of the policy.

Usually, animal welfare issues are dealt with under the Directorate General Health and Consumers which is first and foremost responsible for the well-being

312 European Commission. *Trade in seal products* (nd. (b)). URL: http://ec.europa.eu/environment/biodiversity/animal_welfare/seals/seal_hunting.htm (accessed 17 September 2014).

313 European Parliament. Banning seal products in the European Union, P6_TA(2006)0369, para. B.

314 CoE Recommendation, *supra* note 201, para. 13.1.1.

of animals held in captivity for human exploitation. However, in its 2006 communication to the Parliament and the Council the European Commission does not exclude tackling transboundary animal welfare issues relating to wildlife.[315] This, however, is only reflected as wildlife held in captivity in the subsequent EU animal protection strategies.

Seals are referred to also in the EU's Common Fisheries Policy, however merely from an ecosystem management perspective with regard to sustainable fisheries, without reference to animal welfare aspects regarding their management. It is thus that the European Parliament, in its 2012 report on reporting obligations under the Common Fisheries Policy "[u]rges the Commission to take measures to reduce the negative effects of seals and certain seabirds on fish stocks, particularly where these are invasive species in a particular region."[316] It is therefore not the killing of seals as such that the European Parliament rejects, but rather the killing of seals for commercial purposes. Notwithstanding, ecosystem management, i.e. the hunt for seals for the protection of fisheries, is referred to in the seal regime as a legitimate reason for the killing of seals.[317] This is practiced in several EU countries and for example Finland (Åland), Sweden, Poland and Estonia have seal management plans in place.

Therefore, several policy areas coalesce making a clearly discernible field of responsibility difficult to determine. Adding to the complexity is that although it became clear that trade in seal products was to be banned, it was nevertheless not the DG Trade taking the lead in the issue, but the DG Environment which drafted the Proposal.[318] Within the European Parliament, however, the Proposal was amended by the Committee on Internal Market and Consumer Protection (IMCO), with the Committee on Agriculture and Rural Development (AGRI), the Committee on International Trade (INTA), the Committee on the Environment, Public Health and Food Safety (ENVI), and the Committee on Fisheries (PECH) merely taking advisory roles in the process.[319]

Given the various policy areas that are of relevance for the adoption and implementation of the seal regime, the question on the ultimate goal of the regime itself emerges.

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315 European Commission. *Communication from the Commission to the European Parliament and the Council on a Community Action Plan on the Protection and Welfare of Animals 2006-2010,* COM (2006) 13 final (2006), at 4.

316 European Parliament. *Report on reporting obligations under Regulation (EC) No 2371/2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy (2011/2291 (INI)), A7-0225/2012*) (2012), para. 13.

317 Implementing Regulation, *supra* note 3. article 5.

318 Wegge, *supra* note 48, at 263.

319 Sellheim (2013), *supra* note 19, at 434; Wegge, *supra* note 48, at 266; de Ville, *supra* note 47, at 46.

2.3. Hypothesis 3: Knowledge on and consideration of commercial sealing communities is not relevant for the adoption of the regime

In light of the above, stakeholder involvement becomes a crucial issue. If neither the goal is clearly defined nor the policy area discernible, who should be involved in the drafting of a legislative act to ban the trade in seal products?

Stakeholder consultation prior to and throughout the legislative process occurred in a manifold manner. For each of the states that conduct seal hunting a wealth of different stakeholders was consulted. These included indigenous and non-indigenous hunting organisations, Inuit organisations, trade organisations and representatives, government officials from the EU, Canada and elsewhere, animal rights and welfare organisations and veterinarians.

Apart from direct interaction with stakeholders, the European Commission conducted a public consultation between 20 December 2007 and 13 February 2008 via the Commission's Interactive Policy Making (IPM) Tool. This consultation yielded 73,153 responses from 160 countries most of which, however, stemmed from Anglo-Saxon countries. Although the consultation revealed that 87.4% of the respondents oppose the hunt for commercial purposes with a similar number considering the seal hunt justifiable in a traditional Inuit or indigenous context, in its analysis of the consultation COWI concluded that it does not reflect the EU's public opinion regarding seal hunting. It can therefore not serve as a policy recommendation. This is due to the fact, as COWI recognises, that organisations opposed to the hunt have encouraged and provided guidelines for their members to fill out the survey.[320] Moreover it must be noted that the public consultation was held online and in English only, within a rather short time frame at a time of Christmas and New Year's celebrations.

The clutter of an imprecise goal setting, uncertain policy areas though with a rather wide spectrum of stakeholders involved in the legislative process cause one significant group to be the most disadvantaged and most affected by the ban: the commercial sealers, the sealing communities and sealing industry. Although the commercial sealers do have an organisation representing their interests, the Canadian Sealers Association, representatives from this organisation were not present in the stakeholder meetings nor was there a consultation through other media. This means that communities that rely on the commercial seal hunt were not consulted and in the legislative process by and large neglected. Similarly, communities relying on the processing sector of the sealing industry were not consulted although the trade dimension of the sector was indeed present in the consultations. In combination with the assessment of COWI pointing to the difficulties of

320 COWI (2008), *supra* note 83, at 125, 126; Sellheim (2013), *supra* note 119, at 427, 428.

information regarding commercial sealing communities,[321] this gap has not been addressed while the negative aspects of seal hunting are commonly referred to in combination with the allegedly purely economic nature of the hunt. These two characteristics therefore appear to outweigh knowledge and social well-being of the people and communities.

2.4. The legal basis of the seal regime

Bearing the above in mind, the legal basis of the Basic Regulation is difficult to determine. As the Chapeau of the Basic Regulation reads, the regime is based on article 95 TEC (now article 114 TFEU) which establishes rules for the smooth functioning of the internal market. Two legal opinions deal with the issue of whether the seal regime can be adopted on the basis of the internal market given the absence of a legal basis for ethics-based legal instruments in EU law: The opinion of the Legal Service of the Council of the European Union of 18 February 2009[322] and the opinion of the Committee on Legal Affairs of the EU Parliament of 1 April 2009.[323]

In both opinions recourse is made to the case law of the ECJ with regard to the scope of article 95 and the harmonisation measures therein. Two cases are particularly made reference to: first, *Tobacco Advertising*;[324] and second *Swedish Match*.[325] In the former, Germany applied to the Court in order to annul a Directive banning the advertisement of tobacco products.[326] Germany's main point of challenge was that then-article 100a EC (later amended to article 95 EC, now article 114 TFEU) which establishes harmonised rules for the functioning of the internal market, is not the correct legal basis. As the primary argument served the fact that the Directive banned all advertisement for tobacco products although by and large the advertisement of tobacco products does not extend beyond national borders, thus rendering the Community's competence to harmonise the internal market obsolete. Indeed, the Court held that the powers conferred to the Community under the then article 100a are not to be understood as giving the Community the power to regulate the internal market, only to remove obstacles that

321 COWI (2008), *supra* note 83, at 24, 137.

322 Council of the European Union. Opinion of the Legal Service 6623/09, 18 February 2009 (2009); All legal opinions of the Legal Service are not publicly accessible and can therefore not be directly cited.

323 European Parliament. Committee on Legal Affairs, Opinion on the legal basis of the Proposal for a regulation of the European Parliament and of the Council concerning trade in seal products, PE423.732v01-00, 1 April 2009 (2009).

324 *Germany v Parliament and Council*, Case C-376/98. ECR-I 8498–8534 [2000].

325 *Swedish Match v Secretary of State for Health,* Case 210/03, ECR-I 11900–11930 [2004].

326 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 (OJ L 213, 30.7.1998, p. 9–12).

obstruct its smooth functioning. In this case, however, this was not the case as the national measures by and large fell under national health initiatives, specifically excluded from EU competence for market harmonisation. As a consequence, the Court annulled the Directive.

In *Tobacco Advertising II*,[327] following the adoption of Directive 2003/33/EC[328] that also aimed to ban tobacco advertising, Germany was unsuccessful in overturning this ban. The primary reason for this was that the Court saw Community action justified as a means to protect human health and the significant, and in all likelihood increasing, disparities between the national laws pertaining to advertising tobacco products. In the *Swedish Match* case, a Swedish company, *Swedish Match*, wished to sell oral tobacco ('snus') in the United Kingdom and considered the ban on placing of snus on the EU market unlawful in recourse to article 95 EC. While in principle recourse could indeed be made to this article, the protection of human health outweighs the clause on internal market harmonisation and therefore renders this legal basis obsolete.[329]

The situation of the seal regime is different and both legal opinions argue that animal health has not been included in the scope determined by the ECJ's case law. Even though the Cat and Dog Fur Regulation is made reference to, which also makes use of article 95 EC as its legal basis, the difference is that in the Cat and Dog Fur Regulation harmonised rules were necessary to make certain that consumers are not unknowingly exposed to cat and dog fur and the sale of similar furs still be possible. Hence, since national measures against cat and dog fur impeded on the trade in fur in general, banning cat and dog fur on a Community level served as a harmonisation measure. Since the seal regime's primary objective, in recourse to Section 3 of the Explanatory Memorandum of the Proposal, is to ban fully the trade in seal products, it constitutes the opposite of free circulation and prohibits this. In other words, the Proposal does not unveil how far a ban in trade in seal products, which after all considers trade in products stemming from 'humane' and indigenous seal hunts, contributes to a better functioning of the internal market. Consequently, the Legal Service of the Council argues that the ban lacks a legal basis.[330]

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327 *Germany v European Parliament and Council,* Case C-380/03, ECR-I 11631–11672 [2006].

328 Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products (OJ L 152, 20.6.2003, p. 16–19).

329 *Swedish Match*, *supra* note 325, paras. 76, 77.

330 Legal Service of the European Council, cited in ITK (Inuit Tapiriit Kanatami). "ITK/ICC Press Release * Inuit of Canada: European Union Knows Proposed Seal Ban Would be Unlawful, March 27, 2009," https://www.itk.ca/media/media-release/itkicc-press-release-inuit-canada-europeanunion-knows-proposed-seal-ban-would (accessed 5 December 2014); Sellheim (2013), *supra* note 19, at 435.

The Parliament's Legal Committee argued along the same lines, but made animal welfare, in recourse to Protocol No. 33 to the TFEU and its clause that 'full regard must be paid' to the welfare of animals the main concern for possibly being able to use article 95 EC as the regime's legal basis. Yet, primarily article 95 could be used if consumer protection as in the Cat and Dog Fur Regulation became the justification for internal market harmonisation.[331] As a consequence, the final regulation makes consumer protection its primary determinant for the utilisation of article 95 EC as its legal basis which the Proposal lacked. Recital 3 thus reads: "[...] Given the nature of those products [Omega 3 capsules, processed seal skins and furs], it is difficult or impossible for consumers to distinguish them from similar products not derived from seals." Consumer behaviour was not addressed in the COWI impact assessment and occurs for the first time in the Basic Regulation. What evidence for consumer behaviour was used to substantiate this insertion cannot be assessed.

The legal basis for the seal regime, in particular article 95 EC (now article 114 TFEU) appears difficult to establish. A complete ban on the trade in seal products appears to stand in stark contrast to a well-functioning internal market. However, in *Tobacco Advertising II* the Court argued that a ban on advertising of tobacco products prevents trade in products which is impeded by different national rules and regulations.[332] In the same vein trade in seal products can be prohibited on the basis of article 95 EC as the assumption of an increasingly scattered framework for trade is reasonable in light of the different national rules that were already in place or that were in the process of being adopted. In principle, it could be argued, recourse to article 95 does not ban trade in seal products as such, but rather in those seal products subject to different national rules.

In *Tobacco Advertising II* and *Swedish Match* the protection of human health gave the incentive for the adoption of the respective Directives. According to articles 114 (3) and 168 (5) TFEU (ex article 152 EC), if there is no exclusive focus on human health, but at the same time improves the functioning of the internal market, a measure can be adopted based on article 114 TFEU (ex article 95 EC).[333] The case of the EU seal regime, however, is different. Although, according to Protocol 33, animal welfare is to be implemented in all community policies, both articles 114 (3) and 168 (5) – and their respective predecessors – do not

331 European Parliament Legal Committee, *supra* note 323, at 13.

332 Garde, A. *EU law and obesity prevention.* Alphen aan den Rijn: Kluwer Law International (2010), at 82, 83.

333 *Ibid*,; see also Dougan, M. "Vive la difference? Exploring the legal framework for reflexive market harmonization within the single European market." In Miller, R. A. and P. C. Zumbansen (editors). *Annual of German & European Law,* Vol. 1. New York & Oxford: Berghahn Books (2003), 113–165.

make reference to animal health. Clear-cut recourse to these articles as in *Tobacco Advertising II* can therefore not be established. Moreover, the seal regime's contribution to the welfare of seals cannot be maintained in a satisfactory manner, since a direct link between the regime and the hunting practices themselves is difficult to uphold, as will be explained below. Furthermore, the *raison d'être* of the regime does not appear to be the well-being of seals, but rather the concerns of EU citizens. In order to avoid a similar clash with the provisions of article 95 EC (114 TFEU) as is established in *Tobacco Advertising I* and in line with above described *EU – Seal Products* case before the WTO, a more reasonable legal basis appears to be article 30 EC (now article 36 TFEU), which allows for "prohibitions or restrictions on imports, exports or goods in transit on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants […]." This article, notwithstanding, neither finds reference in the *travaux préparatoires* nor in the regime itself.

3. What is the goal of the EU seal regime and how has it been communicated, addressed and implemented?

By analysing the goal of the EU seal regime the horizontal alignment of the legislative, executive and judicial spheres of the EU come to the fore. By framing and adjudicating the seal regime the different roles of the EU Parliament, the Commission and the EU Courts reflect different stances and different influences within the political and legal environment in which the regime operates.[334] With regard to the European institutions, Lenschow notes that the EP "has been the 'greenest' of the three main environmental policy-making bodies [the Commission, the Council of Ministers and the Parliament]."[335]

The goal communication, addressing and implementation in the context of trade in seal products is based on the consideration of animals as being sentient beings as stipulated in article 13 TFEU:

> In formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respect-

334 See also Wegge, *supra* note 48; Pollack, M. A. "Theorizing EU policy-making." In Wallace, H., M. A. Pollack and A. R. Young (editors). *Policy-making in the European Union.* Sixth Edition. Oxford: Oxford University Press (2010), 16–44 at 30.

335 Lenschow, A. "Environmental policy. Contending dynamics of policy change." In Wallace, H., M. A. Pollack and A. R. Young (editors). *Policy-making in the European Union.* Sixth Edition. Oxford: Oxford University Press (2010), 307–330 at 315.

ing the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.

At the time of the adoption of the Seal Pups Directive in 1983 sensitivity of animals was not reflected in the then-in force Treaty of Rome.[336] Although animal welfare was an issue in the debates surrounding the adoption of the Seal Pups Directive, goal formulation and the scope of the Directive itself was aimed at restoring a favourable conservation status of harp and hooded seals through the reduction of trade in harp and hooded seal products and therefore their hunts.[337] Problem identification, overhunting and the legislative response, were consequently streamlined.[338] Consequently, the conservation status of seals is the primary narrative in the 1983 Directive with a secondary goal of protecting Inuit livelihoods. The seal hunt as a legitimate occupation is not as such challenged and even recognised in the final legislation.[339] Therefore, it is primarily the conservation status of seals which is tackled, and ultimately secured, by this Directive.

The declaration of the European Parliament of September 2006 outlines two distinctive problems that call for a legislative response of the Community: Inhumane killing methods in the commercial seal hunts and concerns over the conservation status of seals.[340] Therefore, two identified problems call for concrete legislative steps to solve them while avoiding that they will "be pointless or undesirable and will not deserve obedience if they will not contribute to problem

336 Treaty establishing the European Economic Community (TEEC), 25 March 1957; In articles 13 and 36 the Treaty of Rome merely makes reference to the protection of health and well-being of animals.

337 Sellheim (2015b), *supra* note 21, at 274, 275.

338 This being said, already para. 1 of the Motion for a Resolution by members of the Parliament indicates concerns over the applied hunting methods, calling the Commission to ban trade in products "coming from seals which have not been humanely killed" (European Parliament. Motion for a resolution on trade in seal products, Document 1-106/80). This is reflected and underlined in the report of the rapporteur for the Parliament, Johanna Maij-Weggen, who writes that "[i]n view of the threat to the species and the barbaric hunting methods employed a Community import ban on the skins of both hooded seals and harp seals […] seems appropriate" (European Parliament (1981), *supra* note 291, at 22). Interestingly the debates following the Maij-Weggen report and surrounding the adoption of the Motion were dominated by animal welfare concerns and many MEPs showed their opposition towards the killing methods. However, also other voices were heard that reflect the emotionalisation by animal rights groups as well as the negative impacts a trade ban would have on the livelihoods of those engaged in the sealing industry (see European Parliament. Debates of the European Parliament, No 1-282/184 and No 1-282/213 of 11 March 1982, respectively).

339 Seal Pups Directive, *supra* note 4, Chapeau.

340 European Parliament (2006), *supra* note 313, paras. A, B, D; Sellheim (2013), *supra* note 19, at 419; Sellheim (2015a), *supra* note 20, at 8.

solving."[341] As in the case with the Seal Pups Directive, Inuit are to be exempted from any measure. Indeed, the focus on the exemption of indigenous hunts, irrespective of the factual effects the legislation would have, is a well-communicated issue in the context of the seal regime. Already throughout the *travaux préparatoires* the concerns for Inuit people were expressed repeatedly. To counter adverse effects as after the adoption of the Seal Pups Directive, the implementation regulation holds distinct cumulative criteria for being considered under the indigenous exemption. This constitutes an important step toward a self-critical assessment and reflects adherence to international human and indigenous peoples' rights, for example by using the definition of Inuit based on the definition by the Inuit Circumpolar Council.[342]

Following the call of the European Parliament to "immediately draft a regulation to ban the import, export and sale of all harp and hooded seal products"[343] the European Commission followed the animal welfare concerns expressed in the Declaration and commissioned the European Food Safety Authority (EFSA) to

> issue a scientific opinion on: 1. the animal welfare aspects of the methods currently being used, particularly non-traditional methods, for killing and skinning seals in the respective range states and, 2. in addition, to assess, on the basis of current scientific knowledge including other available information on different killing and skinning practices, the most appropriate/suit-

341 Breitmeier, H. *The legitimacy of international regimes.* Farnham/Burlington: Ashgate (2008), at 27.

342 Basic Regulation, *supra* note 2, article 2.4; The Belgian national ban, for example, does not hold any definition of the applied terminology nor creates criteria that make the Inuit exemption better applicable in an empirical setting. It follows merely general terminology in line with the 1983 Seal Pups Directive (C – 2007/11138 Loi relative a l'interdiction de fabriquer et de commercialiser des produits derives de phoques [Law on the prohibition to manufacture and marketing of products derived from seals; own translation], 16 March 2007, article 3.2). Throughout the legislative process, the highlighting of an Inuit exemption nevertheless leads to a goal collision and trumps the communicated aim of improving animal welfare concerns in the seal hunts. In the adopted seal regime this contradiction has not been alleviated. This makes the seal regime fundamentally different to another vastly exterior internal market measure, the Leghold Traps Regulation. Here, international standards guide the ban on inhumane trapping in the Community and the regulation itself serves as a further incentive to bolster the welfare of hunted animals through the abolition of leghold traps. Access to Community markets, therefore, is granted when international humane trapping standards are met. As a general rule, an exemption for indigenous peoples cannot be found. According to Cree trappers that were interviewed in an unstructured manner in June 2012, the Leghold Traps Regulation made the utilisation of traditional traps impossible due to animal welfare concerns (Cree trappers, personal communication, 22 June 2012, Iqaluit, unstructured interview).

343 European Parliament (2006), *supra* note 313, para. H.1; Sellheim (2013), *supra* note 19, at 419, 420.

able killing methods for seals which reduce as much as possible unnecessary pain, distress and suffering.[344]

The differences in the formulation of goals between the European Parliament (ending of trade in all harp and hooded seal products) and the European Commission (assessment and improvement of animal welfare in the seal hunts) become obvious in these early stages of the policy-making process. However, although the Commission follows the animal welfare line of argumentation, urging for an assessment of scientific knowledge, the contradiction between a comprehensive assessment of animal welfare in the seal hunts and the focus on non-traditional methods,[345] a lesser focus on traditional hunting methods, cannot be swept under the carpet. The European Commission, however, in its reply of 16 January 2007 to the European Parliament makes note of the public concerns that circle around the seal hunts. While not explicitly stating so, these public concerns by and large do not include the killing of seals by Inuit hunters.

The EFSA report was released on 6 December 2007 and is a re-evaluation of several scientific studies and other materials, focusing on the killing methods applied. The report does not include field research by EFSA scientists.[346] Here, the EFSA does not question the legitimacy of hunting seals *per se*, but calls for an abolition of cruel hunting methods. At the same time it recommends to make the three-step-process, the stunning, checking and bleeding before pelting, a compulsory element of seal hunting legislation.[347] The report therefore concludes that seal hunts with high animal welfare standards are not impossible. Instead it notes: "[S]eals can be, and are, killed rapidly and effectively without causing avoidable pain" although "[t]here is strong evidence that, in practice, effective killing does not always occur but the degree to which it does not happen has been difficult to

344 European Commission. Request for a scientific opinion from the European Food Safety Authority (EFSA) concerning animal welfare aspects of the killing and skinning of seals. D(07)5376, 4 April 2007.

345 Although no definition can be found what this entails, it can be assumed that it refers to non-indigenous hunting methods.

346 It must be noted that the European Commission sent two veterinarians to Newfoundland between 9–16 April 2007 to observe the seal hunt, but the "mission failed to accomplish its objective and the Commission veterinarians were not put in a position to observe the actual hunting of the seals. No adequate arrangements seem to have been made by Canada to ensure access by them to the actual observation of the hunt. Adverse weather and ice conditions also played a role in preventing a successful observation" (European Commission (2008a), *supra* note 24, at 13). The inability of the veterinarians to join the hunt because of poor planning in combination with adverse ice conditions was confirmed by Canadian veterinarian Pierre-Yves Daoust who served as a Canadian observer on a Coast Guard vessel and who was to accompany the two Commission veterinarians (Daoust, P.-Y., personal communication, 26 September 2012, email).

347 EFSA, *supra* note 82, at 94, 95; Sellheim (2013), *supra* note 19, at 421.

assess."[348] It is noteworthy that an analysis of a commonly applied hunting method in Inuit hunts is absent: Harpooning. Since the study constitutes a re-evaluation of previous studies, these must exist in the first place. The study consequently remarks:

> Limited information is available that evaluates killing methods employed in various seal hunts around the world [...]. Since independent observer reports are only available for Canada's commercial seal hunt and Namibia's hunt for Cape Fur seals, the evaluation of the methods used for killing seals focuses on these two hunts. However, the Norwegian hunt has also been independently evaluated to some degree.[349]

Given the Terms of Reference framed by the European Commission which emphasises the assessment of 'non-traditional methods,' the focus on those three seal hunts mostly criticised in public discourse is not surprising.

3.1. Communicating goals – Focus shifts

3.1.1. First shift in focus

While the goal of improving animal welfare had thus far been at the fore of the legislative process, a focus shift occurred after the EFSA study and with the commissioning of COWI to conduct an impact assessment of a possible trade ban on seal products. The COWI report was released on 9 April 2008 and puts significant focus on the harmonisation of the internal market as its point of departure. While analysing the range states' management systems with regard to animal welfare, the impact assessment fails to take into account in how far European policy measures improve animal welfare in the seal hunts and focus on trade and socio-economic aspects instead.[350] The COWI study vaguely refers to the interrelationship of possible EU trade measures and animal welfare by noting that, for example, a total ban on trade in seal products "benefits the environmental dimension" and responds to "animal welfare concerns of the general public regarding seal hunting."[351] In how far and what 'environmental dimension' is referred to in this context cannot be ascertained. Notwithstanding, also the ban's opponents picked up the environmental dimension during the court cases before the EU Courts. In case T-18/10, for instance, which aimed to annul the Basic Regulation, the applicants hold that

348 EFSA, *supra* note 82, at 94.
349 *Ibid.*, at 50.
350 COWI (2008), *supra* note 83, at 7; Sellheim (2013), *supra* note 19, at 425, 426,
351 COWI (2008), *supra* note 83, at 99.

the application of the 'direct and individual concern' clause, as will be shown later, should be read in conjunction with international environmental law, namely the Aarhus Convention and the Convention on Biological Diversity (CBD). But in a later case, T-526/10, the Court dismissed the claims made on the basis of lack of a substantial basis. Indeed, the environmental link does not appear convincing.[352]

Interestingly, a total ban on trade in seal products, as called for by the European Parliament, is even considered to have the possibility of adverse effects on animal welfare: Trade could shift to countries whose animal welfare standards are low.[353] Goal formulation and goal attainment strategies therefore do not correspond and the uncertainty involved in possible trade bans as formulated in the study challenge the degree of objectivity involved in the policy-making process. The focus on the internal market dimension is thus the only way for European policy-makers to respond to emotional and subjective feelings towards the seal hunt, yet without certainty of the effects of the policy measures in question.[354]

3.1.2. Second shift in focus

With the presentation of the first legislative proposal on 23 July 2008 the European Commission underlined its desire to make the EU legislation an incentive for animal welfare improvement in the seal hunts as the Explanatory Memorandum to the Proposal clarifies.[355] As stated above, the only one-off means to make this incentive feasible is a harmonisation measure of the internal market, manifested in article 1, the 'Subject matter', of the Proposal: "This Regulation establishes harmonised rules concerning the placing on the market and the import in, transit through, or export from, the European Community of seal products."[356] In order to reach the prime objective of the proposal trade would be allowed if certain standards of animal welfare are met.

Comparing the Commission's incentive and the policy proposal, a shift in objectivity can be noted which, following El Karouni's diagram, from the field of aspired 'objective objectivity' based on science and knowledge to 'subjective objectivity' and the issue of the seal hunt *vis-à-vis* a European policy measure receives a much stronger political charging.[357] At the same time, the position of the Commission within the policy-making process weakens. This can be best shown by the Commission's interpretation of the general public's stance towards seal hunting which it sees opposed to it because of principal reasons with a majority favouring

352 Sellheim (2015c), *supra* note 22, at 478.
353 COWI (2008), *supra* note 83, at 98.
354 Sellheim (2015a), *supra* note 20, at 19, 20.
355 European Commission (2008a), *supra* note 24, at 5; Sellheim (2013), *supra* note 19, at 430.
356 Sellheim (2013), *supra* note 19, at 433.
357 *Ibid.*, at 431.

a trade ban.[358] This selective interpretation draws from the findings of a public consultation that indeed showed that 87.4% of the respondents are in support of a ban. The COWI study, however, points out that the public consultation cannot be taken as a policy recommendation and that it is not representative of the public's position towards seal hunting. COWI notes that "a number of organisations have encouraged their members to participate in the consultation process and even provided guidelines to members/supporters on how to fill in the questionnaire. The huge interest in the consultations [*sic*] process was facilitated by the involvement of celebrities like Paul McCartney who encouraged participation."[359]

The Commission proposed a mix of different policy options that incorporate both the incentive of animal welfare inclusion as well as being a response to the proclaimed public opposition towards seal hunting. To this end, the legitimation for its policy proposal the Commission rests on the claim that "[a]ny reduction in number of seals killed would translate into an improvement in animal welfare."[360] At the same time, however, certainty of goal attainment is not guaranteed and one sentence later animal welfare improvement is located in a more speculative context as it would "depend on whether commercial sealers improve the animal welfare of their practices. They will have an economic incentive to do so because of the size of the EU market."[361] It needs mentioning that up to this point in the policy-making process the commercial hunt for seals as such has not been challenged from a normative perspective, merely the applied practices are considered change-worthy.

3.1.3. Third shift in focus

The influence of anti-sealing groups that initiated large-scale campaigns to lobby the European Parliament may be a reason for the third shift in focus within the legislative process. With the Internal Market and Consumer Protection Committee (IMCO) of the European Parliament in charge of drafting a new report, the Commission Proposal underwent significant changes away from animal welfare-based criteria for the access to or ban from the EU's internal market towards a blanket ban on all products from all seal species irrespective of the applied animal welfare standards.[362]

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358 European Commission (2008a), *supra* note 24, at 8.

359 COWI (2008), *supra* note 83, at 125; Sellheim (2013), *supra* note 19, at 428, 429; The coordinative character of the policy solution presented becomes obvious here as a merger of seal hunting opponents and the EU polity occurs (see also Sellheim (2015a), *supra* note 20, at 10, 11.)

360 European Commission. *Commission Staff Working Document. Accompanying document to the Proposal for a Regulation of the European Parliament and of the Council concerning trade in seal products. Impact Assessment on the potential impact of a ban of products derived from seal species. SEC(2008)2290.* Brussels: European Commission (2008b), at 52.

361 *Ibid.*

362 Sellheim (2015b), *supra* note 21, at 277.

The IMCO report[363] was adopted by the Committee on 2 March 2009 and presented to the plenary three days later. The weeks before the vote in the Committee on the adoption of the report the Humane Society International (HSI) undertook massive campaigning efforts and continuously advertised for the adoption of a blanket ban for 12 weeks in *European Voice*, a newspaper considered to be an important source for European policy-makers. IMCO members were also directly approached by the organisation with fake voting cards that urged them to vote in favour of a ban and stuffed toy seals.

With support from sealing opponents, the IMCO report modified the Proposal in a way which no longer allowed for a labelling or certification scheme for seal products stemming from seals that were hunted according to high animal welfare standards. *Rapporteur* Diana Wallis, however, pointed towards the inefficiency of the goal to improve animal welfare in the seal hunts in the Explanatory Statement of the IMCO report and underlined the potentially successful application of a stringent labelling and certification scheme which would fulfil the original policy goals of animal welfare and not affecting Inuit populations.[364]

The parliamentary debate[365] on the amended and final regulation was held on 4 May 2009 in Strasbourg. Accompanied by campaigns in Brussels as well as Strasbourg the Parliamentarians participating in the debate seemed to make little use of the scientific basis that the legislative process generated, i.e. the EFSA report and the COWI study. Indeed, the narratives expressed in the debate by those MEPs opposing the seal hunt do not significantly differ from the 2006 Parliamentary Declaration: The seal hunt is inherently cruel, although this was not as such confirmed by the EFSA study; and there is a need to protect Inuit from any negative impacts of a policy measure, although the COWI study clarified that "policy measures that have adverse impacts on the image of the seal skins and other seal products will have a negative impact on the Inuit population anyway."[366] In how far the parliamentary elections one month later influenced the overwhelming number of supporters of the blanket ban in the final vote on the legislation one day later can only be speculated upon. Diana Wallis noted, however, that the rather uncritical support of the blanket ban was a means for the MEPs to present their "animal loving credentials to voters at home."[367]

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363 European Parliament. ****I Report on the proposal for a regulation of the European Parliament and of the Council concerning trade in seal products (COM(2008)0469 – C6-0295/2008 – 2008/0160(COD)). Committee on the Internal Market and Consumer Protection, A6-0118/2009.* Brussels: European Parliament (2009).

364 Wallis, in *ibid.*, at 30, 31; See also Sellheim (2013), *supra* note 19, at 437.

365 European Parliament. Debates – Monday, 4 May 2009 – Strasbourg. 21. Trade in seal products.

366 COWI (2008), *supra* note 83, at 117.

367 Wallis, D., personal communication, 28 September 2012, email.

3.2. The EU seal regime's impact on animal welfare practices

The disregard of the scientific basis and the discursive and ultimately political return to the beginning of the policy-making process in the form of the Parliamentary Declaration renders the policy-making effort that is rooted in sound knowledge of the issue fruitless. This decouples the final regime as adopted by the Parliament and the Council from a rational and objectivity-, knowledge- or problem-based context and locates it in an emotional and subjective environment. After all, it is a "victory for common sense,"[368] as an MEP noted in the debate in Parliament.

The problem, as addressed by Diana Wallis, in the final regulation with regard to achieving the goal of animal welfare improvement is the absence of any practical elements that could lead to animal welfare improvement.[369] Instead, the main goal that the EU seal regime politically, legally and discursively aims to achieve is to establish a right to life for seals that makes their killing as such immoral.[370] This, however, is only limited to the killing for commercial gain as the killing for the protection of the marine environment as well as the fisheries sector seems justifiable.

While this may be the case, it remains questionable in how far the EU seal regime influences the behaviour of the fishermen engaged in the seal hunt. As pointed out elsewhere, animal welfare aspects are by and large absent from the marine management plans of EU countries engaged in the seal hunt.[371] Furthermore, as pointed out in the summarised impact assessment that accompanied the Commission Proposal, "[t]he impact on animal welfare of seals that are killed (i.e. continue to be killed) will depend on whether commercial sealers improve the animal welfare of their practices. They will have an economic incentive to do so because of the size of the EU market [...]."[372] In other words, with the absence of an economic incentive, would sealers alter their practices due to the EU ban?

The question boils down to the applied killing practices on the sealing boats. Two angles to the issue come into play. One is the changing of the legislation under which the seal hunt is conducted; the other is compliance with these rules. As a result of the recommendations of *inter alia* the EFSA study, the Canadian government made the three-step-process mandatory for all sealers in 2009.[373] In that sense, the European Union's policy-making efforts have indeed to some

368 Schlyter, C. Debates – Monday, 4 May 2009 – Strasbourg. 21. Trade in seal products.

369 Sellheim (2015b), *supra* note 21, at 277.

370 The process reminds of the 'emerging right to life' for whales that D'Amato and Chopra addressed in their famous article (D'Amato, A. and S. Chopra. "Whales: Their emerging right to life." *American Journal of International Law* 85 (1991), 22–85)).

371 Sellheim (2015b), *supra* note 21, at 276.

372 European Commission (2008b) *supra* note 360, at 52.

373 DFO. *ARCHIVED – Amendments to the Marine Mammal Regulations – Seal Harvest*. Ottawa: DFO (2009). URL: http://www.dfo-mpo.gc.ca/media/back-fiche/2009/seal_hunt-chasse_au_phoque-eng.htm.(accessed 18 November 2014).

degree contributed to a legislative change in the commercial seal hunts with regard to animal welfare. The EU is however not the sole reason for the legislative change, but rather the overall public scrutiny under which the seal hunt has fallen for the last 40 or so years.[374]

The second point is that of compliance and the alignment of applied practices with the given rules. Also this point must be subdivided into two elements, namely that of deterrence and that of voluntary compliance.

As a general rule, an increase in animal welfare in the applied practices has been visible for the last 15–20 years. This is also due to the continuous surveillance the seal hunt undergoes by NGOs and the Canadian government.[375] Especially the latter has a deterring effect on the sealers and contributes to the application of the rules manifested in the Marine Mammal Regulations: "We don't see them, but they see us" reflects the fear of being caught if the rules are not adhered to.[376] But 'the rules' are not necessarily considered reasonable or logical by a sealing crew. For example, the compulsory crushing of a seal's head with a *hakapik* when the seal is already dead "doesn't make sense, but it's the rules."[377]

Generally, rule compliance, apart from the deterrent effect of governmental monitoring, is furthermore bolstered by the overarching moral determinant of community support: The ability to provide for the community is an unspoken rule which shapes all behaviour on board a boat. The effects of this moral determinant can be subdivided into three categories: Conscious choices, unconscious evaluation as well as retro- and prospective conflict resolution.

Conscious choices immediately and directly affect the outcome of the hunt by analysing the ice, the setting of sailing routes and the application of killing methods. With regard to the latter, several important factors support the compliance with the animal welfare rules of the MMR and render an instantly dead seal desirable: Firstly, a wounded seal moves uncontrollably on the ice or on deck and therefore damages the pelt, leading to its economic devaluation. Secondly, a wounded, fighting seal on the slippery deck where extremely sharp knives and gaffs are used poses a health risk to the sealers. Thirdly, each seal which has not been killed by the first bullet means a loss of money and a loss of time. Lastly, sealers have expressed that there is simply no need to let the animal suffer unnecessarily: "Why would we not kill it right away?"[378]

The duty to provide for family and home and associated rule compliance furthermore translate into the moral environment on board, best represented by the

374 Retired Fisheries Officer, personal communication. 5 November 2013, structured interview.
375 *Ibid.*
376 Sellheim (2015b), *supra* note 21, at 280.
377 Sellheim, N. Field notes, April 2013; Sellheim (2015d), *supra* note 23.
378 Sellheim, N. Field notes, April 2013.

unconscious evaluation and the means of conflict resolution. The dangerous as well as physically and mentally demanding environment in which the seal hunt takes place puts physical and psychological stress on the sealer which results in a high degree of crew solidarity. Mental support is provided by sharing and cooperation, unconsciously occurring when the situation demands for this. At the same time, conflict resolution occurs by looking at the past, i.e. the events that led to the conflict, and by solving it with the prospect of avoiding future conflicts.[379]

Killing practices in the hunts are therefore only marginally, if at all, influenced by the EU seal regime, but rather by the Canadian legislation and the associated ability to hunt seals: "You have to follow the rules to continue sealing."[380] If the EU seal regime was based on animal welfare criteria which were to be documented, the incentive to follow the rules of the Canadian government may be even further supported by the economic incentives provided by the European markets. This claim, however, lies in the realm of speculation and cannot be backed up by empirical data.

3.3. The value of the seal

The way pinnipeds, i.e. *Phocidae*, *Otariidae* and *Odobenidae*, as a group of species are perceived is closely linked to their affordances[381] and therefore in which socio-ecological as well as socio-cultural system they are embedded. Economic and social values are inevitably closely linked to them. In the European Union, for instance, they clearly do not belong to the category of 'food-producing animals' that are held in captivity and which are kept for the benefit of humankind. These are politically handled under the DG Health and Consumers.[382] In other words, seals afford different actions than chicken, for instance. The group of animals widely referred to as 'charismatic megafauna' therefore affords emotional and practical protection, resulting in a 'right to life' agenda.[383] In the case of seals, as noted earlier, this goes only so far that the fisheries sector is not affected. Otherwise a marine resource management clause would not have been inserted into the EU seal regime.

379 Sellheim (2015d), *supra* note 23.

380 Retired Fisheries Officer, *supra* note 374.

381 The theory of affordance was developed by psychologist James Gibson and describes the interrelationship between an object and an organism which responds with certain actions with regard to the object (see Gibson, *supra* note 46). The concept has been widely discussed and further developed, but as such constitutes an important theory for ecology and anthropology (see Ingold, T. *The perception of the environment. Essays on livelihood, dwelling and skill.* London: Routledge (2000), at 166–168).

382 European Commission, DG Health and Consumers. Animal Health (nd.). URL: http://ec.europa.eu/food/animal/index_en.htm (accessed 21 November 2014).

383 Sellheim (2015b), *supra* note 21, at 277, 278.

The shift in affordance of the seal, i.e. the perception of a seal by, in this case, European policy makers, from being a source for oil and fur has occurred over time and can be related to NGO campaigns over the last few decades. Indeed, as Diana Wallis "realised during this process, they [seals] have a great PR."[384] The affordance shift then becomes an issue of a weak vs. a strong lobby. Prior to the vote in the IMCO and the Parliament, especially the "Humane Society International [...] had the resources and capacity to lobby most of the members of the European Parliament."[385]

Shifting the view to Newfoundland, the affordances of the seal are linked to the affordances of the sea in general. Here, the seal is not singled out, but rather constitutes a part of what the sea as such has to offer. The value attached to the seal is one of economy, society and culture and it affords its hunt for economic benefit. It is therefore a resource. In combination with other resources of the sea it influences the social structure of the communities and significantly shapes the cultural production on the island.[386]

Apart from the resource character the seal has in Newfoundland, an evermore rising seal population is considered to be detrimental to ecosystem integrity. As many fishermen have stated, "the seals eat our cod" which is also reflected in Newfoundland's political rhetoric.[387] In this sense, the hunt for seals is considered an ecological necessity for the maintenance of fisheries, upon which the economy as well as identity of Newfoundland largely rests. Economic benefits that could

384 Wallis, D. Debates – Monday, 4 May 2009 – Strasbourg. 21. Trade in seal products.

385 Koivurova et al. (2012), *supra* note 8, at 8.

386 See for example Ryan, S. and L. Small. *Haulin' rope and gaff – Songs and poetry in the history of the Newfoundland seal fishery*. St. John's: Breakwater Books Ltd. (1978); Bock, A. *Out of necessity. The story of sealskin boots in the Strait of Belle Isle.* Shoal Coast east: Great Northern Peninsula Craft Producers (1991); Sellheim, N. "The right not to be indigenous: Seal utilization in Newfoundland." *Arctic Yearbook 2014.* Akureyri: Northern Research Forum (2014b), 546–552. URL: http://arcticyearbook.com/images/Arcticles_2014/BN/Sellheim_AY_2014_FINAL.pdf (accessed 21 November 2014); Sellheim (2015d), *supra* note 23.

387 Sellheim, N., Field notes, April 2013; Government of Newfoundland and Labrador. *News releases, March 9, 1999 – Fisheries and Aquaculture* (1999). URL: http://www.releases.gov.nl.ca/releases/1999/fishaq/0309n02.htm (accessed 21 November 2014); Scientific research does not support this claim as such: Although harp seals do feed on Atlantic cod, their diverse diet allows a shift to other species. Seal management schemes may affect recovery of the cod stocks, but the complexity of the marine ecosystem makes a direct cause-and-effect relationship uncertain (see Chassot et al., *supra* note 204). In Woodstock as well as on board the *Steff&Tahn*, unison over fish species-encompassing decline due to rising seal populations could be found. Although some of the scientific claims were known, "knowing the sea from a helicopter" (Sellheim, N., Field notes, April 2013) was considered inefficient and not on par with knowing the sea from the ground. It must be noted that the reason for the collapse of the Atlantic cod is scientifically not fully understood, but that mismanagement and insufficient enforcement schemes that protect Canadian waters from overfishing from foreign vessels also contributed to the decline.

possibly derive from the sale of products stemming from hunts that reduce the seal population are under the current seal regime prohibited. It can therefore be argued that the EU seal regime is implemented in a way which does not have a mechanism for institutional learning based on changing socio-ecological and economic conditions integrated into its *modus operandi*. Indeed, this furthermore accounts for the changes in hunting practices and monitoring: If hunting methods were to be developed which ensure the instantaneous death of a seal with a recognisably effective and efficient monitoring regime in place, seal products from these hunts would nevertheless be barred from the European market, irrespective of the demand of European consumers.[388]

In this regard the EU seal regime resembles the US Marine Mammals Protection Act which does not hold any clause that would enable the importation of and trade in products stemming from marine mammals other than indigenous products.[389] Similarly, the International Convention for the Regulation of Whaling (ICRW)[390] has had a moratorium on all commercial whaling in place since 1982[391] although scientific evidence no longer supports a blanket moratorium due to conservation concerns. In 1991 this led to the resignation of then-Chair of the Scientific Committee, Philip Hammond, who no longer wanted to be "the organizer of and the spokesman for a Committee which is held in such disregard by the body to which it is responsible."[392]

Other national and international laws that affect the seal hunt by and large do not put total bans on trade in certain seal species, but link those to the conservation statuses of the respective species, often relating to the IUCN or other bodies that assess the population status of certain species. To that end, it is even in theory possible to hunt three of six seal species covered by the Convention for the Conservation of Antarctic Seals (CCAS) of 1972.[393] As mentioned earlier, also the national management plans that regulate the hunts for seals, especially in the European Union, primarily target the seal as a nuisance species in order to protect fisheries. In none of the plans has the commercialisation of seal products been considered.

The special emotional value of the seal in a European discourse can be well exemplified when taking a closer look at the killing method of clubbing, one of

388 Sellheim (2015a), *supra* note 20, at 31.

389 To the contrary, through the expansion of the Pelly Amendment of the Fisherman's Protective Act in 1978, which enables the President to impose trade embargoes if a country engages in the trading or taking of species considered endangered by the United States.

390 International Convention for the Regulation of Whaling, 2 December 1946 (161 UNTS 72).

391 In force since 1986.

392 Hammond, Philip, cited in Aron, W. "Science and the IWC," in Friedheim, R. L. (editor). *Toward a sustainable whaling regime.* Seattle and London: University of Washington Press (2001), 105–122 at 117.

393 Convention for the Conservation of Antarctic Seals (CCAS) of 1 June 1972 (11 ILM 251).

the most-often referred to and most disputed method of killing a seal. To respond to the concerns of the public over the animal welfare aspects of particularly this method by imposing a Community-wide trade ban through market harmonisation renders the seal regime a technical, rather than a problem-solving regulation.[394] That means that the withdrawal from the trade out of the emotional value of the seal was merely promoted by the concerns over the killing methods, but did not influence the methods as such. Similarly, the outlawing of trade in cat and dog fur is purely based on the emotional value of cats and dogs, as stated earlier.

3.4. The expressive character of the EU seal regime

The analysis thus far has shown that the EU seal regime is difficult to be located in animal welfare or environmental contexts, thus making a clear-cut goal and a discernible policy context difficult to establish. This does not exclude the EU seal regime being considered a moral statement of its own that aims to influence consumer behaviour and therefore social norms concerning the utilisation of wild fauna.[395]

As was shown in Part II, Section 4, the moral landscape in the European Union as manifested in law is shaped by different polities, namely the EU Member States that create their own moral standards as well as the Community, legislating on its own moral grounds. While the analyses of cases of the ECJ and ECtHR highlight the Member State-based moral standards that negate a common European public morality, the EU seal regime nevertheless was concluded by the Community, which, by adopting the regime, sends a message as regards its (non-)acceptance of hunting of specific species. While this may be true, it remains unclear what the moral statement in the regime entails. First and foremost, the killing methods cannot stand at the fore of the statement since shooting is a common method in hunting activities worldwide, including the European Union, while also clubbing is accepted in law within the European Union. As an example serves Regulation 1099/2009 on the Protection of Animals at the Time of Killing.[396] In this regulation the "[p]ercussive blow to the head" to provoke "severe damage to the brain" is a means to kill piglets, kids, rabbits and other fur animals.[397]

Killing methods applied in the seal hunts themselves therefore do not differ from those applied in the European Union rendering a moral statement based on these fruitless. In other words, a statement that aims to alter social norms regarding animal welfare would also have to target other types of hunts and ani-

394 Sellheim (2015a), *supra* note 20, at 6, 18.
395 See Sunstein, *supra* note 153.
396 Council Regulation 1099/2009, *supra* note 113.
397 *Ibid.*, Annex I, No. 6.

mal killing, inevitably leading to a ban on trade in products stemming from hunts or modes of production in which clubbing and/or shooting were applied. This appears highly unlikely.

Two viable conclusions are possible. First, it is a statement indicating opposition towards the marketing of products stemming from a species that is endangered. This is a very unlikely scenario since the seal species in question, the harp seal, is not endangered. Concerns over the population status have, with the exception of the 2006 Parliamentary Declaration, not surfaced during the legislative process. This leads to the second and much more likely conclusion: The species itself stands at the centre of attention, irrespective of the killing methods and population status. However, the expressive character of the seal regime then cannot be related to any moral charging, but should rather be considered as a statement that shows a degree of arbitrariness. A goal of the regime could therefore be to simply not *wanting* seals to be killed for commercial purposes under the guise of internal market harmonisation and animal welfare.

3.5. Summary of the goals of the EU seal regime

While concerns over the applied killing methods in the commercial seal hunts gave the incentive for launching the legislative process, an improvement of the actual animal welfare conditions in the hunts cannot be related to the EU seal regime. The means of communicating a withdrawal from the trade in seal products have occurred in the form of the Parliamentary Declaration with a clear agenda to not have the European Union engage in a trade which is considered cruel and inhumane, yet without further specification of how to make the conditions better. The second means to address the issue of animal welfare was the Commission Proposal which indeed held provisions that linked access to the EU market to animal welfare in the seal hunts. Problem identification, problem solving or reduction and goal communication were streamlined while the practical issues relating to the implementation of the goal showed shortcomings. In the end these led to the adoption of a stringent regime that in essence codified the Parliamentary Declaration without an animal welfare angle, but with a clear market harmonisation approach.

The Commission and the Parliament appear to have followed different goals. While the Commission, in response to the Parliamentary Declaration, initiated the policy process with the agenda of knowledge creation and therefore an epistemic basis for the adoption of a possible trade regime, the majority of Parliamentarians appears not having made use of the reports, but instead having stuck to the primary narratives of the seal hunt as prior to the policy process. The focus shifts within the policy-making process signal towards an increasing politicisation of the issue away from the Commission's fact-finding efforts.

Pivotal in the process was the emotional value of the seal which does not legitimise the seal hunt for any commercial gain. This was, however, not an issue that was communicated explicitly. Yet, the *sui generis* character of the seal regime which merely decouples the EU from the seal trade without influencing animal welfare allow for that conclusion. In other words, the approach taken by especially the European Parliament was not problem-solving oriented, but responding to emotional deeds. From this follows that the EU seal regime serves as a statement to express opposition towards the hunting of species and the marketing of the species' products. While this is to some degree related to the way seals are killed, the killing methods themselves do not surface in the final regime, shifting the expressive character away from a morality-based statement to that of an emotion or opinion. In this sense, the analysis by the Appellate Body can be supported as communicating, addressing and implementing the EU seal regime serve merely the response to moral concerns: The moral concerns regarding the way seals are killed. The response to this, without having to touch upon the deeper moral issue of animal welfare, is therefore a regime that rests on emotion as it does not challenge human-animal relations as such. A different goal that goes in line with the final legislative outcome of the policy-making process cannot be justified.

By addressing these concerns which are primarily rooted in the repulsion over commercial gain of trade in seal products the meta-goal of ending or at least reducing the commercial seal hunt is partly achieved. This is particularly true with respect to the cascading effects of the EU seal regime, as exemplified by the ban on import and trade of harp and hooded seal products in the Customs Union of Russia, Belarus and Kazakhstan which entered into force in August 2012, which reflects some essential elements of the EU seal regime.[398] 'Norm cascades'[399] consequently appear on a wider scale than just within the European Union, but affect the worldwide trade in seal products.

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398 Евразийскаяэкономическаякомиссия (ЕЭК) (Eurasian Economic Commission). Единый перечень товаров, к которым применяются запреты или ограничения на ввоз или вывоз государствами – членами Таможенного союза в рамках Евразийского экономического сообщества в торговле с третьими странами, (List of goods subject to bans or restrictions for Member States of the Customs Union of the Eurasian Economic Community on trade with third countries). URL: http://www.tsouz.ru/eek/RSEEK/RKEEK/zas22/Documents/P1_134.pdf (accessed 21 November 2014), Article 1.8; Sellheim (2015a), *supra* note 20, at 32.

399 Sunstein, *supra* note 153, at 2033.

4. How does the EU seal regime consider, reflect and respond to socio-economic contexts in sealing communities in Canada?

Having established the primary purpose of the EU seal regime, addressing the moral concerns of some citizens of the EU, it is now necessary to take the consideration of the human dimension in the legislative process and in the final regime under closer scrutiny. This approach is necessary to better understand the discourse surrounding the seal hunt and the role the seal hunt and the sealing industry play for the people involved in it.

In general, the public scrutiny the seal hunt has experienced has contributed to a professionalisation of the Canadian seal hunting legislation as well as better adherence thereto from the sealers' side. This, however, puts psychological pressure on sealers during the time of hunting.[400] This is best exemplified by the statement of a sealer during the 2013 hunt when an NGO helicopter was following the boat: "Whatever we do, it's wrong for them anyways. Even if we follow the rules they will make us look bad."[401] The validity of this statement was proved a few days later when the Humane Society International (HSI)/Humane Society of the United States (HSUS) in a YouTube video depicted the seal hunt as an activity of utmost cruelty, barbarism and as environmentally detrimental.[402] Notwithstanding, the seal hunt that this author was able to witness showed a strict application of the rules.[403]

As a recurring narrative in the debate surrounding seal hunting, underlined by the non-opposition of NGOs, the aboriginal hunt for seals has been accepted as 'necessary' and culturally important as it is 'traditional.' Also the public consultation that the European Commission carried out, but which has been considered non-representative of the opinion of the EU public, shows that the Inuit seal hunt is all in all more accepted and more acceptable to members of the public.[404] In other words, the discourse seemingly responds to the needs of the Inuit population and with the indigenous exemption aims at not affecting them through any legislative measure. Here, the role of individuals cannot be neglected. For example, celebrities such as Brigitte Bardot or Paul McCartney protested against the seal hunt, generating significant media attention and ultimately moving the public. These actions always target the non-indigenous Canadian seal hunts and

400 Sellheim (2015a), *supra* note 20, at 10.

401 Sellheim, N., Field notes, April 2013.

402 "Canada's 2013 baby seal slaughter begins," YouTube video by HSUS. URL: http://www.youtube.com/watch?v=foW_IiU2idQ (accessed 11 March 2015).

403 Sellheim (2015d), *supra* note 23.

404 Sellheim (2013), *supra* note 19, at, at 428.

never aim at the Inuit hunts due to the discursive exemption the Inuit enjoy in this debate.[405]

At the same time, fundamental knowledge of local economies engaged in the seal hunt or in the processing industry is sparse. Already the 2010 COWI study reads: "[T]here is need to gain more knowledge of factors relevant for trade in seal products, including knowledge of seal hunting communities, seal products and the necessary measures to apply the conditions of the Regulation."[406] Secondary industries like processing sector for seal products are not considered. As shown above, throughout the impact assessment the politicised nature of the debate surfaces and the absence of a critical assessment of the impacts on locals feeds into the narrative of a purely economic value of seal hunt without socio-cultural elements. The 2008 COWI study even makes reference to 'losers' and 'winners' after the adoption of a legislative measure impacting the trade in seal products although there is not enough data to assess the gravity of the impacts while a clear-cut definition of the concept of 'local economy' is absent.[407]

4.1. The local economy – Merging community, market and culture

In anthropological terms, the 'local economy' can best be referred to as the community sphere of exchange *vis-à-vis* the market sphere of exchange.[408] The interlinkage between the market and community spheres of exchange is a defining trademark of a seal hunting community. The exchange of seal products on a community level in the form of bartering and other money-less exchange rises and falls with the number of seals hunted: Better markets lead to a higher number of hunted seals which in turns increases the degree of community exchange. Also the incentive for hunting seals, either for monetary benefit or for subsistence purposes, depends on the markets. While the former yields delicacies such as ribs and hearts as by-products, the latter yields seal pelts as by-products, which are usually the main parts of the seal that are sold on the market. Apart from that, also the markets for fisheries are a determinant for the characteristics of sealing: If markets for

405 Sellheim (2015a), *supra* note 20, at 23, 24; The issue found more attention when Inuit, award-winning singer Tanya Tagaq photographed her baby next to a dead seal and generally her open opposition towards anti-sealing groups like PETA. The alleged cruelty of the seal hunt then also was connected to the Inuit hunts although in the aftermath of this media stunt anti-sealing groups repeatedly emphasised their non-opposition to Inuit sealing (see for example "Inuit singer Tanya Tagaq's 'Sealfie' photo supporting seal hunt sparks backlash." *Huffington Post*, 4 February 2014. URL: http://www.huffingtonpost.ca/2014/04/02/inuit-tanya-tagaq-sealfie_n_5077203.html (accessed 24 November 2014).

406 COWI (2010), *supra* note 83, at iii; Sellheim (2015a), *supra* note 20, at 19.

407 COWI (2008), *supra* note 83, at 101, 114; Sellheim (2013), *supra* note 19, at 426.

408 Gudeman, S. *The anthropology of economy.* Malden: Blackwell Publishing (2001).

fisheries are good, the economic incentive to go sealing may be outweighed by the economic incentive to fish, for instance, crab.[409]

Throughout the legislative process of the seal regime the impact on a seal hunting community and the associated community sphere of exchange is not recognised and a clear distinction, albeit the lack of data, is undertaken between the community and market sphere: "The targeting will hurt the economy where it is supposed to hurt."[410] The Explanatory Memorandum of the Commission Proposal for a trade regulation moreover states that the impact assessment is limited: "[E]conomic impacts are limited to those impacts to trade and local economies, both on the side of the sealing countries as well as of potential transit and transformation countries, while the social dimension touches mainly upon the conditions for the Inuit population."[411] In other words, the social dimension of the impacts in non-Inuit sealing communities did not find recognition. This inevitably leads to the question of ethnicity, inserting a race-based dimension into the seal hunting debate.

Looking at the social and economic value of the hunt in a community in Newfoundland the seal hunt is embedded into the overall affordances of the sea and moral structures on the boat reflect into moral structures in the community. Community cohesion is furthermore fostered by the cooperation the locals apply prior and after the seal hunt. The important role of a local store as a community hub for knowledge exchange and transition becomes ever more present when the community prepares for the hunt. The closeness that the women develop during the hunt when the men are at sea constitutes an important social glue. With a decline in markets for seal products and with a declining seal hunt, community cohesion is therefore negatively affected, accelerating the continuing trend of outmigration from small communities.[412] On a larger scale, cultural production relating to sealing in general and seal products undergoes a decline as well. Knowledge transmission on the processing of seal products and small-scale crafts may disappear with a complete shut-down of the sealing industry.[413]

Also the economic dimension is heavily impacted by changes in the market. Although the seal hunt lasts for only 3–4 weeks every spring, a significant part of the annual income can be based on the sale of raw seal products to the processing company. The 2008 COWI study remarks that some communities "derived 15–35% of their total earned income from sealing, and about 37 communities

409 Sellheim (2015d), *supra* note 23.

410 COWI (2008), *supra* note 83, at 99; Sellheim (2013), *supra* note 19, at 427.

411 European Commission (2008a), *supra* note 24, at 10; Sellheim (2013), *supra* note 19, at 432.

412 Sellheim (2015d), *supra* note 23.

413 See Sellheim (2014b), *supra* note 386.

report that above 5% of their income originates from sealing in 2006."[414] Given the heavy fluctuations in both the fisheries and seal products markets these numbers are not static, but fluctuate equally. Interview partners suggested that in some years the income from sealing may even reach 50%.[415] Moreover, spin-off industries like local stores that apart from groceries offer fishing and sealing gear are affected by declining markets. This in turn impacts community cohesion and may constitute another element in community dissolution.[416]

With a decline in economic revenues and the associated economic downturn also the cultural, community sphere is impacted drastically. For example, with a potential closure of the only retail store in the author's field site, Woodstock, knowledge transmission declines as the store serves as an important hub of knowledge exchange prior to the hunt. Moreover, close family ties that are rooted in the ability to go to sea and which translate into community cohesion are affected when seal products are no longer bartered in the community or the boat's crews are no longer able to share their free time together. The trust the crews and by extension their families develop during the countless hours in the hostile marine environment of the 'Front' is lost when the seal hunt and the commercial fisheries decline. With an increasingly changing demographic structure in a remote coastal community due to outmigration of the younger generation also the inherent social fabric undergoes change. The loss of knowledge, culture and livelihood therefore is directly linked to the markets for seal and fish products.[417]

4.2. The recognition of the commercial sealing industry

The consideration of local economies is primarily limited to the Inuit although in the adjudication of the seal regime, best exemplified by the cases before the EU Courts, a legal recognition of the social dimension within the sealing sector does indeed occur when determining *locus standi*.[418] The cultural importance of the seal hunt for Newfoundland cannot be underestimated while the economic need varies from year to year for the hunters. As will be discussed later, the economic need for the workers of the processing sector is significant.

As such, European Parliamentarians do not consider the seal hunt and all associated activities as being on par with European values. This is reflected in an open letter of around 100 MEPs that call the Commission for a cessation of the talks concerning a free trade agreement with Canada (CETA) if Canada does not with-

414 COWI (2008), *supra* note 83, at 24.
415 Sellheim, N. Field notes, April 2013.
416 Sellheim (2015d), *supra* note 23.
417 Sellheim (2015d), *supra* note 23.
418 Sellheim (2015c), *supra* note 22, at 484.

draw its WTO challenge.[419] In how far this contradicts the Arctic aspirations of the EU shows for example the Parliament's *A sustainable EU policy for the high north*[420] which in paragraph 7 highlights the need for more knowledge on living conditions in the Arctic and therefore calls for more communication with Arctic communities, both indigenous and non-indigenous. Also other documents that deal with the Arctic make communication with the Arctic people and peoples a key element in the EU's Arctic vision.[421] To this end the value argument put forth in the open letter is ambiguous because it raises the question if effective cooperation with the Arctic's population occurs only if MEPs consider the values to be reconcilable.

Seal hunting communities by and large are better able to buffer declining markets for seal products by making more use of other marine species. It is therefore the utilisation of all abundant marine living resources that enables the socio-economic survival or a community.[422] While the impacts on the local economy are not considered throughout the *travaux préparatoires*, the debate primarily circles around the effects on seal *hunting* communities while those even more directly affected are communities engaged in seal *processing* due to the absence of alternative employment in the respective regions. Although the 2008 COWI assessment mentions the processing sector in relation to the sealing season 2006,[423] conditions have significantly changed since then and the damage the market for seals has taken has had direct impacts on the processing sector. While the legislative process of the seal regime does not consider the processing in its deliberations at all, the adjudication of the regime makes the industry a direct addressee of the regime, pointing towards an inherent need of the seal hunt for the workers in the industry. Therefore, legal consideration of local communities is in principle possible.

While the transit through the European customs union as well as the warehousing and processing are in principle not affected by the regime,[424] empirical data shows how the regime in practice affects Canadian workers directly although being outside its legal scope. Interestingly, although empirical evidence points towards a direct relationship between the regime and the workers' livelihoods, this is almost impossible to argue before a court due to the definition of the concept of 'direct

419 Sellheim (2015a), *supra* note 20, at 11.

420 European Parliament. *A sustainable EU policy for the High North,* P7_TA(2011)0024, Thursday, 20 January 2011 (2011).

421 Sellheim (2015b), *supra* note 21, at 278, 279.

422 This has also been documented in the context of seemingly single-species-based cultures such as Nenet reindeer herders (see Stammler, F. "Animal diversity and its social significance among Arctic pastoralists." In Stammler, F. and H. Takakura (editors). *Good to eat, good to live with: nomads and animals in Northern Eurasia and Africa.* Sendai: Center for Northeast Asia Studies/ Tohoku University (2005), 215–243).

423 COWI (2008), *supra* note 83, at 25.

424 Sellheim (2015b), *supra* note 21, at 283.

and individual concern' which is the prerequisite to obtain legal standing before the EU Courts.[425] It must be borne in mind that for Member State citizens article 267 TFEU would allow for indirect action against a Community act before a national court when the act has been implemented in national legislation. Here the 'preliminary ruling' clause takes hold in which the national court in case of unclear application of Community legislation consults the ECJ as regards the interpretation of the "validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union."[426] It is thus that even though a natural or legal person who is not an addressee of an act, as will be discussed below, and therefore does not enjoy *locus standi* before the ECJ has the opportunity to challenge an act through indirect reference.[427] However, this provision bears two significant shortcomings that need addressing. First, even if an applicant indirectly challenges Community legislation through national courts in recourse to article 267, she is not able to require the court to call for a preliminary ruling by the ECJ.[428] Second, while according to article 263 (4)[429] *any* natural and legal persons can institute proceedings before the ECJ, indirect action as set out in article 267 is limited to citizens of Member States only since indirect judicial review of Community legislation is only possible where it has been implemented in national law. In other words, the Canadian sealing industry would not be able to initiate legal proceedings before Canadian courts given that no legal act concluded in the EU finds reflection in Canadian law. Ultimately, this limits their actions to article 263 (4).

The principle of 'direct and individual concern' for the obtainment of *locus standi* before the courts is based on article 263 (4) TFEU and since the adoption of the Treaty of Lisbon to be applied in conjunction with the 'regulatory act,' as set out in the same article, making the obtainment of legal standing rather difficult.[430] Although the principle goes back at least to the 1970s, its cumulative

425 Even in spite of the possibility to argue for a 'closed group', meaning a finite group of individuals affected by a measure, this was not argued in the cases before the EGC and the ECJ (see Sellheim (2015c), *supra* note 22, at 475)

426 TFEU, *supra* note 106, article 267 (1) (b).

427 Hartley, T. C. *The foundations of European Union law. An introduction to the constitutional and administrative law of the European Union.* 7th Edition. Oxford: Oxford University Press (2010), at 414.

428 Weatherill, S. *Cases and materials on EU law.* 11th Edition. Oxford: Oxford University Press (2014), at 214–217.

429 The article reads: "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."

430 Sellheim (2015c), *supra* note 22, at 469; Cambou, *supra* note 44, at 408.

reading with the undefined 'regulatory act' complicates the issue.[431] As such, the principle is divided into 'direct concern' and 'individual concern' both of which are separately defined. 'Direct concern' is established when there is a direct cause-and-effect relationship between an act of a general scope and the circumstances of an applicant.[432] The definition and scope of 'individual concern' is based on *Plaumann v Commission*[433] and the so-called *Plaumann*-formula established therein and applied in subsequent case law:

> Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the person addressed.[434]

The issue of 'direct and individual concern' becomes crucial in the adjudication of the seal regime in the form of the court cases before the EGC and the ECJ. Directly after the adoption of the Basic Regulation, Inuit organisations, seal traders, hunters and seal product producers and processors initiated legal proceedings before the EGC on 11 January 2010 as case T-18/10 to annul Regulation 1007/2009.

Some words seem in order here concerning the ECJ's ability to annul a legal act that was adopted under the ordinary legislative procedure, meaning by democratically elected policy-makers. Generally it must be said that the ECJ functions as the EU institution monitoring the correct application of the Community's founding treaties in accordance with article 263 TFEU. As *Tobacco Advertising I* & *II* and the cases regarding the EU seal regime have shown, proceedings that aim to annul an act relating to the internal market focus on the act's legal basis. Furthermore, associated competences conferred to the Community in pursuance to articles 2–6 TFEU are scrutinised. In other words, the ECJ assesses, on the basis of the legal foundation of an act, the limits of Community competence and in how far the competence is reconcilable with the act's legal basis. In general, there-

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431 In principle the 'regulatory act' implies that an act is of a broad and widely applicable scope, with a general character of addressees and adopted under the 'ordinary legislative procedure', i.e. with the European Parliament and the Council as co-decision makers.

432 Arnull, A. *The European Union and its Court of Justice.* Oxford: Oxford University Press (2006), at 74; Sellheim (2015c), *supra* note 16, at 472, 473.

433 *Plaumann & Co. v Commission of the European Economic Community,* Case 25-62 [1963], ECR 95.

434 *Stichting Greenpeace Council (Greenpeace International) and others v Commission of the European Communities*, Case T-585/93 [1993], ECR II-2205; Sellheim (2015c), *supra* note 22, at 474.

fore, the ECJ "shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties."[435] If the Community oversteps its competences and/or applies a wrong legal basis, the ECJ is therefore eligible to override even democratically instituted policy choices.[436] This being said, it is not surprising that the 'regulatory acts' are shielded from individuals or groups of individuals challenging them. It must be borne in mind that they are concluded under the 'ordinary legislative procedure', thus being concluded by those EU institutions arguably enjoying the highest democratic legitimacy – the European Parliament and the Council.[437]

In the seal products cases, one of the reasons for not obtaining legal standing is the applicants' focus on the empirical definition of the challenged act without a sound legal basis. This means that the applicants claimed that the act is legislative, meaning with a limited *de facto* application, and not regulatory with a broader, more general application. The Court argued that although this may in principle be the case, given the definition set forth in the TFEU of a regulatory act with regard to its adoption procedure, this challenge cannot stand as the Basic Regulation was adopted under the 'ordinary legislative procedure' and therefore is indeed regulatory. Therefore, the reliance of the empirical denotation of whether or not the act is regulatory or legislative cannot stand before the court.[438]

In the context of 'direct concern' empirical evidence could be beneficial. 'Direct concern' implies that a change in the legal position of an applicant has occurred because of a given act. While the court did not contest the 'direct concern' of seal product traders it nevertheless held that although the legal situation may have changed, this is not solely due to the contested regulation.[439] This is in principle also supported by results from empirical research in the seal processing sector

435 TFEU, *supra* note 106, article 263 (1); see also Arnull, *supra* note 432, at 53–56.

436 See also Usher, J. A. "Case C-376/98, *Germany v European Parliament and Council (Tobacco Advertising)*." *Common Market Law Review* 38 (6) (2001), 1520–1543.

437 The question of democratic legitimacy in the European Union is indeed a broad one and shall not be further discussed here. It suffices to say that in light of the adoption of an act of general application through democratically elected institutions, acting within their fields of competence allow for a restrictive approach towards legal standing of individuals. This is further not an unusual practice since also in the EU Member States legislative acts are not commonly subject to judicial challenges (Türk, A. H. "Lawmaking after Lisbon." In Biondi, A., P. Eeckhout and S. Ripley (editors). *EU law after Lisbon.* Oxford: Oxford University Press (2012), 62–84, at 73).

438 Sellheim (2015c), *supra* note 22, at 478; In how far this could potentially point towards a clash of common law and civil law principles shall not be discussed here. Also the ECJ's ability to reconcile these shall not be part of this dissertation.

439 Sellheim (2015c), *supra* note 22, at 480;

which ascribes the EU ban rather an indirect effect due to its impacts on the discursive environment. Moreover it is linked to the cascading effect that has motivated the adoption of trade bans in other countries, such as in the Russian customs union.[440] Therefore, 'direct concern' cannot be justified. This being said, the scope of the Basic Regulation clearly takes seal traders into account and in recourse to article 3 makes four of the 17 applicants directly concerned by the regulation. The legal understanding of a direct concern and the empirical concern, however, do not match: Although Inuit as well as hunters are empirically directly affected by the regulation, given the Inuit exemption and the regulation's trade-dimension, a legal 'direct concern' cannot be maintained.[441]

Similarly, the 'individual concern' based on the *Plaumann*-formula failed. Although the four applicants are indeed addressees of the Basic Regulation and therefore potentially individually affected, the Court was not able to determine attributes "which are peculiar to them or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee of a decision."[442]

The above arguments were in essence also used in the appeal case C-583/11 before the ECJ in which also, for reasons of clarification, the *travaux préparatoires* were included. The ECJ ruled that it is only the seal product traders which are directly concerned, but given the general formulation and scope of the regulation, individual concern cannot be established.[443]

Empirically, a direct and individual concern of the EU seal regime is omnipresent in processing sector. Throughout the course of the court cases one of the appellants, *NuTan Furs,* ceased to exist because of the negative trade environment, directly affected by any legislative changes that impact a functioning of international trade in seal products. Moreover, the 'closed group' and evermore shrinking group of actors engaged in the seal trade make the addressees of the EU seal regime directly discernible, thus potentially enabling a 'direct concern' claim before the EU courts. The burden of proof, however, lay with the applicants and in the cases before the EU courts these did not provide sufficient evidence to provide legal standing, rendering a 'direct concern' claim legally unjustified. The empirical data justifies an individual concern, however. Although the formulation of the Basic Regulation is indeed held in a general manner, the peculiarity of the trade environment for seal products, i.e. the existence of only very few actors actively

440 Sellheim, N. Field notes, November 2013.

441 Sellheim (2015c), *supra* note 22, at 480; EGC (General Court of the European Union), Order of the General Court (Seventh Chamber, Extended Composition), Case T-18/10 R, 6 September 2011, paras. 75, 88.

442 Sellheim (2015c), *supra* note 22, at 481; Order General Court T-18/10, *supra* note 441, para. 88.

443 Sellheim (2015c), *supra* note 22, at 485.

engaged in it, does correspond, at least in principle, to the criteria set forth in the *Plaumann*-formula. But once again, the burden of proof lay with the applicants and it remains questionable if successful presentation of empirical data in support of *Plaumann* would have enjoyed legal recognition by the court.[444]

4.3. Recognising the Inuit and indigenous peoples

The seal regime is designed with the intention of taking the interests and cultural needs of Inuit and other indigenous communities into account by exempting them from any trade restrictions. To this end, the Basic Regulation has inserted a definition of the term 'Inuit' in article 2.4. based on the definition by the Inuit Circumpolar Council. Yet only in the Implementing Regulation the term 'other indigenous communities' is more clearly defined and according to article 2.1.

> 'other indigenous communities' means 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 colonisation 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;[445]

Problematic in the context of recognising the interests of indigenous peoples is the perception of concepts such as 'subsistence' and 'tradition' which was applied throughout the legislative process and the emergence of the indigenous exemption.[446] In the strictest sense, a purely subsistence-based economy would not necessitate an indigenous exemption in the EU regime in the first place due to the limited and regionalised circle of exchange for products produced and exchanged therein.[447] Moreover, it was established in the early 1970s that subsistence activities are used to facilitate a connection with goods produced and imported from outside the subsistence system.[448]

This notwithstanding, the genesis of the indigenous exemption has framed the final exemption as being based on the incentive of the hunt: For subsistence pur-

444 *Ibid.,* at 492.

445 The definition is taken over verbatim from ILO Convention 169 article 1 (b) (see *supra* note 15). For a discussion on the definition of the term 'indigenous' see Joona, T. *ILO Convention No. 169 in a Nordic context with a comparative analysis: An interdisciplinary approach.* Rovaniemi: Lapland University Press (2012), at 28–38.

446 Hossain, *supra* note 42, at 162, 163.

447 See also Gudeman, *supra* note 408.

448 Kemp, W. "The flow of energy in a hunting society." *Scientific American* 225 (1971), 105–115.

poses with commercialised products as by-products. This is further emphasised in article 3 (b) of the Implementing Regulation which acknowledges that "seal hunts the products of which are at least partly used, consumed or processed within the communities according to their traditions." In other words, those products not used in the community are eligible to enter the market sphere of exchange in order to generate monetary income. In the WTO dispute settlement procedure, the EU maintains that as long as "subsistence [...] remains the primary objective of the hunts" the application of the seal regime can be considered even-handed, irrespective of the scope commercial dimension of Inuit hunts.[449] Yet, the European Union acknowledges that even in spite of the Inuit exemption "Inuit sealing communities would be better off absent any regulation of the placing on the EU market of seal products" although "the IC exception seeks to mitigate the necessarily adverse impact of the EU seal regime on the Inuit and other indigenous communities."[450]

In this regard, Hossain's claim of an outdated perception of the concept of 'subsistence'[451] cannot in full confidence be supported, because irrespective of the degree of the subsistence use of seal products, its external, commercial dimension, meaning the enmeshment with the market sphere has been *de facto* recognised.

Problematic is the applicability of the indigenous exemption which by Inuit is perceived as holding paternalistic and backwardly-oriented connotations, especially because of the 'tradition'-narrative spanning throughout the legislative process and, as shown above, as reflected in the Implementing Regulation. As a response, Inuit lawyer Aaju Peter writes: "Inuit are not frozen in time, but must pursue economic opportunities just like everyone else in Canada or Europe."[452] Although legally a timely definition of 'subsistence' is applied, the emphasis on the 'tradition' of the seal hunt implies certain hunting methods and a high degree of local utilisation of products stemming from the seal hunts.

449 *EU – Seal Products* AB Report, *supra* note 12, at 2.104.

450 *Ibid.,* at 2.102.

451 Hossain, *supra* note 42, at 162, 163.

452 Peter, A. "The European Parliament shuts down seal products imports – again." *Above and Beyond – Canada's Arctic Journal.* May/June 2010 (2010), 3–7. at 7. URL: http://env.gov.nu.ca/sites/default/files/aaju_on_european_ban_re_seals.pdf (accessed 25 November 2014); Sellheim (2015b), *supra* note 21, at 282; In the debate on the final regulation in the European Parliament on 4 May 2009 MEP Heide Rühle underlines Peter's concerns by 'museifying' Inuit hunts: "If the Inuits [*sic*] want to continue selling these products, then they can only do this if it is quite clear that the products have nothing to do with the usual method of hunting seals. Only if a clear distinction is made will the Inuits [*sic*] have the opportunity to sell anything" (Rühle, H. Debates – Monday, 4 May 2009 – Strasbourg. 21. Trade in seal products. URL: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20090504+ITEM-021+DOC+XML+V0//EN&language=EN, accessed 25 November 2014).

Throughout the legislative process, some inclusion of Inuit occurred that, according to the EGC, in the end led to the insertion of the Inuit exemption into the final regime.[453] Consequently, given the indigenous exemption, the European Courts do not consider Inuit addressees of the seal regime in the first place and therefore in this case they do not enjoy *locus standi* before the courts.[454] Notwithstanding, although the interests of the Inuit are in principle legally considered, the absence of *locus standi* and the little discursive consideration of negative impacts on Inuit communities by policy-makers makes the Inuit exemption difficult to implement. The difficulties in determining a 'recognised body' that issues an attesting document which confirms the indigenous or MRM origins of certain seal products, pursuant to articles 6 and 7 of the Implementing Regulation, complicates the issue. At the time of writing, only two countries, Sweden and Greenland, are capable of placing seal products on the EU market based on the status of two national agencies as 'recognised bodies.'[455] In other words, since the coming into force of the regime in 2010 Canadian Inuit seal products as well as all other indigenous seal products were in practice barred from the EU market although, as shown above, Canada and the EU now work on measures to ensure Inuit products on the EU's markets.[456]

While problems with the recognition of indigenous communities appear in practice and bear difficulties due to the narratives applied,[457] the EU seal regime cannot be considered unique with regard to its indigenous exemption. Also other international pieces of legislation that deal with the hunt of marine mammals, such as the MMPA or the ICRW, hold exemptions for indigenous peoples. The seal regime's uniqueness lies in the context in which the exemption is embedded. While the MMPA or the ICRW were by and large concluded over conservation concerns, aboriginal hunting was not considered as being equally detrimental to

453 EGC, *supra* note 309, para. 114; Sellheim (2015b), *supra* note 21, at 285.

454 Sellheim (2015c), *supra* note 22, at 480.

455 List of recognised bodies in accordance with Article 6 of Commission Regulation (EC) No 1007/2009 [*sic!* – the correct reference here is Commission Regulation (EU) No 737/2010] 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. URL: http://ec.europa.eu/environment/biodiversity/animal_welfare/seals/pdf/list_recognized_bodies.pdf (accessed 25 November 2014). As shown above, also in the EU seal hunts are carried out. Under the MRM exception of the seal regime products from these managerial hunts can be placed on the EU market in a non-commercial fashion, accompanied by an attesting document documenting the pursuance to article 5 of the Implementing Regulation. Therefore, a body with the capacity to do so needs to be recognised.

456 See *supra* note 51.

457 Sellheim "Narrating the 'other' - Challenging Inuit sustainability through the European sealing debate." Hossain, K. and A. Petrétei (editors). *Understanding the many faces of human security. Perspectives of northern indigenous peoples.* Leiden: Brill (forthcoming).

the population statuses as commercial hunts which therefore justified a continuation for aboriginals to hunt.[458] Also in the context of Arctic sealing, the earliest sealing agreements reflect recognition of indigenous sealing as not leading to a decline in the overall population.[459] It was therefore environmental considerations that were pivotal in the recognition of indigenous livelihoods.

The difference to the EU seal regime lies with the incentive for the regime. While in the Parliamentary Declaration also conservation concerns were part of the discourse, these were quickly abandoned and the focus emphasised only animal welfare concerns.[460] If, however, concerns over animal welfare shape the regime, an indigenous exemption cannot be convincingly justified as some killing methods applied by indigenous peoples, for example netting in Greenland, are considered inhumane in the EFSA study.[461] If abhorrence at the scale of the seal hunts is the primary incentive, also Greenlandic Inuit should not be able to place their products on the European market.[462] If aboriginal hunts are predominantly considered to be subsistence hunts, a satisfactory justification of an *indigenous* exemption cannot occur due to the existence of subsistence-based hunts in non-aboriginal communities.[463]

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458 How difficult this right can be in practice shows the case of the Makah people to resume whaling (see Brand, E. "The struggle to exercise a treaty right: An analysis of the Makah Tribe's path to whale," *Environs: Environmental Law & Policy* 32 (2009), 287–319. URL: http://environs.law.ucdavis.edu/volumes/32/2/brand.pdf (accessed 25 November 2014).

459 See for example article 8 of the Award by the Tribunal of Arbitration following the Treaty for Submitting to Arbitration the Questions Relating to the Seal Fisheries in the Bering Sea of 29 February 1892, effectively banning the hunt on Northern Fur Seals, which reads: "The regulations contained in the preceding articles shall not apply to Indians dwelling on the coasts of the territory of the United States or of Great Britain" (see Robb, C. A. R. *International environmental law reports*. Vol. 1. Early Decisions. Cambridge: Cambridge University Press (1999), at 71; see also Sellheim, N. "Early sealing regimes: The Bering Sea fur seal regime *vis-à-vis* Finnish–Soviet fishing and sealing agreements." *Polar Record* FirstView articles(2015e)).

460 Sellheim (2015a), *supra* note 20, at 6.

461 This is in principle the argumentation of the Appellate Body that does not consider the indigenous exemption to be in line with the moral exception based on GATT article XX (a) (*EU – Seal Products* AB Report, *supra* note 12, at 6.1.d).

462 In 2013, the Canadian East Coast hunt landed ca. 90,000 seals while preliminary data for the first 9 months from Greenland shows a landing of almost 105,000 seals (see Sellheim (2015b), *supra* note 21 at 284; Grønlands Statistik, *Tabell 11. Fangst av pattedyr og fugle.* URL: http://www.stat.gl/dialog/main.asp?lang=da&version=201407&sc=SA&subthemecode=t11&colcode=t (accessed 25 November 2014).

463 Sellheim (2015d), *supra* note 23; Similar argumentation in the International Whaling Commission led to the Japan-based suggestion of introducing the concept of 'small-scale coastal whaling' irrespective of the 'indigenousness' of the whalers (see Stoett, *supra* note 266, at 121–123; Sowa, F. *Indigene Völker in der Weltgemeinschaft. Die kulturelle Identität der grönländischen Inuit im Spannungsfeld von Natur und Kultur* [*Indigenous peoples in the global society. The cultural identity of Greenlandic Inuit in the area of conflict of nature and culture*]. Bielefeld: transcript (2015)).

The notion of a 'traditional' hunt as a primary narrative in the debates surrounding the indigenous exemption implies a hunt with 'traditional' gear, such as kayaks and harpoons. MEP Rühle's statement underlines this hypothesis.[464] However, disconnecting a traditional livelihood from technological advancement stands in contrast to international law and practice, best exemplified by the view of the Human Rights Committee (HRC) which legitimises the utilisation of 'modern' technologies in the pursuit of traditional activities.[465] The traditionality of an aboriginal seal hunt as a determinant for an exemption therefore cannot be seen in isolation from non-aboriginal hunts such as in Newfoundland as tradition, livelihood and culture are also closely intertwined.[466]

4.4. Summary of recognition of local communities

In general terms recognition of communities engaged in the seal hunt is sparse when screening the final regime. While through the proxy of seal traders, which in Newfoundland are the same entities as seal processors, community recognition is potentially possible, legal standing before the courts is difficult to achieve. Linking the preparatory works of the seal regime with the adjudication of the regime the interface of self-identification, policy and law becomes obvious: While it is an EU policy to include stakeholders in the decision-making process, it after all depends on the legal interpretation of 'direct and individual concern' whether or not these stakeholders are able to challenge an act. In that sense, it boils down to a legal frame whether or not individual or group actors are *de facto* considered stakeholders. Consequently, there are three spheres of identifying stakeholders: 1. Actors themselves and whether or not they consider themselves a stakeholder (like the Inuit in spite of their exemption); 2. The EU political system and the stakeholder-inclusion practices and policies which identify certain stakeholders; 3. The European Courts who frame the 'stakeholdership' based on *locus standi*.

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464 Rühle, *supra* note 452.

465 The HRC expressed its view on the interpretation and application of article 27 of the International Covenant on Civil and Political Rights (ICCPR) that grants cultural protection to minorities and in practice also indigenous peoples. In the context of reindeer herding with modern equipment the HRC notes in para. 9.3: "The right to enjoy one's culture cannot be determined *in abstracto* but has to be placed in context. In this connection, the Committee observes that article 27 does not only protect traditional means of livelihood of national minorities, as indicated in the State party's submission. Therefore, that the authors may have adapted their methods of reindeer herding over the years and practice it with the help of modern technology does not prevent them from invoking article 27 of the Covenant." (original emphasis; Human Rights Committee, Communication No. 511/1992, *Länsman et al. v. Finland*. U.N. Doc. CCPR/C/52/D/511/1992).

466 Sellheim (2013), *supra* note 19, at 444–448 ; Sellheim (2015b), *supra* note 21, at 281, 282.

The preparatory documents based on which the Commission Proposal was drafted by and large do not consider non-aboriginal seal hunting communities and a trade measure's potential to impact the social and individual well-being of a community. Although negative impacts are in very broad terms referred to in the 2008 COWI study, an elaboration on the traditionality of the hunts and the sustainability of these communities is absent.

The recognition of Inuit communities takes up a significantly larger part in the debates. Although seemingly based on simplifications and deficits in the factual understanding of living and hunting conditions in the Arctic and sub-Arctic, EU policy-makers have attempted to shield Inuit communities as far as possible from any potential negative effects of a trade ban. In practice this shielding is however prone to significant shortcomings. This is explainable also with non-substantiated perception of Inuit and indigenous hunts, inevitably leading to a 'museification' of aboriginal cultures and practices.[467]

Here the need for more knowledge surfaces again which is also called for by the European Parliament resolution on a sustainable high north policy.[468] This goes hand in hand with a call for increased recognition of the views of Arctic communities with regard to their social and economic development and self-defined needs.[469] This stands in diametrical contrast to the seal regime and the reactions it has yielded in the Arctic and Sub-Arctic. The neglect of commercial sealers' interests does not correspond to the Arctic aspirations of the EU.

5. Conclusion – On goals and knowledge in the EU seal regime

It remains without doubt that opposition towards the commercial hunt for seals is significant within the European Union and elsewhere. It is the main aim of this dissertation to study in how far this opposition has translated into a legal regime. To this end the regime's goal identification, communication and formulation are scrutinised and contrasted with the existing and generated knowledge on the seal hunt. Given the opposition towards especially the commercial seal hunt it is the human dimension of this hunt which is a core element throughout this thesis leading to the focus on the regime's consideration, reflection and response to commercial sealing communities.

467 Sellheim (2013), *supra* note 19, at 436.

468 Sellheim (2015b), *supra* note 21, at 278.

469 Interestingly, the High North resolution recognises the importance of marine resources for Arctic peoples. As such, therefore, it does not challenge the seal hunt as a legitimate occupation (European Parliament (2011), *supra* note 420, para. 5)

The Basic Regulation highlights that it was the "serious concerns by members of the public and governments sensitive to animal welfare"[470] that serves as a foundation for the *raison d'être* of the seal regime, yet without providing any quantification for the scope of these members of the public. In *EU – Seal Products* the European Union was able to defend the primary objective of the seal regime, namely as being a response to the moral concerns of the public, yet once again without further specification. The Appellate Body confirmed this objective. It must be clarified, however, that emphasis cannot lie on *the* public, but rather, borrowing from the Basic Regulation directly, *members* of the public. As was shown, invoking a public morality both in Community law as well as within the fabrics of the WTO creates problems in delimiting this. For example, European case law from the Court of Justice and the ECtHR shows that a common 'European morality' does not exist and can therefore not be defended legally, especially with regard to the role of opinion polls or surveys which cannot serve as indicators for public morality. Both in Community and WTO-contexts it was found, however, that morality-related perceptions of specific contexts can vary in time and space, thus also altering the expressive character of law within a given time.[471] The discipline of anthropology also acknowledges the variance in morality based on cultural and geographic differences.[472] With the existence of animal welfare legislation in the European Union as an indicator for the current public morality being concerned with the welfare of animals, it can be argued that the well-being of seals does indeed fall under the moral considerations of the European public.

As argued, morality and objectivity do not necessarily correspond and it seems fair to say that moral stances towards a certain issue can be influenced by filtered and biased information. Given the decade-lasting, emotional and impressive campaigns of anti-sealing groups seal hunting in general seems to have become an 'activity non-grata' that many seem confident in commenting on. Indeed, public pressure to end the commercial seal hunt is commonly referred to in the policy-making process although unbiased knowledge does not exist. Before the DSB in *EU – Seal Products* the EU nevertheless seems to indicate that it is in possession of "superior knowledge of the specific factual circumstances"[473] that motivates and

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470 Basic Regulation, *supra* note 2, Chapeau, para. 4.

471 This shift can be directly observed when comparing the Seal Pups Directive and the Basic Regulation: While in 1983 seal hunting generally was still considered a legitimate occupation, in 2009 this was no longer the case. In other words, the moral expression of the Basic Regulation has rendered seal hunting as such immoral.

472 See for example Robbins, J. "On becoming ethical subjects: freedom, constraint, and the anthropology of morality." *Anthropology of this Century* 5 (2012). URL: http://aotcpress.com/articles/ethical-subjects-freedom-constraint-anthropology-morality/ (accessed 11 March 2015).

473 *EU – Seal Products* AB Report, *supra* note 12, para. 2.157.

justifies the creation and adoption of a regime that bars the EU markets from any trade in seal products.

Based on this a regime was adopted that responded to perceived moral concerns of some EU citizens. As shown in the articles of this dissertation 'The neglected tradition? The genesis of the EU seal products trade ban and commercial sealing,' 'Policies and influence. Tracing and locating the EU seal products trade regulation' and 'The goals of the EU seal products trade regulation: from effectiveness to consequence,' the EU seal regime is neither identifiable as a regime that responds to a certain problem by providing policy options for problem reduction, nor can a clear goal be found. This is due to the utilisation of concepts that have yet to find clear-cut application, the significant influence of groups opposed to the seal hunt, the difficult task of stakeholder involvement and the shaky scope of the Basic Regulation. The outcome can therefore not be considered a best possible outcome for all stakeholders of the debate, but rather mirrors the influence of groups opposed to the hunt aiming to permanently shut down the (non-indigenous) seal hunt. The 'delegitimation' of the larger scale, non-indigenous seal hunt as a source of income therefore has found its way into the final regime. In other words, a legitimate seal hunt based on this regime can be considered small scale, in line with conservation concerns and indigenous. Especially the indigenous dimension appears to be the most important denominator: Looking at Greenland, animal welfare and the size of the hunt are not an issue with regard to placing seal products on the EU market.

The differences in focus within the policy-making process that led to the adoption of the Basic Regulation in September 2009 reflect the different roles and the increasingly political charging of the debate. While the Commission appears to have focused on the animal welfare aspect of the commercial hunt based on which the legislative proposal was drafted, already the impact assessment made use of terminology that reflects a bias in how the seal hunt is perceived with a full abandonment of the animal welfare improvement in the adopted regulation. Consequently, the *travaux préparatoires* have undergone an objectivity-shift that has created a least objective outcome. This may have further been emphasised by the irreconcilable negotiating blocs during the stakeholder consultations which were publicity-wise dominated by groups opposing the commercial trade in seal products. Bearing this in mind, given the studies that accompanied the preparatory works, the knowledge base seems to have shaped the final outcome although the final regime does not show a reflection of the generated information, but instead appears to be merely a codification of the 2006 Parliamentary Declaration.

Although unbiased knowledge on the seal hunt and the overall industry was indeed generated throughout the policy-making process it does not appear to be objectivity-oriented with regard to problem-identification and the adequate

legislative response. From the outset the political discourse seemed to have circled around a pre-determined stance concerning certain seal hunts that even the knowledge base was not able to change. To this end, the 'subjective-objective' outcome is based on the utilisation of certain 'knowledges,' meaning the targeted political framing of certain parts of the knowledge base, such as the non-representative public consultation, and the neglect for others, such as the impact of the legislation on non-Inuit seal hunting communities.

Especially the latter is based on the narrative of a purely economic seal hunt devoid of cultural context. As shown in the dissertation article 'Morality, economy and practice in a commercial sealing community,' this perception is oversimplified and does not appreciate the socio-economic, socio-ecological and socio-cultural systems that prevail in remote sealing communities. In combination with the perceived low economic value of the hunt the notion of obsolescence of the commercial seal hunt has influenced the seal regime in a way that it does not respond to adverse effects it may have on communities in which sealing is conducted. Empirical data shows that although the impact of the regime as such is not detrimental it nevertheless constitutes significantly to further weakening communities that, due to their socio-economic composition, suffer from great vulnerability and low levels of resilience. The interwoven community and market spheres of exchange are crucial in this regard. Given the lack of knowledge in the first place and the disregard for knowledge in the Basic Regulation, the EU seal regime discursively creates a significant friction between the socio-economic, socio-ecological environment in sealing and processing communities on the one hand and the legal framework for sealing on the other: The regime has not integrated mechanisms to respond to, for example, changing methods and practices and does consequently not show capabilities for institutional learning. It appears to be based on a static perception of seal hunt and sealing economies which does not correspond to the socio-economic complexities in the sealing industry.

Although the processing industry finds even lesser recognition in the *travaux préparatoi*res than the sealing communities, the merging of processors and traders into one entity gives processing communities the opportunity to potentially influence the application of the seal regime. This can be, at least in theory, achieved through the obtaining of *locus standi* before the courts as the seal traders are indeed the main addressees of the regime. While this is not based on deliberate consideration and knowledge, the adjudication of the seal regime leaves space for a merging of empirical and legal contexts. This notwithstanding, legal recognition does not imply the consideration of empirical findings to a degree which allows for legal standing without a solid legal basis and substantiated evidence. If therefore the split between the processing and trading sectors of the industry was to occur,

albeit the direct and individual concern for the processing sector it would lose its capability of obtaining *locus standi* due to it not being an addressee of the regime.

In conclusion it can therefore be said that although attempts were made to create a regime whose goal responds to a perceived problem, this has not been achieved in the final regime and a clearly formulated goal is absent. The consideration of communities focuses predominantly on aboriginal communities with a disregard for the human dimension of the commercial seal hunts. A most-objective approach towards the seal hunt based on sound scientific knowledge has therefore not occurred.

6. On the future of the EU seal regime and improvement suggestions

With the report of the Appellate Body in *EU – Seal Products* the WTO challenge has been concluded. The European Union, although in principle having been able to uphold its ban based on the provisions in international trade law, is now required to bring certain aspects of the EU seal regime in conformity with the GATT. It suffices to say that the options to bring the regime into compliance with international trade law are limited. It is very unlikely that the EU will remove the Inuit exemption for the sake of making the overall objective of the seal regime, addressing concerns over the seal hunt, coherent within itself. This is especially unlikely since Canada's resistance towards the EU seal regime has weakened in light of an agreement between Canada and the EU in October 2014 which eases the access of Canadian Inuit seal products to the EU markets while Canada withdraws its opposition towards EU observership in the Arctic Council.[474] The repercussion of the potential removal of an indigenous exemption would furthermore lead to significant reputational losses of the EU concerning the rights of indigenous peoples and stand in violation of international agreements on indigenous peoples' rights. On the other hand, given the strong resistance against the commercial seal hunt in the European Parliament, a complete abandonment of the seal regime appears equally impossible as a lifting of the ban on cat and dog fur.

On 6 February 2015 the European Commission proposed an amendment to the Basic Regulation in order to implement the ruling of the Appellate Body of the World Trade Organization. This proposal aims in particular at amending article 3 of the Basic Regulation, stipulating the conditions for placing seal products on the EU market. According to the proposal, the MRM exception is to be removed while also products of indigenous origin are to stem from hunts which "is conducted in a manner which reduces pain, distress, fear or other forms of suffer-

474 See *supra* note 51.

ing of the animals hunted to the extent possible taking into consideration the traditional way of life and the subsistence needs of the community."[475] The proposal was adopted in October 2015, effectively amending Regulation 1007/2009 on Trade in Seal Products, repealing Commission Regulation 737/2010 and replacing it with Commission Regulation 2015/1850.[476]

With the EU seal regime being a stand-alone regime, protocols or amendments especially to the Implementing Regulation that directly tackle the issue of animal welfare in *all* seal hunts are unlikely. However, in order to regain legitimacy especially from the Canadian side, an amendment that makes animal welfare the regime's primary component and based on which also trade with the EU would be possible could only emerge in close cooperation with the sealing industry. Here lies the crux of the issue, because as shown throughout this dissertation, the European Union does no longer seem to consider the hunt of seals with a commercial incentive to be a legitimate livelihood. To this end a sustainable exchange of information between the sealing industry and the EU appears uncalled for in the context of the seal regime. Merely within the framework of an EU Arctic policy animal welfare in the commercial seal hunts may find some practical reference as a part of EU-Arctic dialogue although given the southerly latitude of Newfoundland and its non-inclusion in common definitions of the Arctic, cooperation with the local population would be, if it was to emerge at all, sparse.[477] This being said, the European Union as a polity engaged in drafting its Arctic policy would significantly benefit from strategic and sustainable communication with the Arctic population, as set out in the various Arctic documents. While changing the seal regime is by all likelihood not an option, my own research in Newfoundland has shown that there is appreciation amongst the sealers and industry workers for a "European who bothers to have a look"[478] *vis-à-vis* "Europeans [who] don't care if we lose our jobs."[479] In other words, if official EU representatives were to visit the hunt and the industry, sealers and workers would presumably willingly grant

475 European Commission. *Proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 1007/2009 on trade in seal products,* COM(2015) 45 final, 6 February 2015.

476 Commission Implementing Regulation (EU) 2015/1850 of 13 October 2015 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 (OJ L 271, 16.10.2015, p. 1–11).

477 One commonly used geographical definition stems from the Arctic Human Development Report (AHDR). While large parts of the Canadian province of Newfoundland and Labrador is indeed situated in the Arctic, the island of Newfoundland lies south of the AHDR's boundary (AHDR. *Arctic Human Development Report.* Akureyri: Stefansson Arctic Institute (2004), at 17, 18).

478 Sellheim, N. Field notes, April 2013; Sellheim (2015d), *supra* note 23.

479 Sellheim, N. Field notes, November 2013; Sellheim (2015c), *supra* note 22, at 495.

them insight into living and working conditions, raising the profile of the EU as an entity with concern for local populations.

This would however be faced with the economic difficulties the sealing industry is undergoing. Indeed, the EU seal regime has contributed to a reduction of the hunts especially due to its cascading effects in the form of other trade bans. But any ban does not change the affordance of the seal in Newfoundland as such. This means that although the seal appears to be holding a 'right to life' within the European discourse regarding the seal hunt, unless they are hunted by indigenous peoples or for the protection of fisheries, the hunt for seals in Newfoundland and the industry in general would in all likelihood grow if markets grow.[480] Due to market decline in combination with extremely adverse ice conditions especially the industry workers suffer from low seal catches and associated decrease in the processing sector: Of the 38 permanently employed workers of the last remaining processing plant in South Dildo during fieldwork in 2013, in early 2015 only 6 were still employed.[481] Nevertheless, the perception of the seal as an exploitable resource will likely endure although its exploitation may be reduced to become a hunt for subsistence purposes.

Further research is needed that assesses the socio-economic role of the seal hunt for more communities in Newfoundland. Hence, it is especially the ethnographic dimension of this dissertation that needs further appraisal. Only with robust and contextualised research can science and policy merge to fulfil a stronger claim of objectivity.

480 See for example "Bernie Halloran looking to open seal processing plant," *CBC News Newfoundland & Labrador,* 5 October 2014. URL: http://www.cbc.ca/news/canada/newfoundland-labrador/bernie-halloran-looking-to-open-seal-processing-plant-1.2788170 (accessed 28 November 2014).

481 Industry worker, personal communication, 2 March 2015, unstructured telephone interview.

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7.1. Legal acts

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Commission Implementing Regulation (EU) 2015/1850 of 13 October 2015 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 (OJ L 271, 16.10.2015, p. 1–11).

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THE ARTICLES

1. The Neglected Tradition? The genesis of the EU seal products trade ban and commercial sealing.

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The Neglected Tradition? – The Genesis of the EU Seal Products Trade Ban and Commercial Sealing

*Nikolas Sellheim**

Abstract

The European Union's ban on the placing on the market of seal products stemming from commercially hunted seals has triggered much controversy due to its negative impacts on Arctic livelihoods. This article looks at the different documents and steps that constitute the crafting process which has led to the adoption of Regulation 1007/2009 on trade in seal products. It puts special emphasis on the degree of recognition of commercial sealing as a livelihood and asks if it is a tradition that may have been neglected by the political discourse in the EU. Also the role of anti-sealing groups is considered that may have contributed to a pre-determined stance on the commercial seal hunt during the policy-making process.

Keywords: Sealing, Commercial sealing, EU seal ban, Policy-making, Livelihood, Tradition

1. *Introduction*

On November 20, 2009, Regulation (EC) No. 1007/2009 of the European Parliament and of the Council on trade in seal products came into force,[1] shutting

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1 European Community, Regulation (EC) No. 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:286:0036:01:EN:HTML (accessed September 2, 2012)

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down the EU market for seal products stemming from commercial seal hunts.[2] The Regulation's claimed goal is to improve animal welfare aspects in commercial seal hunting while following resentments of the public against this hunt. However, seal products stemming from hunts traditionally conducted by Inuit; in the personal property of travellers; and from marine management initiatives are allowed to enter the EU's common market.

In the discussions leading to the adoption of the ban, the cultural importance of seal hunting for the Inuit is referred to in several instances while commercial seal hunting is predominantly perceived as an economic activity. This article by focusing on the commercial seal hunt in Atlantic Canada takes the lack of recognition of the human dimension of commercial seal hunting in the crafting process of the Regulation into consideration and claims that the mindset of animal rights organizations has found its way into the policy-shaping processes. This ultimately has led to a distorted and biased picture of the hunt and the hunters. Therefore, this article claims that commercial sealing as a tradition has been neglected from the outset of the crafting process, leaving the cultural significance and the commercial sealers themselves out of the normative discussion surrounding commercial sealing. However, it is not the goal of this article to determine the degree to which the adoption of the ban undermines the continuity of commercial sealing as a tradition, but to show which elements indicate that an unbiased approach towards commercial sealing throughout the EU policy crafting process did not take place. Instead, a rather prefabricated discourse shaped the outcome of the crafting process, resulting in the blanket ban on trade in seal products in the EU.

The article first analyzes the scientific basis of the Regulation and to what degree the human dimension is reflected in it. It then focuses on the first Proposal for a trade ban and its different elements, followed by the procedural steps leading to the adoption of the Regulation and the discussions surrounding its adoption in the European Parliament. It is in this context that the campaign of the Humane Society International (HSI) in Brussels and Strasbourg prior to the ban is depicted. The article concludes with a discussion on the normative influence of animal rights organizations on the outcome of the vote in the European Parliament and a discussion on the denotation of commercial sealing as a tradition.

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2 The Regulation was followed by 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, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:216:0001:01:EN:HTML (accessed September 2, 2012).

2. *Steps towards the Proposal*

2.1. *The European Parliament Declaration and the Recommendation of the Parliamentary Assembly of the Council of Europe*

The first pan-European steps for the crafting of the current anti-seal product regime were taken in the Declaration of the European Parliament on banning seal products in the European Union[3] of September 26, 2006. The Declaration holds a notion of urgency, as the Parliament "[r]equests the Commission to *immediately* draft a regulation to ban the import, export and sale of all harp and hooded seal products."[4] Two prominent concerns stand out in the Declaration. Firstly, the Parliamentarians are concerned over the population status of harp and hooded seals with reference to the age of the killed seals.[5] Secondly, animal welfare concerns constitute the second basis of the Parliamentarians' will to end the trade in seal products.[6] Furthermore, the Parliamentarians indirectly refer to the public resentments against large scale seal hunting by making reference to the member states' steps to halt the trade in seal products which are ultimately built on the resistance of the public against the commercial seal hunt. However, the Declaration aims at excluding the Inuit from the ban, as the Inuit hunt "only accounts for 3% of the current hunt."[7]

On November 17, 2006, the Council of Europe's[8] Parliamentary Assembly issued Recommendation 1776 on seal hunting,[9] endorsing the EP Declaration and expressing several recommendations for its member and observer states[10] that

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3 European Parliament, Declaration P6_TA(2006)0369, Banning Seal Products in the European Union; http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NOSGML+TA+P6-TA-2006-0369+0+DOC+PDF+V0//EN (accessed September 17, 2012).

4 Own emphasis; *Ibid.* Paragraph H.1.; The call for an end in trade in seal products was reiterated in the European Parliament resolution on a Community Action Plan on the Protection and Welfare of Animals 2006–2010 of October 12, 2006, Paragraph 70. (P6_TA(2006)0417, The protection and welfare of animals 2006–2010, European Parliament resolution on a Community Action Plan on the Protection and Welfare of Animals 2006–2010 (2006/2046(INI)), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:308E:0170:0170:EN:PDF (accessed September 28, 2012).

5 European Parliament, *supra* note 3 at Paragraphs A. and B.

6 *Ibid.*, Paragraph D.

7 *Ibid.*, Paragraph H.2.

8 The Council of Europe (CoE) is a council of 47 European states – EU and non-EU – fostering the same principles such as human rights or democracy, and covers the entire European continent. Members *inter alia* include the Russian Federation, Azerbaijan, Switzerland or Turkey.

9 Council of Europe Parliamentary Assembly, Recommendation 1776 (2006), Seal hunting, 17 November 2006, http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta06/erec1776.htm (accessed September 17, 2012).

10 The Council of Europe has 6 observer states, namely Canada, Holy See, Israel, Japan, Mexico and the United States all of which were granted observership prior to the Recommendation,

are engaged in the seal hunt, e.g. the effective protection for seals and maintaining their numbers for sustainable management and protection of wildlife; the banning of cruel hunting methods; Training for sealers; or the establishment of professional seal hunters associations that promote humane practices and that focus on the professionalism of sealing.[11] The Recommendation in Paragraph 8 takes notice of the politicized nature of the seal hunting debate and stresses the differences in values and attitudes towards sealing.

2.2. *EFSA Study 2007 "Animal Welfare Aspects of the Killing and Skinning of Seals"*

Since both the European Parliament and the Council of Europe called for actions to be taken to tackle the problem of sealing and trade in seal products, the Commission had to respond. To this end, the Commission had decided to assign the European Food Safety Authority (EFSA) to carry out an assessment on the animal welfare aspects of the killing and skinning of seals.

The EFSA report[12] was released on December 6, 2007, presenting an overview of the different killing methods and their advantages and disadvantages in those countries conducting seal hunting.[13] The report points to several studies and observations dealing with the seal hunt in particular in Canada. With regard to the Canadian seal hunt, four reports[14] are primarily referenced. Due to the

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http://www.coe.int/web/coe-portal/country/united-states?dynLink=true&layoutId=205&dlgroupId=10226&fromArticleId (accessed April 26, 2012).

11 This particular recommendation does not take notice of already existing sealing associations: the Canadian Sealers' Association (CSA) which was established in 1982 or. L'Association des chasseurs de phoques des Iles-de-la-Madeleine (ACPIM), which was already founded in the 1960s and formally established in 1983.

12 European Food Safety Authority (EFSA). "Animal Welfare Aspects of the Killing and Skinning of Seals." *The EFSA Journal* (2007) *610*. Parma: EFSA, 2007; p. 52, http://www.efsa.europa.eu/en/efsajournal/doc/610.pdf (accessed September 1, 2012).

13 Canada, Norway, Greenland, Russia, Namibia, Sweden, Finland, Iceland, UK, and USA. It must be noted, however, that an on-site study of the working group was not carried out. Rather, scientific and non-scientific information was analyzed, and a stakeholder workshop was held on October 4, 2007, in Parma, Italy, in which 25 stakeholder organizations participated, ranging from European and Canadian government representatives, hunting organizations, trade and animal rights organizations.

14 Burdon, Rosemary L., John Gripper, J. Alan Longair, Ian Robbinson and Debbie Ruehlmann. 2001. Veterinary Report. *Canadian Commercial Seal Hunt. Prince Edward Island. March 2001*. International Fund for Animal Welfare, http://www.harpseals.org/about_the_hunt/ifaw_vet_report_2001.pdf (accessed June 7, 2012); Daoust, Pierre-Yves, Alice Crook, Trent K. Bollinger, Keith G. Campbell, and James Wong. "Animal Welfare and the Harp Seal Hunt in Atlantic Canada – Special Report." *The Canadian Veterinary Journal*43 (2002): 687–694; Smith, Bruce and BLSmith Groupwork, 2005, *Improving Humane Practice in the Canadian Harp Seal Hunt*, http://www.thesealfishery.com/files/IVWGReportAug2005.pdf (accessed September 19, 2012); Butterworth, Andy,

different nature of the cited reports, the EFSA veterinarians on several occasions throughout the report highlight the difficulties in interpreting the available data, either because of a non-continuous and opportunistic assessment of the hunt, or different interpretations of the available data.[15] Notwithstanding, the EFSA report draws several general conclusions, inter alia that there are killing methods that allow for pain-, distress-, and fearless killing of seals but that "[e]ffective killing does not always occur."[16]

Based on these findings, the EFSA study recommends *inter alia* that any kind of suffering should be avoided when killing seals. Moreover, the three-step-process – stunning, checking, bleeding – should be followed. Before a seal is bled or skinned, it should be monitored in order to ensure death or unconsciousness; death should be ensured by bleeding-out before skinning; sealers should be trained in the applied procedures of killing methods, monitoring, bleeding and skinning; or monitoring of the hunt by independent observers.[17]

2.3. *COWI 2008 "Assessment of the Potential Impact of a Ban of Products Derived from Seal Species"*

The Consultancy within Engineering, Environmental Science and Economics (COWI), was requested by the European Commission to conduct an impact assessment for policy measures related to the trade in seal products.[18] The report was released on April 9, 2008, as a comprehensive study of the management

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Pierre Galego, Neville Gregory, Stephen Harris and Carl Soulsbury, Welfare Aspects of the Canadian Seal Hunt: Final Report, 2007, http://www.harpseals.org/politics_and_propaganda/welfareaspectsofcanadiansealhunt_butterworth.pdf (accessed September 23, 2012). Reference is also made to the 1986 report of the Royal Commission on Seals and the Sealing Industry in Canada, which was established in 1984 to "review all matters pertaining to seals and the sealing industry in Canada, to assemble relevant information, and to make recommendations on the implications of this information for the development of policy" (Royal Commission on Seals and the Sealing Industry in Canada, Seals and Sealing in Canada, Vol. 1. Ottawa: Supply and Services Canada, 1986, http://epe.lac-bac.gc.ca/100/200/301/pco-bcp/commissions-ef/malouf1986-ef/malouf1986-vol1-eng/malouf1986-vol1-part1.pdf, accessed August 29, 2012; Foreword).

15 EFSA, s*upra* note 12, at 52–54.

16 *Ibid.*, 94.

17 The framing of 'independent monitoring' in the report includes independency from government, industry and NGOs, as it reads "[. . .] independent (meaning independent of government and industry) [. . .]" (EFSA, *supra* note 12 at 28) and "[i]ndependent monitoring of hunts (without commercial/industry and NGO links) [. . .]" (*Ibid.*, 95).

18 Consultancy within Engineering, Environmental Science and Economics (COWI). *European Commission Directorate-General Environment, Assessment of the Potential Impact of a Ban of Products derived from Seal Species. April 2008*. Kongens Lyngby: COWI, 2008, http://ec.europa.eu/environment/biodiversity/animal_welfare/seals/pdf/seals_report.pdf (accessed October 2, 2012), 7.

systems of seal hunting in the range states. Moreover it "also assesses the impact of any possible EC measures on trade and other socio-economic aspects."[19]

2.3.1. *'Inuit', 'Tradition' and 'Local Economies'*

The COWI study emphasizes the different stances on seal hunting and the seemingly irreconcilable positions regarding seals and their utilization, especially in the context of human needs. It is thus the local economies and the Inuit people which play an elementary role in the debate surrounding the morality of seal hunting.

A crucial element surrounding the outside legitimacy of seal hunting is the notion of 'tradition', which the COWI study recognizes. In Paragraph U.2. the 2006 European Parliament Declaration for instance makes direct reference to traditional Inuit seal hunting. Also the Belgian national ban on the import of seal products[20] in Art. 3.2 allows products deriving from Inuit hunts that were conducted in a traditional manner to be used for trade and commercial purposes.[21], [22] Canadian authorities consider all Inuit hunts, irrespective of the methods applied, traditional, whereas the study states that in Greenland the hunt which to its largest part is conducted from small boats with an outboard engine using a rifle is not considered 'traditional'.[23] It is thus that the COWI study

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19 *Ibid.*

20 C – 2007/11138 Loi relative a l'interdiction de fabriquer et de commercialiser des produits derives de phoques [Law on the prohibition to manufacture and marketing of products derived from seals; own translation], http://www.gaia.be/media/files/wetgevingpdf/10/3._Wet_betreffende_het_verbod_op_de_fabricage_en_de_commercialisering_van_producten_die_afgeleid_zijn_van_zeehonden_16032007_.pdf (accessed September 17, 2012).

21 *Ibid.*; Art. 3.2: Par derogation aux dispositions du § 1 er , 1° et 2°, les phoques qui sont chasses de maniere traditionnelle par les Inuits peuvent etre utilises pour la fabrication et la commercialisation des produits derives de phoques [By derogation of the provisions of § 1.1 and 1.2, seals that are hunted in a traditional manner by Inuit can be used for manufacturing and commercialising products deriving from these seals; own translation].

22 Also Sea Shepherd does "not oppose subsistence hunting by traditional people practicing traditional cultures utilizing traditional hunting practices. We view the Greenland hunters as the most traditional in their approach to hunting. [. . .]. We do not support the killing of seals by aboriginal communities for export outside of their communities unless the retailing of the products is exclusively done by and for these communities" Sea Shepherd. Frequently asked Questions about Canadian Seals and Sealings (sic!), http://www.seashepherd.org/seals/seals-faq.html#16 (accessed September 17, 2012).; Bearing in mind that between 1993 and 2009 almost 3 million seals, with an annual average of about 165.000 seals, were caught in Greenland. Moreover, the seal skins stemming from the Greenlandic hunts are sold to markets worldwide in a commercial fashion (Ministry of Fisheries, Hunting & Agriculture, Greenland, *Management and Utilization of Seals in Greenland*. Nuuk: The Government of Greenland, Ministry of Fisheries, Hunting & Agriculture, 2012, 21, 25–28).

23 COWI, s*upra* note 18 at 13.

concludes that there is no uniform definition of the notion of traditional sealing.[24] The study acknowledges the importance of the seal hunt for different regions and people irrespective of the applied hunting methods.[25] Notwithstanding, it becomes clear that the working definition of 'tradition' and 'cultural inheritance' in the context of seal hunting within European bodies is merely connected with the notion of 'indigenous', whereas seal hunting in Atlantic Canada, carried out by non-indigenous people on a larger scale is merely considered 'economic'.[26] Yet, the COWI locates seal hunting as a tradition also in the context of the Newfoundland seal hunt[27] however without elaborating on the issue further, but primarily emphasizing economic elements of the hunt.[28]

In this context, the absence of a rational and objective discourse on sealing, sealing practices and the tradition of sealing becomes apparent. Although recognized as such, the normative dealing with commercial sealing as a tradition is absent. Instead, and openly antagonistic, the COWI study refers to 'good' and 'bad' seal hunts,[29] inevitably linked to indigenous as good, and non-indigenous commercial hunts as bad hunts. While the 'good' hunts are shaped by its perceived indigeneity and therefore by its cultural importance and living tradition irrespective of the applied hunting methods or animal welfare standards, the 'bad' hunts are inextricably linked to low animal welfare standards and a nonexistent traditionality. This ultimately leads to a non-objective approach towards the assessment of the impacts of a trade ban on the socio-economic conditions in those communities in which the commercial seal hunt is conducted.

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24 UN standards follow *I. Länsman et al v. Finland*, Communication No. 511/1992, views of 26 October 1994, the Human Rights Committee (HRC), in reference to the application of Art. 27 ICCPR, which reads in Paragraph 9.3: "The right to enjoy one's culture cannot be determined **in abstracto** but has to be placed in context. In this connection, the Committee observes that article 27 does not only protect **traditional** means of livelihood of national minorities, as indicated in the State party's submission. Therefore, that the authors may have adapted their methods of reindeer herding over the years and practice it with the help of modern technology does not prevent them from invoking article 27 of the Covenant" (original emphasis; Human Rights Committee, *Views of the Human Rights Committee under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civic and Political Rights* – Fifty-Second Session – concerning Communication No. 511/1992, http://www1.umn.edu/humanrts/undocs/html/vws511.htm (accessed September 18, 2012)).

25 COWI, *supra* note 18 at 13.

26 Also the 2007 EFSA study excludes 'traditional', i.e. indigenous, hunting methods such as harpooning from its assessment.

27 COWI, s*upra* note 18 at 22.

28 *Ibid*., 24.

29 See for example *ibid*., 136.

2.3.2. *Canadian Seal Hunting Legislation and Enforcement*

As regards the legislation on seal hunting in the range states, the COWI study focuses on legislation and enforcement. Also the Canadian Marine Mammal Regulations (MMR)[30], [31] as those regulations of the Fisheries Act under which the seal hunt falls[32] are scrutinized.[33]

According to the COWI study, the Canadian legislation is considered "inconclusive"[34] in several contexts: Animal welfare provisions are low as there is no reference in the MMR to the avoidance of unnecessary pain; furthermore, the lack of clarification of the application of hunting tools outside the sealing areas referred to in Art. 28 MMR and the unclear legislation with regard to the training of the sealers;[35] the independency of inspectors is not guaranteed, as they are selected and trained by the Department of Fisheries and Oceans Canada (DFO).[36]

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30 COWI, *supra* note 18 at 24.

31 Marine Mammal Regulations SOR / 93–56, http://laws-lois.justice.gc.ca/eng/regulations/SOR-93-56/FullText.html (accessed September 19, 2012).

32 *Ibid*., Part IV, Art. 26–37.

33 In place since 1993, the MMR incorporate several acts and regulations concerning marine mammals, i.e. the *Beluga Protection Regulations;* the *Cetacean Protection Regulations*; the *Narwhal Protection Regulations*; the *Seal Protection Regulations*; and the *Walrus Protection Regulations*. The MMR set out rules for the licensing for as well as prohibitions, landings, observations, closing times and areas of seal hunting. The COWI study focuses on four elements in the MMR with regard to the seal hunt, i.e. conditions for the hunt; the training of the hunters; animal welfare aspects; and killing methods.

34 COWI, *supra* note 18 at 34.

35 *Ibid.*

36 Already during the production of the COWI study, the ensuring of the competence of the individual sealer has been taken up by the DFO upon request by the sealing industry: In the 2006–2010 Atlantic Seal Management Plan reference is made to the results of the study conducted by the Independent Veterinarians Working Group (IVWG), which *inter alia* recommends "[a] three-step process of stunning, checking (palpation of the skull) and bleeding" (*supra* note 35, Smith et al., p. 21) while the DFO already in 2004 issued a freeze on the issuing of new sealing licenses "to allow industry to gather information on active sealing licences and pursue professionalization of the seal hunt" (Department of Fisheries and Oceans, *Overview of the Atlantic Seal Hunt 2006–2010*, 2006; Section 7.2, http://www.dfo-mpo.gc.ca/fm-gp/seal-phoque/reportsrapports/mgtplan-plangest0610/mgtplan-plangest0610-eng.htm#re12, accessed September 23, 2012). Moreover, the 2006–2010 management plan, which was not available to the COWI study team (COWI, *supra* note 19, at 27), highlights the considerations of the DFO to make amendments to the MMR in order to include the recommendations of the IVWG and to respond to the concerns by stakeholders of the seal hunt. It is thus that Section 1.1.2 reads: "During the course of this plan, the Department will work towards amending the Marine Mammal Regulations (MMR) with respect to licence class, humane hunting methods, and amendments which will help to ensure the orderly management and conduct of the hunt." Also the proposed "Universal Declaration on the Ethical Harvest of Seals" which was made public in April 2009 by representatives of the sealing industry, veterinarians, indigenous representatives, ethnographers and marine ecosystem researchers aims at implementing the recommendations set forth by EFSA and the

Although the sealers are required to keep records and logs on their hunt on a daily basis, the COWI study criticizes the absence of any requirements to include environmental factors into the reporting procedure.

Lastly, the study questions the applicability of the requirements to ensure animal welfare. However, the study acknowledges the efforts the DFO has undertaken to improve the enforcement measures in the seal hunt. Yet, in reference to a claim put forth by the International Fund for Animal Welfare (IFAW), according to which observer licenses are difficult to obtain, the study notes that "NGOs stress that there are administrative barriers to get an observers licence in spite of the procedure being rather simple and straightforward according to the legislation."[37, 38]

2.3.3. *The Impact Assessment*

Before assessing the impacts of different EU measures, the study presents the different policy options under consideration as such. The functioning of the internal market serves as the point of departure for legitimizing the assessment of different policy measures since at the time of the COWI study several EU

IVWG ('We care' – Universal Declaration on the Ethical Harvest of Seals. 2009, http://www.sealsonline.org/_files/ENG_UD%20FINAL%20April%202009.pdf (accessed October 9, 2012).

37 COWI, *supra* note 18 at 34.; Since IFAW's goal is to shut down the seal hunt and because of the long-standing difficult history between the organization and the DFO / sealers, it is hardly surprising that obtainment for an observers license for members of that organization are not easy to get, while also background security checks, especially for members of animal rights groups, are not surprising. This, notwithstanding, is not embedded in the MMR which does not differentiate between organizations. An explanation, besides an emotional one, for more rigorous procedures for IFAW members could be that due to the nature and agenda of the organization, DFO officials are concerned with the unimpeded conduct of the seal hunt when IFAW members are present.

38 In 2009, the MMR were amended, having "further enhanced the humaneness of Canada's annual seal harvest." Department of Fisheries and Oceans, *ARCHIVED – Amendments to the Marine Mammal Regulations – Seal Harvest*, 2009, http://www.dfo-mpo.gc.ca/media/back-fiche/2009/seal_hunt-chasse_au_phoque-eng.htm (accessed September day, 2012). The amendments require the sealer to implement the three-step-process of striking, checking and bleeding, applying the concrete recommendations of the IVWG while the DFO furthermore states that the amendments "are also consistent with many of the conclusions of the European Food Safety Authority" (*ibid.*). In order to ensure the professionalization of the sealers in applying the three-step-process, the 2011–2015 Integrated Fisheries Management Plan for Atlantic Seals stresses the importance of mandatory training programs for sealers and highlights ongoing initiatives to establish these. The creation of standards for sealers to "articulate the required skills and knowledge, a certification system to ensure that existing sealers and new entrants acquire and maintain these competencies, and the development and delivery" (Department of Fisheries and Oceans, *2011–2015 Integrated Fisheries Management Plan for Atlantic Seals*, 2011; Section 3.4.1., http://www.dfo-mpo.gc.ca/fm-gp/seal-phoque/reports-rapports/mgtplan-planges20112015/mgtplan-planges20112015-eng.htm#c2(accessed September 19, 2012) is ongoing.

Member States had already imposed or were in the process of imposing national seal product trade bans. These bans would fragmentize the internal market of the EU and therefore compromise its functioning, thus legitimizing legislative steps for its harmonization.

The presented measures are divided into legislative and non-legislative measures, both being analyzed bearing effectiveness/efficiency and consistency in mind. The impacts of these measures are evaluated by the study team in three policy dimensions, i.e. environmental, economic and social. It is the seals which are in the centre of the distributional impacts of the measures and which are considered "'winners'" as they are "less hunted or at least are killed in a way that avoids unnecessary pain, distress and suffering."[39] On the other hand, "[t]he 'losers' are then those who derive their income directly or indirectly from seal hunting, although part of this group might see a benefit from implementing some of the policy measures."[40]

As a baseline for the impact assessment serve the socio-economic contexts in which seal hunting occurs[41] and which are analysed in regard to possible impacts of different EU policy measures.[42] Despite this baseline the COWI study notes that there is no clear-cut definition of 'local economy' and that official data does not allow for a precise picture of possible EU measures on the local economy. Therefore, "any policies will have to be based on limited information."[43]

In regard to information on the local economy, the COWI study relies on the classification of Statistics Canada as well as other data such as data on seal landings of regional dependences of the DFO or other data on population and economies in different regions.[44] Presumably based on this data and presumably building on the accessible information presented by the DFO, the study states that in Newfoundland and Labrador economic dependency of coastal communities on sealing may amount to 15–35%. Alternative income cannot be identified and the unemployment rate in the sealing communities is 30% higher than the national average. However, although the starting points for the baseline are to be the socio-economic contexts, the study recognizes that the "information

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39 COWI, *supra* note 18 at 101.

40 COWI, *supra* note 18 at 101; For an evaluation of the impact on the Inuit, see Department of Environment, Nunavut, *Report on the Impacts of the European Union Seal Ban, (EC) No. 1007/2009, in Nunavut*. Iqaluit: Department of Environment; Exploring the human rights implications of the ban in regard to indigenous peoples, see Hossain, Kamrul, "The EU ban on the import of seal products and the WTO regulations: neglected human rights of the Arctic indigenous peoples?" *Polar Record*, (March 28, 2012), http://dx.doi.org./10.1017/S0032247412000174 (accessed October 2, 2012).

41 COWI, *supra* note 18 at 101.

42 *Ibid.*, 114.

43 *Ibid.*, 114.

44 *Ibid.*, 115.

[…] can with right be regarded as too scarce for a local economy assessment."[45] As regards seal welfare, a baseline for the analysis could not be chosen and that it is the formulation of the measures themselves that include the assumed impacts on seal welfare.[46] Impacts of possible EU measures on trade in seal products are demonstrated by the presentation of trade data relating to different seal products as reflected in the Eurostat trade database for 2006 as well as the time span of 1999–2006.[47]

Five policy options[48] are assessed with regard to impacts on the range states, efficiency and effectiveness. In all measures, the impact on Canada is considered medium to significant based on available trade data. Notwithstanding, given the lack of knowledge of the impacts on the local economy, no clear-cut impact assessment for the 'losers' of the ban can be found – instead, the clear divide between the economic and social dimension is continuously applied, leading to assessments such as "[t]he targeting will hurt the economy where it is supposed to hurt"[49] ignoring the social impact this adverse effect may have. A labelling system is considered as the least detrimental measure for the local population. The system would be expected to benefit the economic and social dimension by benefitting the overall image of seal hunting and fostering best practices. These and other possible measures, however, would need to be defined *vis-à-vis* criticized worst practices.[50]

The public's opinion is included in the impact assessment although, as the following section shows, no clear conclusions can be drawn from the public consultation. Nevertheless, the study states that the labelling system does not find public support (5% *vis-à-vis* 80% favouring a ban).[51]

2.3.4. *The Public Consultation*

An essential part of the COWI study is a public consultation that was carried out in order to reflect the public's view on the seal hunt. The consultation was conducted via the European Commission's Interactive Policy Making (IPM)[52] tool

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45 *Ibid.*, 116.

46 *Ibid.*, 103.

47 *Ibid.*, 104–110.

48 Prohibition of placing on the market of skins of seals and products derived therefrom; Impact of Prohibition of Imports into the Community of Skins of Seals and Products derived therefrom; Impact of Prohibition of Placing on the Market (and/or imports/exports) of Skins of Seals and products derived therefrom – if not taken through measures that meet the established Standards for the hunting of Seals; Impacts of a harmonized, mandatory labeling system; and Impacts of Bi-/multilateral Agreement(s) with Range State(s).

49 COWI, s*upra* note 18 at 99.

50 *Ibid.*, 99, 121

51 *Ibid.*, 119.

52 Available at http://ec.europa.eu/yourvoice/ipm/index_en.htm (accessed September 25, 2012).

between December 20, 2007 and February 13, 2008 and yielded 73.153 responses from 160 countries, the majority of which were responses from the UK, the USA and Canada. Yet, the study notes that the consultation does not necessarily correspond to the attitude of the population as such, merely of those that responded. Therefore, it does not constitute an overview of the EU population's attitude towards sealing nor a policy recommendation based on public opinion.[53, 54]

One overall conclusion from this consultation is that the majority of the respondents (87.4%) consider seal hunting for commercial purposes as not justified. This goes in line with the attitude towards Inuit or indigenous seal hunting, which according to this consultation is commonly more accepted when "it isembedded in a traditional seal hunting culture. Inuit seal hunt is in this context more acceptable than non-traditional seal hunt."[55] This result does not come as a surprise, given the overall stance towards indigenous sealing in all aforementioned policy documents. However, again the traditionality of commercial sealing is not only put into question but neglected as it is perceived as inherently bad and not as part of local culture and local communities.[56] The reason for this can only be speculated upon, but it seems fair to say that the overall discourse of those having responded to the public consultation is framed by animal rights groups disconnecting commercial sealing from any cultural and societal relevance. It is therefore that the majority of respondents[57] were in favour of an EU trade ban[58] with a higher level of acceptance towards the seal hunt if it is carried out for

53 COWI, s*upra* note 18 at 125; The question therefore ultimately arises what purpose the public consultation served.

54 The study recognizes that "a number of organizations have encouraged their member to participate in the consultation process and even provided guidelines to members /supporters on how to fill in the questionnaire. The huge interest in the consultation process was facilitated by the involvement of celebrities like Paul McCartney who encouraged participation" (*supra* note 20 at 125). Paul McCartney has been a long-time opponent of the commercial seal hunt and the inclusion of celebrities in the animal rights movement to halt the hunt of seals in Canada has been ongoing since at least 1977, when Brigitte Bardot visited Newfoundland to protest against the hunt (*supra* note 7 at 41; *supra* note 10 at 93). The 'Media and Arts Advisory Board' of Sea Shepherd now holds celebrities such as Sean Connery, Pierce Brosnan, Martin Sheen or Sean Penn (Sea Shepherd. "Board of Advisors – Media and Arts Advisory Board." http://www.seashepherd.org/who-we-are/advisors-media-and-arts.html accessed September 25, 2012). A survey carried out in Canada in 2000 showed that about 9% strongly and 31% somewhat support the seal hunt, while 26% strongly and 28% somewhat oppose the hunt (Department of Fisheries and Oceans Canada, "Canadian Attitudes towards the Seal Hunt", http://www.dfompo.gc.ca/fm-gp/seal-phoque/reports-rapports/study-etude/study-etude-eng.htm#re6 (accessed October 12, 2012).

55 COWI, s*upra* note 18 at 126.

56 *Ibid*., 131.

57 Ca. 80%, 50% of which came from Canada and the US.

58 COWI, s*upra* note 18 at 127, 128; Of the 32.061 responses from EU citizens, 73% were in favour of a ban, whereas 8.8% support international standards for seal hunting, 5.7% responded in favour of a label and 6.1% were of the opinion that no measures were needed (*Ibid*., 129).

subsistence purposes and not commercially, ultimately denying the right to economic benefit from the hunting of seals.

2.3.5. *Recommendations*

The contribution of the study is perceived by the study team as "an element to the Commission's own progress towards a proposal for measures (if any) that will improve the animal welfare aspect of seal hunting."[59] Therefore, the COWI study presents several recommendations, such as:

- Policy measures should be aimed at pursuing good practices while avoiding bad practices
- Therefore, labelling schemes or prohibitions that take these practices into account and which limit the social and economic impacts[60] to those areas where the bad practices are applied, should be the focus of the crafting process
- Since the public perception is opposed to seal hunting based on principle reasons,[61] therefore information campaigns should be launched for obtaining a public acceptance of the distinction between good and bad practices

Notwithstanding, due to the lack of concrete information especially in regard to the effects on the local economy the COWI study highlights the lack of concrete knowledge.[62]

3. *Proposal for a Regulation of the European Parliament and of the Council concerning Trade in Seal Products*

On July 23, 2008, only three months after the release of the COWI study, the European Commission presented its proposal for a regulatory scheme on trade in seal products (henceforth called 'the Proposal')[63] to the plenary. It was accompanied by a Commission Staff Document on the Potential Impact of a Ban of Products

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59 *Ibid.*, 136.

60 Since the knowledge of the socio-economic impacts is limited, the severity of these impacts cannot be evaluated.

61 See also the same applying in the whaling context (Epstein, Charlotte, *The Power of Words inInternational Relations – Birth of an Anti-Whaling Discourse*. Cambridge & London: MIT Press, 2008). In how far can this claim is justified is questionable due to the difficulties of interpreting the Public Consultation (COWI, *supra* note 18 at 125).

62 Cf. *supra* note 43; see also COWI, s*upra* note 18 at 5, 137.

63 European Commission. COM (2008) 469 final, Proposal for a Regulation of the European Parliament and of the Council concerning Trade in Seal Products, http://eur-lex.europa.eu/ LexUriServ/ LexUriServ.do?uri=COM:2008:0469:FIN:EN:HTML (accessed September 25, 2012).

derived from Seal Species,[64] based on the findings of the 2007 EFSA study, the 2008 COWI study and the public consultation.

3.1. *The Explanatory Memorandum*

The Explanatory Memorandum of the Proposal locates the Proposal within a means on banning the trade in seal products unless certain animal welfare conditions are met.[65] The proposed regulation furthermore aims at harmonizing the conditions of the internal market for trade in seal products and in order to respond to the public's opinion on seal hunting. The harmonization procedure is therefore considered the best means to ensure the welfare of seals.[66]

The proposed regulation holds a clear external dimension as it affects international trade with countries not member to the European Union. It was set to give "incentives to countries concerned to review and improve, where need be, their legislation and practice concerning the methods to be complied with when killing and skinning seals."[67] The Seal Pups Directive[68] and Habitats

64 European Commission. SEC (2008) 2290, Commission Staff Working Document – Accompanying Document to the Proposal for a Regulation of the European Parliament and of the Council concerning trade in Seal Products; Impact Assessmetn on the Potential Impact of a Ban of Products derived from Seal Species; Available at http://ec.europa.eu/environment/biodiversity/animal_welfare/seals/pdf/seals_ia.pdf (accessed September 25, 2012).

65 European Commission, *supra* note 65 at 2.

66 European Commission, *supra* note 65 at 4.

67 *Ibid*., 5; The Proposal itself states that the measure in terms of its effects in international trade are consistent with Article XX (a) of the GATT Agreement, allowing for the introduction of trade barriers based on public morals as long as they are not considered arbitrary and unjustifiably discriminatory (*ibid*., 8). While Howse and Langlille condone to this assessment (cf. Howse, Robert and Joanna Langlille, *Permitting Pluralism: The Seal Products Dispute and why the WTO should permit Trade Restrictions justified by non-instrumental Moral Values*. New York University Public Law and Legal Theory Working Papers, No. 316. New York: New York University School of Law, 2011, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1969567 (accessed September 26, 2012)); Fitzgerald argues that morality is not sufficient justification to impose a trade ban, leading to a breach of Art. XX of the GATT Agreement (Fitzgerald, Peter L. "'Morality' May Not Be Enough to Justify the EU Seal Products Ban: Animal Welfare Meets International Trade Law." *Journal of International Wildlife Law & Policy* 14 (2011): 85–136). Canada (later joined by Iceland and Norway) has initiated Dispute Settlement Procedure DS400 under the WTO due to alleged inconsistencies with international trade law (World Trade Organization. "Dispute Settlement: Dispute DS400 – European Communities – Measures Prohibiting the Importation and Marketing of Seal Products." http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds400_e.htm (accessed September 26, 2012).

68 Extended to European Economic Community (EEC) Council Directives 85/444/EEC, http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31985L0444:EN:HTML (accessed September 26, 2012) and 89/370/EEC, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31989L0370:FI:NOT (accessed September 26, 2012).

Directive[69] constitute the legislative framework in which the proposed regulation is to be embedded.[70]

When legislating in the field of the internal market, animal welfare considerations are a requirement for the Member States to pay full regard to.[71] In accordance with the Action Plan on the Protection and Welfare of Animals 2006–2010,[72] the Proposal highlights the inclusion of stakeholders in the crafting process. Both the public consultation and a stakeholder meeting, organized by EFSA prior to its report, held in Parma, Italy, October 4, 2007,[73] bear witness of these efforts.[74]

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69 European Economic Community (EEC) Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31992L0043:EN:HTML (accessed September 26, 2012).

70 However, while both the Seal Pups Directive and the Habitats Directive are aimed at fostering a favourable conservation status of seals by regulating certain facets of international and intra-Community trade, the Proposal aims to respond to the ethical concerns of the public. The public consultation serves as the basis for the European Commission to conclude that a large part of the public is opposed to seal hunting out of principle reasons, leading to the preference of a trade ban (European Commission, *supra* note 65 at 8; European Commission, *supra* note 66 at 11).

71 This provision is set out in the Declaration on the Protection of Animals to the Treaty on European Union which calls on Member States: "when drafting and implementing Community legislation on the common agricultural policy, transport, the internal market and research, to pay full regard to the welfare requirements of animals." Moreover, this provision is manifested in the Protocol on Protection and Welfare of Animals to the Treaty of Amsterdam, amending the Treaty on European Union, the Treaties Establishing the European Communities and other Related Acts: "In formulating and implementing the Community's agriculture, transport, internal market and research policies, the Community and the Member States shall pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage," http://eur-lex.europa.eu/en/treaties/dat/11992M/htm/11992M.html#0103000044, (accessed September 26, 2012).

72 Cf. *supra* note 4.

73 The participants of the meeting consisted of several groups and individuals associated with trade in seal products; groups and individuals promoting or working on animal welfare, both in seal hunting and elsewhere; hunters associations; government officials; and veterinarians. It must be noted that it is the commercial sealing associations that are absent from the meeting. The list of participants is at the time of writing not publicly accessible and was obtained through personal contact with EFSA.

74 A "fact-finding mission" (European Commission, *supra* note 66 at 13) was planned between April 9–16, 2007, upon invitation of the "responsible Canadian Minister" (*ibid.*). Yet, due to logistical misjudgements from the DFO, the two veterinarians appointed to observe the seal hunt, were not able to accomplish their mission (*ibid.*; Pierre-Yves Daoust, e-mail message to author, September 26, 2012).

3.2. *Legal Elements and the Policy Proposition of the Proposal*

According to the Proposal, "the Treaty establishing the European Community (TEC) does not provide for a specific legal basis [. . .] to legislate in the field of ethics as such. However, where the Treaty empowers the Community to legislate in certain areas and that the specific conditions of those legal bases are met, the mere circumstance that the Community legislature relies on ethical considerations does not prevent it from adopting legislative measures."[75] As such, the Proposal is based on Articles 95 – the functioning of the internal market – and 133 – common commercial policy, imports and exports – TEC, making reference also to the case law setting up the conditions for recourse to Article 95. Due to the trade implications of the proposed measures Article 133 TEC constitutes the second legal basis of the Proposal.[76]

The preferred policy package of the proposed regulation is, according to the accompanying document a combination of several policy options, which aims to provide protection for seals during the killing and skinning process while at the same time responding to the alleged concerns of the public over animal welfare issues in seal hunting.[77] In order to achieve these objectives, the placing on the market, the import, export and transit through the European Union should be prohibited. As already set out in the Parliamentary Declaration, seal products stemming from Inuit communities are to be exempted from this prohibition.[78] The policy package would allow for derogation from the prohibition, if measures are in place which guarantee the absence of suffering in the killing and skinning process. Also if the animal welfare criteria developed by EFSA and COWI are respected, re-opening of the European market is to be possible.[79]

The impacts of this proposal on trade are identified as being significant, due to the importance of the EU market for seal products from Canada, Greenland and Namibia. The Explanatory Memorandum reads that "economic impacts are limited to those impacts to trade and local economies"[80] but abstains from providing a policy option on the impact on the further conduct of seal hunting in e.g. local communities. This would be particularly relevant in light of the impacts of the 1983 ban on Inuit communities which have led to a decline in traditional

75 European Commission, s*upra* note 65 at 3.
76 *Ibid.*, 12; This legal basis is challenged in Case T-18/10 Inuit Tapiriit Kanatami and Others v Parliament and Council, available at http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=18/10&td=ALL (accessed September 26, 2012).
77 European Commission, *supra* note 66 at 7.
78 *Ibid.*, 51.
79 European Commission, *supra* note 66 at 51.
80 European Commission, *supra* note 65 at 10.

seal hunting activities with associated effects on food production, traditional livelihoods and socio-economic integrity of Inuit and northern communities.[81]

With a shutting down of the European market, world market prices were expected to decline, leading to a decline in the overall demand for seal products, ultimately leading to a decrease in demand and therefore to less seals being killed "in an inappropriate manner."[82] This leads to the authors of the accompanying document to the conclusion that "[a]ny reduction in number of seals killed would translate into an improvement in animal welfare. The impact on animal welfare of seals that are killed (i.e. continue to be killed) will depend on whether commercial sealers improve the animal welfare of their practices."[83]

3.3. *The Proposal*

The "Proposal for a Regulation of the European Parliament and of the Council concerning Trade in Seal Products" consists of a Chapeau of 19 recitals outlining the content of the proposed policy measures, followed by 12 Articles specifying the introductory recitals and two Annexes.[84]

Contrary to the explanatory memorandum which contextualizes the Proposal into the ethical concerns of the citizens over methods applied in seal hunting, Recital 19 emphasizes that the objective of the proposed Regulation is the harmonization of the internal market.[85] This is reaffirmed in Article 1, stating the Subject Matter being the establishment of harmonized rules for the trade in seal products in the Community.[86]

In order to achieve this objective, the proposed Regulation puts a blanket ban on the trade in seal products within the European Community (intra-Commmunity trade) as well as the external trade, i.e. the import, export and transit of seal products in, from and through the Union. This, however, does not apply to "seal products resulting from hunts traditionally conducted by Inuit communities and which contribute to their subsistence."[87]

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81 Wenzel, George. *Animal Rights, Human Rights – Ecology, Economy and Ideology in the Canadian Arctic.* Toronto: University of Toronto Press, 1991, 142.

82 European Commission, *supra* note 66 at 52.

83 *Ibid.*, 52.

84 Contrary to the "Seal Pups Directive" the European Commission favoured a Regulation to govern the trade in seal products in the EU. According to the Proposal, the application of a regulation is of a uniform character, is "binding in its entirety and directly applicable in all Member States on the same day, without the additional administrative burden of a national act being necessary for transposition" (European Commission, *supra* note 65, 14).

85 European Commission, *supra* note 65 at 19.

86 European Commission, *supra* note 6 at Art. 1.

87 *Ibid.*, Art. 3.2.

Article 4 stipulates the conditions for derogation from the ban for products deriving from seals that have been killed and skinned without suffering. This derogation is possible when it can be demonstrated that animal welfare standards correspondent to EU norms are met.[88] A derogation is furthermore possible when imports are of an occasional character and consist merely of goods for the personal use of travellers.[89] A certification, labelling and marking scheme is to display these criteria.

Implementation of the Regulation is to occur with a separate Commission Regulation, although the proposed Regulation as such stipulates in Annex I that 17 species of pinnipeds fall under its scope while Annex II delimits the criteria that allow for derogations.

4. *From the Proposal to the Regulation*

4.1. *Procedural Steps Following the Proposal*

After the Proposal was published, several comments and opinions were issued reflecting the political climate in Brussels and as regards seal hunting in general. Following the first reading to the European Parliament on September 4, 2008, four parliamentary committees were asked to provide their opinions on the proposal, i.e. the Committee on International Trade (INTA), the Committee on Fisheries (PECH), the Committee on the Environment, Public Health and Food Safety (ENVI) and the Committee on Agriculture and Rural Development (AGRI).[90] On October 20, 2008, the Environment Ministers of the Member States, within the meeting of the Council of the European Union, "in order to direct the work at technical level that is continuing with a view to carrying this dossier forward as quickly as possible" exchanged their views and expressed their support of the Proposal. They concluded that "the Inuit communities linked to traditional hunting and subsistence should not be compromised" while "a more detailed examination seems necessary, particularly as regards the scope and feasibility of certain provisions."[91] The political deliberations did not indicate recognition of

88 *Ibid.*, Art. 5.1.

89 *Ibid.*, Art. 2.4.

90 European Parliament. A 6-0118/2009, ****I Report on the Proposal for a Regulation of the European Parliament and of the Council concerning Trade in Seal Products*, Committee on the Internal Market and Consumer Protection, 2009, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2009-0118+0+DOC+PDF+V0//EN (accessed September 27, 2012), p. 76; The AGRI Committee's official request for an opinion was announced to the plenary on December 4, 2008.

91 Council of the European Union. "Press Release – 2898th Council Meeting, Environment, Luxembourg, 20 October 2008," http://register.consilium.europa.eu/pdf/en/08/st13/st13857.en08.pdf (accessed September 27, 2012), 19.

the non-indigenous traditionality of seal hunting. Therefore, as already reflected in the COWI study, seal hunting as a tradition is inextricably linked to its indigeneity, irrespective of the number of seals that are killed or the methods that are applied. Yet due to the lack of a clear-cut impact assessment the Council called for a more thorough investigation. Notwithstanding, it remains unclear if these examinations include socio-economic impacts of the ban on non-indigenous seal hunting communities.

On February 18, 2009, the Legal Service of the Council of the European Union released its Opinion on the Proposal. The Opinion questions the legal basis of the Proposal and concludes that if the harmonisation of the internal market were the overall aim of the ban, other products would have to be included. Since this is not the case, Art. 95 TEC allowing for legislative steps to harmonise the internal market, nor any other article of the TEC can be applied. Ultimately, the Legal Service concludes that the proposed ban lacks a legal basis.[92]

Contrary to the Legal Service, the legal basis on which to regulate, in spite of the absence of Community competence in regulating in animal welfare issues as such,[93] is approved by the European Economic and Social Committee (EESC), an advisory body to the European Commission, Council and Parliament, which issued its opinion on the Proposal[94] on February 26, 2009. However, since in the Proposal no distinction between small- and large-scale seal hunting can be found, Paragraph 5.2 points out that "[i]ntroducing specific exceptions for European countries where small-scale seal hunting is carried out cannot be justified from the animal welfare point of view, and could put the international legality of the entire proposal into question."[95] The opinion considers a blanket

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92 Legal Service of the European Council, cited in ITK (Inuit Tapiriit Kanatami). "ITK/ICC Press Release * Inuit of Canada: European Union Knows Proposed Seal Ban Would be Unlawful, March 27, 2009," https://www.itk.ca/media/media-release/itkicc-press-release-inuit-canada-europeanunion-knows-proposed-seal-ban-would (accessed October 5, 2012).

93 Community competence in animal welfare elements are based on the principle of conferral and subsidiarity. Art. 13 TFEU reads: In formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.

94 European Economic and Social Committee (EESC), 2009/C 218/12. *Opinion of the European Economic and Social Committee on the Proposal for a Regulation of the European Parliament and of the Council concerning trade in Seal Products*, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:218:0055:0058:EN:PDF (accessed October 2, 2012).

95 EESC, *supra* note 96 at Paragraph 5.2; The minutes of the meeting indicate that Sweden and Finland sought an exemption from the ban Proposal, because of the small-scale nature of the hunt carried out in both countries (Euroopan Talous- ja Sosiaalikomitea. *Keskustelupöytäkirjaasiakohdan Ehdotus: Euroopan parlamentin ja neuvoston asetus hyljetuotteiden kaupasta.* Brussels: EESC,

ban with accompanying derogation an innovative policy tool giving incentives for future policy-making in the EU.[96] However, the Committee suggests a delay of the implementation of the derogation in order to ensure a completion of the ban, however not applicable to Inuit communities.[97] The opinion abstains from a clarification of the notion of 'dependency,' possibly meaning a socio-economic dependency. Here, as above, indigeneity constitutes the determining factor for a legitimate seal hunt as 'livelihoods' raises a museification of Inuit culture before the inner eye.[98] Taking into account economic dependency, it is seems to be therefore legitimate to gain economic benefit from seal hunting only to a degree that ensures the conduct of a non-commercial, 'museified,' livelihood. It thus remains unclear how high the percentage of revenues must be in order to be considered 'dependent.' Given the numbers provided by the DFO,[99] it remains questionable if the EESC would consider an Inuit community whose economy would gain 15–35% from sealing 'dependent' on seal hunting. The normative question of who is entitled to economic benefit from the trade in seal products ultimately is linked to the stereotypical European perception of a 'noble' Inuit society.

Since the purpose of the Proposal aims at harmonizing the European Union's internal market, responsibility of finalising the regulation was given to the parliamentary Committee on Internal Market and Consumer Protection (IMCO) of the European Parliament. Therefore, rapporteur Diana Wallis' report was adopted by the IMCO on March 2, 2009 and presented to the plenary on March 5. The main amendments included the abolition of the derogation clauses of the Proposal, therefore making the ban a more stringent measure against the commercial nature of seal hunting. This consequently makes labelling and certification schemes obsolete and the proposals for these, which could also be found in Wallis' draft report, were removed due to resistance from within the IMCO. Moreover, the proposed Regulation was to include all seal species.[100] Based on these two fundamental alterations, both annexes were deleted. Also the criteria for the import were slightly amended, highlighting that import may be allowed

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2009 [European Economic and Social Committee. Proceedings of the debate on the Proposal for a European Parliament and Council Regulation on Trade in Seal Products; own translation).

96 EESC, *supra* note 96 at Paragraph 4.6.

97 *Ibid.*

98 The 'museification' of culture in this context implies that the perception of Inuit culture is based on stereotypes, simplification and generalisation, such as living in *igloos*, using harpoons and non-motorized *kayaks* while not being part of any western economies. This stereotypically perceived culture is then 'museified' – never changing – and conserved as such in popular depictions and ultimately laws.

99 Cf. COWI, *supra* note 18 at 116.

100 *Phocidae* (earless seals), *Otariidae* (eared seals) and *Odobenidae* (walruses).

as the personal property of travellers and their families, yet only to the degree that indicates a non-commercial purpose.[101]

The Report moreover included the amendments proposed by the other parliamentary committees, of which, however, merely the Committee on the Environment, Public Health and Food Safety (ENVI) and the Committee on Agriculture and Rural Development (AGRI) submitted their opinions. ENVI-rapporteur Frida Brepoels identified three objectives, corresponding to public moral, animal welfare, and environmental considerations, upon which a blanket ban with an exemption for Inuit communities can be based[102] and which could constitute an element in an international effort to shut down the commercial seal hunt.[103] Contrarily, AGRI-Rapporteur Veronique Mathieu criticized the ambiguity of the EFSA study and its proneness to different interpretations for and against the seal hunt. Moreover, the absence of a definition of 'commercial sealing' and the total neglect of financial benefits stemming from seal hunting may, according to Mathieu, contribute to poaching and therefore decreasing animal welfare considerations, running "contrary to every measure in connection with the rational use of natural resources, which advises that maximum possible use should be made of an animal after it has been killed."[104]

April 1, 2009, the Committee on Legal Affairs of the European Parliament (JURI) released its Opinion on the Proposal.[105] Contrary to the Legal Service's Opinion of the Council of the European Union, the JURI opinion argues in favour of Arts. 95 and 133 TEC as the legal basis for the Proposal, however, only, if

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101 Rapporteur Wallis in the Explanatory Statement to the Report identified two major objectives of the Proposal, i.e. the improvement of animal welfare standards in seal hunting, and the respect and preservation of traditional cultures in the Arctic. Yet, especially the latter cannot be ensured with a blanket ban as "is so damaging to any trade or market in seal products (which is after all the purpose of a ban) that it renders the exception useless to those Inuit communities whom it was designed to assist in the first place." In order to correspond to the objectives of the Proposal and in line with the 2006 European Parliament Declaration, she proposes "an appropriately and robustly constructed mandatory labelling system would have more chance of achieving both of Parliaments policy goals, allowing public opinion – through informed consumers – much more effectively to assist in guaranteeing high animal welfare standards, whilst equally assisting Inuit communities" (European Parliament, *supra* note 92 at 29, 30).

102 *Ibid.*, 33

103 *Ibid.*, 34.

104 *Ibid.*, 57.

105 European Parliament, Committee on Legal Affairs, *Opinion on the legal basis of the Proposalfor a regulation of the European Parliament and of the Council concerning trade in seals products (COM(2008)0469 – C6-0295/2008 – 2008/0160(COD)), PE423.732v01-00*, http://www.europarl.europa.eu/RegData/commissions/juri/avis/2009/423732/JURI_AL(2009)423732_EN.pdf (accessed October 12, 2012).

reference is made to the Regulation on trade in cat and dog fur,[106] which connects animal welfare aspects and internal market prohibitions. Without such reference, also the JURI committee would consider Art. 95 as the legal basis as not justified.

4.2. *The Debate in the European Parliament and Final Vote*

On May 4, the Proposal and the amendments were discussed in Parliament with the view of the decision on the Proposal the following day. The debate in Parliament revealed the different facets of the controversy surrounding seal hunting as well as the unity amongst representatives of different political groups.[107] MEPs from different groups in the Parliament were in favour of a trade ban due to the perceived inhumanness of the hunt, however not to be applicable to Inuit communities. The ban would follow the wish to end the commercial seal hunt in the proclaimed interest of EU citizens and would significantly affect hunting activities and the trade in seal products.[108] Yet, Diana Wallis asked whether even in spite of the exemption Inuit communities will be adversely affected with a possible detriment to the conduct of their traditional livelihoods.[109] Other MEPs suggested support for indigenous communities by helping them to establish alternative economies[110] or claimed that the ban is "a victory for common sense, it is a victory for humanitarianism, it is a victory for democracy and not least it is a victory for all the seals [. . .]."[111]

But also critical voices were raised, claiming that the proposal would significantly affect coastal communities and people's livelihoods.[112] It is important to note that no distinction between indigenous or non-indigenous communities is made and also reference to Greenland[113] does not hold a direct indigenous reference. On a normative level, one MEP noted that hundreds of thousands of animals are killed for human consumption and that it is questionable why seals constitute an exception to this acceptance of animal killing.[114]

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106 European Community, Regulation (EC) No. 1523/2007 of the European Parliament and of the Council of 11 December 2007 banning the placing on the market and the import to, or export from, the Community of cat and dog fur, and products containing such fur, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:343:0001:0004:EN:PDF (accessed October 4, 2012).

107 European Parliament. "Debates, Monday, 4 May 2009, Strasbourg," http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20090504+ITEM-021+DOC+XML+V0//EN (accessed October 2, 2012).

108 Frida Brepoels, rapporteur of the Committee on Environment, Public Health and Food Safety.

109 Diana Wallis, rapporteur of the Internal Market and Consumer Protection Committee.

110 Toine Manders, Alliance of Liberals and Democrats for Europe (ALDE).

111 Carl Schlyters, Greens (Verts/ALE).

112 Peter Šťastny, Group of the European People's Party (PPE-DE Group).

113 Christian Rovsing, Group of the European People's Party (PPE-DE Group).

114 Marios Matsakis, Alliance of Liberals and Democrats (ALDE).

On May 5, 2009, the European Parliament voted on the amended Proposal, which no longer includes derogations and which constitutes a blanket ban on the import, export and trade in seal products stemming from non-indigenous hunts. 550 MEPs voted in favour of this ban, 49 against, and 41 abstained.[115] The final act was adopted by the Council of the European Union on July 27, signed on September 16, and published as Regulation No. 1007/2009 of the European Parliament and Council on Trade in Seal Products in the Official Journal on October 31, 2009. Its implementing regulation[116] was published in the Official Journal on August 10, 2010.

4.3. *The HSI Campaign*

Looking at the efforts undertaken by the Humane Society International, its campaign in Brussels and Strasbourg prior to the adoption of the ban shows how the organization has used multiple different methods and image events to exert influence on MEPs.[117]

The HSI campaign to lobby European politicians was launched prior to the adoption of the IMCO report and normatively aimed at the shut-down of the seal hunt altogether, even without reference to Inuit communities. On February 16, a report on the Proposal and different positions on the issue was published in *The Parliament*. At the same time, on February 19, 12 weeks of continuous advertising against the seal hunt were placed in the European Voice, a Brussels-based newspaper on European affairs and important source of information for EU policy-makers, displaying imagery of seals (whitecoats and older), sealers or supporting MEPs, framed by slogans such as "[a] bloody fate . . . the EU can stop", "[d]oomed to die . . . unless the EU acts now", or "[s]ave me from a horrible fate." After the adoption of the ban, on May 7, 2009, the last advertisement was placed thanking the MEPs.[118] HSI itself stated that 150 MEPs and environment officials within the Permanent Representations[119] of the EU Member States as well as Commission members were approached face-to-face, having also been provided with leaflets and information material about the HSI position on the seal hunt. In the morning of March 2, doorhangers with the main HSI arguments were hung on every MEP's office door. Later on during the day, seal cuddle toys were distributed in front of the Parliament in Brussels to raise awareness also amongst

115 European Parliament, Legislative Observatory, Statistics 2008/0160 (COD) A6-0118/2009, http://www.europarl.europa.eu/oeil/popups/sda.do?id=16846&l=en (accessed October 3, 2012).

116 European Commission, *supra* note 2.

117 Humane Society International (HSI). "Banning the Seal Trade – Looking back at a Success Story, 2009." http://bansealtrade.wordpress.com/ (accessed October 4, 2012).

118 *Ibid.*

119 *Ibid.*

the public. Shortly before the vote in the IMCO, each committee member was provided with a seal toy and a fake MEP voting card, stating: "Vote YES to a strong prohibition, without loopholes, on the EU trade in seal products [in green]. It is the only way to end the inherent cruelty of commercial seal slaughter; Vote NO to deceptive labelling schemes and derogations [in red]. Don't be fooled by toothless labelling schemes that would deceive consumers and promote trade in products of cruel slaughter."[120]

After the release of the IMCO Report the HSI issued position papers, followed by reports on the legal basis and the internal market, on the WTO as well as on sealing in Greenland.[121] An online petition to end the trade in seal products was started on the campaign's website www.bansealtrade.eu[122] and on Facebook and yielded, according to HSI, 220.000 signatories.

As the vote in Parliament drew closer large screens in Strasbourg and Brussels were set up, displaying HSI's main points against the seal hunt and for a trade ban. Between early March and late April 2009, seven booklets were distributed to the MEPs both in email and glossy format, in order to provide information about the hunt and about ongoing developments in the committees. Each newsletter also held an update on the ongoing online petition for a trade ban, while a Special Report focused on incorrectly labelled seal products on the European market. Two online advertisement campaigns were started on europeanvoice.com and euractiv.com, both important sources of information for EU policy-makers. Moreover, the public's attention was attracted by placing anti-sealing advertisements in leading national newspapers in France, Spain, Ireland, Germany, Italy, Hungary, Romania, Portugal and Poland. MEPs were approached the closer the vote drew and provided with PR materials such as DVDs and toy seals, while pictures with the MEPs were taken in front of an HSI anti-sealing banner. Shortly before the plenary vote, door-hangers urging the MEPs to support the ban were hung on every MEP's office door while again toy seals were handed out in front of the parliamentary buildings.[123]

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120 HSI, *supra* note 118.

121 In the report on the legal basis and the internal market, HSI challenges the Opinion of the Legal Service, presenting "ample evidence that seal products cannot be distinguished from like products" (Humane Society International (HSI), *Why a Prohibition on Seal Products Would Improve the Functioning of the Internal Market for a Category of Other Products Wider than those Concerned by the Ban*, 2009, http://bansealtrade.files.wordpress.com/2009/10/2009-03-10-article-95-legal-basis-for-seal-products-trade-ban-3.pdf (accessed October 4, 2012), 1.

122 No longer accessible as such, but all content is not archived on bansealtrade.wordpress.com. See *supra* note 117.

123 HSI, *supra* note 118.

5. *Discussion*

5.1. *Animal Rights Groups and the Adoption of the Ban*

The influence of the animal rights lobby on the MEPs in the outcome of the vote on Regulation 1007/2009 cannot be underestimated. Also Diana Wallis observed that "[s]eals are very beautiful marine animals – in fact, I have realised during this process that they have great PR [. . .]".[124] Lobbying efforts from animal rights and animal welfare groups to end the commercial seal hunt have been long ongoing.

Organizations such as IFAW, the Humane Society, Sea Shepherd, People for the Ethical Treatment of Animals (PETA) or Franz Weber Foundation actively worked against the conduct of the hunt and commercial sealers.[125] Two trademarks of the protest, stemming from postcolonial studies,[126] become apparent in the groups' depiction of the commercial seal hunt:

Firstly, the sealers themselves are depicted individuals, using hunting tools that seemingly do not correspond to 21st century hunts anymore,[127] using methods

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124 European Parliament, *supra* note 108.

125 The World Wildlife Fund (WWF) in its position statement of March 8, 2012, concerning the "Harp Seal Hunt in the Northwest Atlantic Ecoregion" takes a utilitarian approach: "WWF recognizes local economies play a significant role in, and economically benefit from, the sustainable use of natural resources" (WWF (World Wildlife Fund). "Position Statement March 08, 2012 – Harp Seal Hunt in the Northwest Atlantic Ecoregion") while recognizing that "hunting seals is an important part of the local culture, economy and heritage of many coastal communities in Atlantic Canada, the Arctic, and other maritime nations" *(Ibid.)*. While not making reference to the animal welfare concerns of other organizations, the WWF states furthermore that "the harp seal population is at a near record high with an estimated eight million individuals" (*Ibid.*). Also the Red List of the International Union for the Conservation of Nature (IUCN) lists the harp seal under the category 'Least Concern' "[d]ue to its large population size, and increasing trends" (International Union for the Conservation of Nature. "The IUCN Red List of Threatened Species – *Pagophilus Groenlandicus*," http://www.iucnredlist.org/details/41671/0 (accessed September 17, 2012). It must be noted, however, that both organizations make reference to the potentially adverse effects of climate change on the breeding grounds of harp seals, i.e. sea ice. Both the WWF and IUCN stress the need for continuous monitoring of the effects of climate change on the harp seal population. Also the ICES/NAFO Working Group on Harp and Hooded Seals (WGHARP) stresses the high mortality of harp seal pups due to declining ice conditions (ICES/NAFO Working Group on Harp and Hooded Seals (WGHARP). *Report of the Joint NAFO/ICES Working Group on Harp and Hooded Seals (WGHARP). Serial No. N6067, NAFO SCS Doc. 12/17*. St. Andrews: NAFO, 2011, http://archive.nafo.int/open/sc/2012/scs12-17.pdf (accessed September 25, 2012). 4.

126 Post-colonial studies aim to uncover power relations based on an ethnic and cultural dimension within the social and political construct of a country or a region which have been subject to colonialism and colonialist discourse.

127 EESC, *supra* note 96 at Paragraph 2.6.

that hold notions of cruelty and a merciless nature[128] – ultimately fostering the binary relation of 'us' and 'them' – and thus constituting the Other. The creation of the ultimate counterpart to 'us' provides 'us' with an identity of a superior character to the Other, because 'we' are the ones creating the binary relationship in the first place, and secondly enjoin the Other and its alleged practices with terminology that holds certain connotations and images alien and contemptuous to 'us'.[129] It is therefore that during the crafting process of the seal ban the differences between the values and interests of European policy makers and Canadian commercial sealers have become apparent. Economic interests and cultural values attached to the conduct of commercial sealing and represented by the Other are not only perceived with great scepticism by those opposed to the hunt, but politically framed by a denial or neglect. It could be argued that this climate of neglect and even contempt of a livelihood and ultimately of the people conducting it, without giving them a fair chance of participation identifies commercial sealers as 'subaltern' – a group of people that are politically marginalised, is not perceived as corresponding to the culture of the hegemonic power and does not have the possibility to partake in political processes that govern them. Therefore, the often adversarial divide between local/traditional knowledge vs. scientific knowledge[130] is expanded to adversarial and seemingly competing value systems in which that of the anti-sealing camp has politically prevailed. By integrating the knowledge and values of commercial sealers and those fostering the sustainable use of natural resources into the policy making processes it would have been more likely that the outcome had resulted in a less adversarial relationship between the anti-sealing and the sealing advocates, but possibly more resembling a co-managerial system.[131]

Secondly, the seals are perceived as the innocent and the oppressed. They are not able to defend themselves nor tell their story. Therefore, two denotations take foot in this context, firstly, the anthropomorphism sets the seal on equal footing with humans ("baby seals"; "mother seals") while being an anthropomorphized animal without an active participation in the cultural narrative of hunting. It does

128 People for the Ethical Treatment of Animals (PETA). "Canadian Seal Slaughter;" http://www.peta.org/issues/animals-used-for-clothing/canadian-seal-slaughter.aspx (accessed October 3, 2012).

129 Cf. Said, Edward. *Orientalism: Western Conceptions of the Orient*. London: Penguin Classics, 1978.

130 See for example Nadasdy, Paul. "Re-evaluating the Co-Management Success Story." *Arctic* 56 (No. 4) (2003), 367–380.

131 See for example Gadgil, Madhav, Per Olsson, Fikret Berkes, and Carl Folke "Exploring the role of local knowledge in ecosystem management: three case studies." In *Navigating social-ecological Systems-Building Resilience for Complexity and Change*, edited by Fikret Berkes, Johan Colding and Carl Folke, 189–209, Cambridge: Cambridge University Press, 2003.

not possess any powers or voice and becomes an oppressed subject for which animal rights organizations speak.[132] The legitimization of this claim is based on the inherent perception that "[i]f we believe it is wrong to inflict suffering upon innocent human animals then it is only logical phylogenically[133]-speaking, to extend our concern about elementary rights to the nonhuman animals as well"[134] and the associated notion of speciesism.[135] Ultimately, the anthropomorphic individualization of a seal leads to the generation of natural rights of the animal, enforced by its legal counterpart, e.g. legally-binding animal welfare standards or the EU seal products trade ban. If a legal framework is absent it is animal rights organizations that stand up for defending and representing the rights of animals. It is therefore this rights-based approach which does not take into consideration possible benefits of overriding the rights of the right-holder, i.e. in this case the seal.[136]

In order to find ways for influencing policy-making processes and "in order to participate in the most important arena of public discourse, the televisual public sphere, and in order to be more than an enclave, environmental groups must use the tactic of image events."[137] Frequent reference in both the EFSA and COWI studies to information provided by IFAW and HSUS bears witness to the credibility of these organizations. The absence of an impact assessment of those communities most affected by a definite EU trade ban – i.e. the communities in Atlantic Canada in which commercial sealing, most refused e.g. in the 2006 European Parliament Declaration, is conducted – raises doubts over the legitimacy of the study itself, as it goes in line with the perceptual framework of the animal rights organizations, which either does not consider commercial seal hunting as a tradition, or as a tradition which is legitimate.[138]

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132 Spivak, Gayatry Chakravorty. "Can the Subaltern Speak?" In *Marxism and the Interpretation of Culture*, edited by Cary Nelson and Lawrence Grossberg, 271–313. Champaign: University of Illinois Press, 1988.

133 'Phylogeny' describes the evolutionary development of a taxonomic group or species.

134 Ryder 1970, quoted in Ryder, Richard D. "Speciesism Again: The Original Leaflet." In *Critical Society*.2 (Spring 2010). http://www.criticalsocietyjournal.org.uk/Archives_files/1.%20Speciesism%20Again.pdf (accessed October 3, 2012), 12.

135 'Speciesim' implies an arbitrary application of rights – or the absence thereof – of a different species or differences in the moral treatment that are merely based on the genetic differences.

136 original emphasis; Waldau, Paul. *Animal Rights – What everyone needs to know*. New York: Oxford University Press, 2011.

137 DeLuca, Kevin Michael. *Image Politics – The New Rhetoric of Environmental Activism*. New York & London: The Guilford Press, 1999, 20.

138 Fondation Franz Weber writes on its website: "One needs to ask, what modern weaponry, radio equipment, motorsleds with trailers, 'skidoos', ice-breakers, and helicopters that accompany the seal hunters, have to do with tradition. Also many Eskimos (*sic!*) use most modern equipment and catch more than their own need. Traditions do not always need to be preserved and are in

Thirdly, the massive image campaigns of animal rights organizations in Strasbourg and Brussels prior to the vote constitute the main pillar of the activities of animal rights organizations in the European Parliament. The outcome of the vote in the European Parliament on the ban may serve as an indicator for an elevated normative influence of these organizations on the decision-making process. A notable absence of a human dimension within the debate surrounding seal hunting albeit the knowledge on adverse impacts of a trade ban on indigenous or non-indigenous communities exists supports this hypothesis.

5.2. *Can Commercial Seal Hunting be Considered a Tradition?*

What constitutes a tradition? And which elements does it consist of? These questions have been debated intensively. For example Eric Hobsbawm writes that the "object and characteristic of 'traditions', including invented ones, is invariance. The past, real or invented, to which they refer imposes fixed (normally formalized) practices, such as repetition."[139] Glenn adds that a particular social context is necessary in which a continuously transmitted tradition needs to be embedded in order to be of current relevance. Therefore tradition and its transmission linked to the shaping of identity, associated inter-cultural relations, and the information stored in a specific social environment.[140] Also Ingold notes that current and applied knowledge mirrors and re-produces memory and even ongoing progress and development inevitably lead back to place and knowledge of the past.[141] It can furthermore be claimed that the historical dependency of Newfoundlanders on marine resources enables the location of the sealing culture into a human-in-nature discourse, ultimately 'traditionalizing' the act of seal hunting *per se*.[142]

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no way plainly positive. In the whole world traditions are given up that do not have a purpose or are not ethically justifiable anymore" ("Dabei muss man sich fragen, was die modernen Waffen, Funkgerate, Motorschlitten mit Anhanger, "Skidoos", Eisbrecher, und Hubschrauber, die die Robbenjager begleiten, mit Tradition zu tun haben. Auch viele Eskimos benützen modernste Gerate und fangen weit uber den eigenen Bedarf hinaus. Traditionen müssen nicht immer aufrecht erhalten werden und sind keineswegs ausschliesslich positiv. In der ganzen Welt werden Traditionen aufgegeben, die keinen Sinn mehr haben oder ethisch nicht mehr vertretbar sind." [own translation]; available at http://www.ffw.ch/index.php?id=241 (accessed October 3, 2012).

139 Hobsbawm, Eric. "Introduction: Inventing Traditions." In *The Invention of Tradition*, edited by Eric Hobsbawm and Terence Ranger, 1–14. Cambridge: Cambridge University Press, 1992, 2.

140 Glenn, H. Patrick. *Legal Traditions of the World*. Fourth Edition. Oxford: Oxford University Press, 2010, 12–13

141 Ingold, Tim. *The Perception of the Environment – Essays on Livelihood, Dwelling and Skill*. New York: Routledge, 2011, 148

142 See also Davidson-Hunt, Iain J., and Fikret Berkes. "Nature and Society through the lens of resilience: toward a human-in-ecosystem perspective." In *Navigating social-ecological Systems Building*

Taking the notion of the linkage between the past, present and future into account, a tradition does not have a timely minimum, i.e. a tradition may in theory have started yesterday. Notwithstanding, the commercial seal hunt in Atlantic Canada can be considered a 'tradition', as the activity as such has been continuously ongoing[143] for the last several hundreds of years,[144] shaping the identity of the people in the coastal communities of Newfoundland and shaping Canada as a nation. Both internal and external perceptions of 'tradition' and 'identity' must be considered here. On the one hand, some elements point to the Canadian self-identification as a sealing people[145] with a right to maintaining culture and economic activities. On the other hand, it is the anti-sealing groups as well as the political approach in Europe towards sealing which ultimately links commercial seal hunting with the hunt conducted in Atlantic Canada, thus characterizing, 'identifying', its inhabitants as sealers. This is both exemplified by the linkage between sealing and the boycott of Canadian seafood[146] as well as the direct references to Canadian or Northwest Atlantic sealing both in the Declaration of the European Parliament[147] and in the Parliamentary Assembly Recommendation of the Council of Europe[148] respectively. It is this hunt, its large-scale nature and the applied hunting methods which make outsiders and anti-sealing activists portrait the hunters as "barbarians"[149] or ruthless "baby killers"[150, 151] When considering

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Resilience for Complexity and Change, edited by Fikret Berkes, Johan Colding and Carl Folke, 53–82, Cambridge: Cambridge University Press, 2003.

143 A hiatus of commercial sealing took place during World War 2.

144 It must be noted that there is no timely limit to the notion of 'tradition'. Hobsbawm (*supra* note 141 at 2) points out that (invented) traditions may even be of a fairly recent origin.

145 E.g. the political stance on commercial sealing (cf. Department of Fisheries and Aquaculture, *Province of Newfoundland. Key Messages and Facts on Canada's Sealing Industry*, http://www.fishaq.gov.nl.ca/sealing/10key_messages_facts.pdf (accessed September 18, 2012), or the planned memorial for the sealers that died in the *Newfoundland* sealing disaster (cf. Home from the Sea – Sealers Memorial in Elliston, http://www.homefromthesea.ca/ (accessed October 12, 2012) support this hypothesis.

146 Barry, Donald. *Icy Battleground – Canada, the International Fund for Animal Welfare, and the Seal Hunt*. St. John's: Breakwater Books Ltd., 2009, 81–89; Sea Shepherd. "Defending Seals – Stop the Canadian Seal Slaughter," http://www.seashepherd.org/seals/ (accessed September 17, 2012).

147 European Parliament, *supra* note 3.

148 Council of Europe, *supra* note 9.

149 Watson, Paul. *Seal Wars – My twenty-five Year Struggle to Save the Seals*. London: Vision Paperbacks, 2004, 17.

150 International Fund for Animal Welfare (IFAW). "Why commercial Sealing is cruel," http://www.ifaw.org/international/our-work/seals/why-commercial-sealing-cruel (accessed September 17, 2012).

151 The depiction of the sealers goes closely in line with one approach of creating a 'common culture' outlined by Featherstone, stating that this "can only be created in terms of the education project of a cultural elite who will ultimately achieve the elimination of the vulgar and brutal

the commercial seal hunt as a *living* tradition, as an extension of the past to the present, the alleged cruelty of the hunters associated with the terminology of 'barbarians' or 'baby killers' locates the entire tradition into the past – neglecting any current relevance. The image that appears in front of the inner eye is thus framed by a discourse on (cultural) practices alien to the beholder: terms like 'barbarian' or 'baby killer' are inevitably associated with cultures other than the Western. It is therefore the seemingly irreconcilable antagonism of 'tradition' versus 'modernity' which becomes prominent in this context.[152] However, this, as Regulation 1007/2009 shows in Art. 3, does not apply to indigenous cultures and their traditional practices, which are considered inherently acceptable and were therefore also not considered in the 2007 EFSA Study.[153]

The origins of commercial seal hunting in Atlantic Canada can be traced back to 1793, when the first vessel with commercial purposes embarked to hunt seals.[154] Since then it has been an integral part of e.g. Newfoundlanders' lives and has contributed greatly to the establishment of the colony. The long-term normative influence on the socio-economic and cultural development of the Newfoundlanders[155] thus enables the denotation of seal hunting as a tradition in Newfoundland and it therefore holds a cultural and societal importance beyond that of economy. Yet, on a normative level it is not embedded into a discursive framework of 'tradition' with a right to exist further, but is instead in the political process of the EU labelled and stigmatized as inherently bad. It is therefore morally wrong to kill and use seals for the socio-economic benefit of non-indigenous persons

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cultural residues" (Featherstone, Mike. *Consumer Culture and Postmodernism*. London: SAGE Publications, 2007, 128).

152 The linkage has certainly been taken up before. For example, Sheryl Fink of the IFAW writes: "But when the leader of a political party justifies the reputation-staining, taxpayer-supported slaughter of tens of thousands of seals with arguments of "culture and tradition," accompanied by weak lamentations that the practice is 'being singled out unfairly' – accepting such an excuse would prevent action against any atrocity to humans or animals [. . .]." Fink, Sheryl. "Seal Hunt Letter from Bill Maher: Bob Rae missed the Point," 2012, http://www.ifaw.org/european-union/news/seal-hunt-letter-bill-maher-bob-rae-missed-point (accessed September 18, 2012).

153 The reason can only be speculated on, though former policy advisor to the Canadian Department of Aboriginal Affairs and Northern Development Brian Roberts writes that aboriginal hunting is acceptable for EU policy makers as "as a 'primitive' society they [the Inuit] can't be expected to have the 'advanced' moral standards of European society" and therefore it seems acceptable to exempt them from the ban on trade in products deriving from an 'immoral' activity which, however, is "regarded by Canadian Inuit as ethnocentric, patronizing and insulting." (Roberts, Brian. Personal Communication. September 19 and November 6, 2012. Email).

154 Candow, James E. *Of Men and Seals – A History of the Newfoundland Seal Hunt. Ottawa: Minister of Supply and Services Canada*, 1989, 29; Ryan, Shannon. *The Ice Hunters – A History of Newfoundland Sealing to 1914*. Newfoundland History Series, Vol. 8. St. John's: Breakwater Ltd., 1994, 54.

155 See for example Ryan, Shannon, and Larry Small. *Haulin' Rope & Gaff – Songs and Poetry in the History of the Newfoundland Seal Fishery*. St. John's: Breakwater Ltd., 1978.

and the instrumental importance of seals for coastal communities in Atlantic Canada is not recognized as such but succumbs to the ascription of an inherent right to life.[156] Ultimately, the adversarial stalemate of resource utilization versus preservation, which leaves out the notion of tradition, is reached. Within these polarized positions the EU policy-crafting process has adopted the preservationist approach as Recital 10 of Regulation 1007/2009 notes that legislative steps are necessary since "the concerns of citizens and consumers extend to the killing and skinning of seals *as such* [own emphasis]." The denotation of seals as innocent and good thus has made commercial sealers their 'bad' adversaries whose hunting activities symbolize the recklessness of human domination over emotionally imbued wildlife and who therefore do not hold the right to maintenance of their tradition.[157]

An additional problem in denoting commercial seal hunting as a tradition is that the seal hunters and their ancestors derive from the European culture. They are thus perceived as 'developed', since they are part of Canada, as the rest of the nowadays Western culture, ultimately denying the multiple modernities – different cultural, social and political developments – of the West.[158] Yet, in their having practiced the commercial seal hunt as a tradition, i.e. up to this day stemming from a different discursive framework, in which sealing and whaling was not only generally accepted, but even encouraged,[159] sealers are now deviating from the mono-dimensional 'modernized' public discourse by still conducting this activity. Therefore, the justification for the hunt is not accepted as legitimate anymore – or completely dismissed as unjustifiable, in spite of governmental support, attempts of the Canadian government, hunting organizations and the sealers themselves to improve the image of the commercial seal hunt, and veterinary studies that have identified the 'barbaric' club as humane killing tool.[160] Although, certainly, Newfoundlanders are part of the 'Western culture' as such, differences in cultural

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156 See also Nilsson Dåhlström, Åsa. *Negotiating Wilderness in a Cultural Landscape – Predators and Saami Reindeer Herding in the Laponian World Heritage Area.* Uppsala: Acta Universitatis Upsaliensis, 2003, 100, 101.

157 The same applies to the context of commercial whaling, in which the adversarial positions are nearly identical as in the sealing debate. See Stoett, Peter J. *The International Politics of Whaling*. Vancouver: UBC Press, 1997, 104–113.

158 Göle, Nilüfer. "Global Expectations, Local Experiences: Non-Western Modernities." In *Through a Glass, Darkly: Blurred Images of Cultural Tradition and Modernity over Distance and Time*, edited by Wilhelmus Antonius, 40–55. Leiden: Brill Publishers, 2000, 42.

159 See *supra* note 67.; Tønnessen, Joh. N., and Arne Odd Johnsen. *The History of Modern Whaling*. London: C. Hurst & Company, 1982.

160 For the most recent study, see Daoust, Pierre-Yves and Charles Caraguel, "The Canadian Harp Seal Hunt: Observations of the Effectiveness of Procedures to avoid poor Animal Welfare Outcomes", *Animal Welfare* 2012, 21.; doi: 10.7120/09627286.21.4.445; 445–455.

practices and traditions can also be found in different countries and regions.[161] By imposing the dogma of the right to life for seals on the Newfoundlanders, an inner cultural imperialism is taking place, eradicating the right to property and culture for those conducting the seal hunt. The constant normative and ethical progressive evolution away from an interfering relationship towards a non-utilitarian, distant relationship between humans and non-humans thus places the preservationist approach into a position to judge upon diverging cultural traits and human-animal schemes and to measure their degree of 'civilizationary development.'[162] The immediate interests and activities of local populations that fall short of those traits considered 'developed' are therefore forced to be adapted to the laws and regulations manifesting the views of those shaping the discursive and normative environment.[163]

6. *Conclusion*

The anti-sealing campaigns of HSI or IFAW as well as the overall sealing discourse predominantly focus on sealing as an economic activity that is 'bad' and needs to be ended. Yet, does this perception do justice to the activity itself and the sealers that conduct it? The mere focus on the economic (in)significance neglects the possible cultural importance of the hunt, customs and livelihoods that have evolved around the hunt.[164] Bearing in mind the lobbying efforts of the animal rights groups and the clear-cut outcome of the plenary vote to end the trade in seal products, the disregard of sealing as a tradition is somewhat understandable as by voting for the ultimate shut-down of a tradition, MEPs would have breached an underlying characteristic of European cooperation – the respect for cultural differences.[165] However, the discourse on certain features of the cultural landscape – seal hunting – is propelled forward to the disadvantage of the sealers by groups opposed to the seal hunt.

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161 The still ongoing tradition of bull-fighting in Spain and southern France serves as a delicate example for this claim.

162 Kalland, Arne. *Unveiling the Whale – Discourses on Whales and Whaling*. New York & Oxford: Berghan Books, 2012, 71.

163 See also Helander-Renvall, Elina. "Globalization and Traditional Livelihoods." In *Globalization and the Circumpolar North*, edited by Lassi Heininen and Chris Southcott, 179–219. Fairbanks: University of Alaska Press, 2010.

164 For a detailed study on the history of sealing in Newfoundland, see Ryan, *supra* note 153.

165 This is *inter alia* manifested in Art. 13 TFEU which in aligning it with animal welfare requirements reads that "[. . .] the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage." See also *supra* note 161.

It is thus that throughout the crafting process, the image of a 'cruel' sealer, conducting 'bad' sealing arises, being not in unison with the alleged high levels of European hunting and killing standards. Yet the arguments used in constituting a 'bad' hunt both refer to the cruelty and the numbers of killed seals ultimately lead to a moral dilemma: how can 'inhumanness' be quantified? Is it more cruel to raise millions animals in captivity just for the purpose of killing them than to kill seals in a way in which "humane killing does not always occur"?[166] Irrespective of the outcome of this stalemate, a fundamental question is ignored during the crafting process: Who is allowed to benefit from seals economically? According to the discourse, it is Inuit and other indigenous peoples who have the right to make profit from seals, irrespective of the applied killing methods. The reason can be found in 'traditional' hunting methods, one of which – harpooning – however was not evaluated from an animal welfare perspective and because of the smaller numbers they hunt.[167]

Apart from its Recitals 4, 5, 10 and 11, Regulation 1007/2009 does not hold any further reference to animal welfare,[168] but deals primarily with technical internal market issues. The absence of provisions fostering best practices in commercial seal hunting, i.e. the absence of provisions that indeed actively contribute to the improvement of animal welfare standards in seal hunting, and the lack of reference to, at the point of crafting the Regulation, improvements of the MMR seem to locate the EU debate within the scope of the morality of making profit through seal hunting as such.[169] This seemingly legitimizes possible adverse effects on the coastal communities – indigenous or non-indigenous – in Eastern Canada, and to "hurt the economy where it is supposed to hurt."[170] This explains also the

166 EFSA, *supra* note 12 at 94.

167 In this context see EESC, *supra* note 96 at Paragraph 5.2.

168 Commission Regulation 737/2010 does not hold any at all.

169 Reiterated by Brian Roberts, who highlights that hunting seals is acceptable only as long as no profit is made from their products. Profit can nevertheless be made by seal hunters of indigenous decent, which has been a long-standing trademark of subsistence hunting, when surpluses were traded with other communities before the arrival of the first Europeans (*supra* note 155). See also Boas, Franz. *The Central Eskimo*. Lincoln: University of Nebraska Press, 1964, 54–62. or amongst the Chukchi of the Russian Arctic, see Bogoras, Waldemar. *The Chukchee*. New York: AMS Press, 1975, 53.

170 European Commission, *supra* note 66, 26; In general terms, the accompanying document states: "While the macroeconomic impact of reducing seal hunting might be limited in the range states – there will be an impact on the incomes of the individual sealers (although state subsidies might alleviate this income loss) and the seal product manufacturers. These activities often take place in remote, coastal areas. Hence, the impacts will in practice depend on the share of income in a local economy from sealing activities – and whether or not there are any other employment/ income opportunities" (*Ibid.*, 29). Reference to seal hunting as a tradition and as a cultural heritage for coastal communities is consequently also not considered. Also impacts on the Inuit are tolerated: "However, policy measures that have adverse impact on the image of seal skins

continuous reference to the public consultation which, as identified by COWI, cannot be considered representative for giving an adequate picture concerning seal hunting. As regards the factual impact of the animal rights organizations on the decision-making process in the European Parliament, an assessment cannot be quantitatively undertaken. However, the elections for Parliament one month later, which allowed the MEPs to show their "animal loving credentials to voters at home"[171] can be considered elevating for the normative importance of the influence of the animal rights lobby on the outcome of the Parliamentary vote.

Knowledge on Canadian commercial seal hunting in Europe is scarce and predominantly shaped by the imagery provided by animal rights groups. By a normative 'moral outlawing' of the conduct of seal hunting for economic benefit, the 'traditionality' and therefore the human dimension of this activity has been neglected throughout the policy crafting process, leading to human rights considerations fuelled by an emotionally steered discourse.

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and other seal products will have a negative impact on the Inuit population anyway" (*Ibid.*, 30); Also the negative impacts of the Seal Pups Directive are recognized in the accompanying document even in spite of the exemption for Inuit communities due to the decline of the image of seal hunting in general (*Ibid.*, 21). No further elaboration on how to avoid negative impacts for Inuit can be found in the Proposal or in the accompanying document.

171 Diana Wallis, E-mail message to author, September 28, 2012.

2. Policies and influence – Tracing and locating the EU seal products trade regulation

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Policies and Influence

Tracing and Locating the EU Seal Products Trade Regulation

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Abstract

The European Union's ban on trade in seal products prohibits the placing on the market of seal products stemming from commercial hunts. It is based on the assumption that the commercial seal hunt is inherently inhumane, although the design of the ban does not contribute to alleviating this concern. This article takes the perceived problems in EU documents relating to the seal hunt under closer scrutiny and analyses the composition and characteristics of the stakeholders involved. While political processes are marginally touched upon, it is the ban's underlying principles and effects that the article considers and it embeds the crafting process and the ban itself in a normative and discursive environment.

Keywords

EU seal products ban – stakeholders – policy location – policy effects – problem of fit

1 Introduction

Regulation 1007/2009 on trade in seal products (basic regulation),[1] which bans the placing on the European Union (EU) market of products deriving from

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1 Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ .do?uri=OJ:L:2009:286:0036:01:EN:HTML> (visited 12 January 2013).

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commercially hunted seals, has stirred much controversy. This is due to its adverse effects on Inuit livelihoods,[2] although the regulation holds an exemption for products stemming from Inuit and other indigenous hunts based on the recognition of the subsistence nature of this hunt. Notwithstanding, commercial seal product traders and Inuit organisations have launched several unsuccessful court cases before the EU General Court to overturn the ban since trade in both Inuit and commercial seal products alike are de facto affected by the ban. While the court cases constitute the last steps in handling the consequences of the ban, it is the crafting process that led to the adoption of the basic regulation on 16 September 2009 that give rise to the assumption that there were deficits in the neutrality of approaches to the issue of seal hunting: the commercial seal hunt was labelled as 'cruel' and 'unnecessary' from the very beginning although unbiased knowledge on the hunt is virtually nonexistent. Contrarily, the small-scale and subsistence nature of Inuit seal hunts was considered 'necessary' and has not been located within animal welfare discourses.[3]

Accompanied by protests from the Inuit and seal hunting community as well as image campaigns by animal rights advocacy organisations, the EU Parliament voted overwhelming in favour of a blanket ban on commercial seal products. By imposing a market ban for products stemming from commercial seal hunts, EU policy-makers aimed at reducing the number of seals killed leading to increased animal welfare standards.[4] Although animal welfare concerns gave rise to the creation of a seal products trade regulation in the first place, the General Court has ruled in its judgement of 25 April 2013[5] that the basic regulation does not address animal welfare, which the plaintiffs argued would

2 Government of Nunavut, Department of Environment, *Report on the Impacts of the European Union Seal Ban*, (ec) *No 1007/2009, in Nunavut* (2012).

3 Sellheim, Nikolas, "The Neglected Tradition? – The Genesis of the EU Seal Products Ban and Commercial Sealing", in G. Alfredsson, T. Koivurova and A. Stepien (eds.), *The Yearbook of Polar Law* (Vol. 5, 2013), pp. 417–450.

4 See for example European Commission. *SEC* (2008) 2290, *Commission Staff Working Document – Accompanying Document to the Proposal for a Regulation of the European Parliament and of the Council concerning trade in Seal Products; Impact Assessment on the Potential Impact of a Ban of Products derived from Seal Species*, available at <http://ec.europa.eu/environment/biodiversity/animal_welfare/seals/pdf/seals_ia.pdf> (visited 25 February 2013), p. 52, which reads: "Any reduction in number of seals killed would translate into an improvement in animal welfare".

5 Judgement of the General Court (Seventh Chamber), 25 April 2013, in Case T-526/10, available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=136881&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=341915 (visited 3 June 2013).

fall outside the legal competence of the Union therefore rendering the regulation without a legal basis. However, the Court argued that it is the harmonisation of the internal market of the European Union that the basic regulation and its implementation regulation[6] affect, enabling the Union to legislate on a sound legal basis.

This article analyses where the ban comes from and what it is in both a design and normative context. The article, therefore, considers the setting of the process leading to the adoption of the ban. It looks at characteristics of the incentives that gave rise to the adoption of the ban using the institutional diagnostic tool provided by Young.[7] The different stakeholders and the political environment are touched upon briefly, while the basic regulation is then considered in terms of legal mechanisms and other institutions that the regulation affects or is affected by. The article then turns to the ban's location within different discursive and environmental contexts that the crafting process and the ban itself affects. While it is the Canadian commercial seal hunt that is mainly referred to here, the outcomes of this article are expected to also apply to other commercial seal hunting communities and people, such as those in Namibia.

2 The EU's Seal Products Trade Regime

The regime that regulates trade in seal products in the European Union is multifaceted and consists of several Directives and Regulations. The first legislation affecting trade in seal products was Council Directive 83/129/EEC[8] ("Seal Pups Directive"), which placed a ban on the import of products stemming from harp and hooded seal pups into the Community. While initially designed to be valid for two years, in 1985 it was continued until 1989, when it was extended

6 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, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=oj:L:2010:216:0001:01:EN:HTML> (visited 12 January 2013).

7 Young, Oran R. "Building Regimes for Socio-ecological Systems: Institutional Diagnostics", in O. R. Young, L. A. King and H. Schroeder (eds.), *Institutions and Environmental Change – Principle Findings, Applications and Research Frontiers* (2008), pp. 113–144.

8 Council Directive 83/129/EEC of 28 March 1983 concerning the importation into Member States of skins of certain seal pups and products derived therefrom, available at <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31983L0129:EN:HTML> (visited 3 June 2013).

indefinitely.[9] The 1992 Directive on the conservation of natural habitats and of wild fauna and flora[10] lists earless seals (*phocidae*) in its Annex IV requiring Community members to implement strict protective measures, however not outlawing the trade in seal products itself when the conservation status is not threatened.

Regulation 1007/2009 and its implementing regulation Commission Regulation 737/2010 constitute the latest legislative steps that impact the trade in seal products and are the focus of this article. In its Chapeau, the basic regulation lists animal welfare deficits in commercial seal hunts as the primary incentive for the regulation. Moreover, different national provisions within the Community regarding the trade in seal products necessitate a harmonisation of the EU's internal market. Therefore, the placing on the market of products stemming from commercially hunted seals is prohibited with the coming into force of this regulation.

Three derogations allow the importation and placing on the market of the EU: 1. Products stemming from hunts conducted by Inuit or other indigenous communities; 2. When they are in the personal use of travellers or their families; and 3. when they are by-products of hunts conducted for marine management purposes. These products are to be placed on the market on a non-profit basis.

Commission Regulation 737/2010, in Art. 3, limits the applicability of the so-called 'indigenous exemption' to three features. 1. the communities and regions where the hunt is conducted need to have a tradition in seal hunting; 2. Products stemming from these hunts are at least partly used in the community according to the traditions; 3. The seal hunt contributes to the subsistence of the community.

Both the Seal Pups and Habitats Directive foster conservation of seals while recognising seal hunting as a "legitimate occupation".[11] Throughout the process leading to Regulation 1007/2009 conservation issues were by and large excluded, while animal welfare concerns became the linchpin for its adoption.[12] The reconciliation of these purposes is nevertheless absent in the

9 With Directives 85/444/EEC and 89/370/EEC respectively.

10 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild flora and fauna, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=consleg:1992L0043:20070101:EN:PDF> (visited 3 June 2013).

11 Seal Pups Directive, *supra* note 8, Preamble.

12 EFSA (European Food Safety Authority), *Animal Welfare Aspects of the Killing and Skinning of Seals – Scientific Opinion of the Panel on Animal Health and Welfare* (2007), available at <http://www.efsa.europa.eu/en/efsajournal/doc/610.pdf> (visited 2 June 2013), p. 9, 10.

final regime which predominantly deals with internal market and trade elements, giving rise to questions over the intended impact of the ban.

3 A Diagnostic of the EU Seal Products Trade Ban

To better understand the nature of the seal products trade ban, an institutional diagnostic is conducted in which the incentive-giving problems, the involved stakeholders, the political environment and the legislation-shaping processes are analysed.[13] This tool serves the understanding of the institutional response to a certain, in this case managerial, problem. Several documents reflect the political climate in the EU with regard to sealing and serve as indicators for the rationale and incentives behind the imposition of the ban:[14]

1. the 2006 Declaration of the European Parliament on trade in seal products[15]
2. the 2006 Council of Europe Parliamentary Assembly Recommendation on seal hunting[16]
3. the 2007 Report of the European Food Safety Authority (EFSA) on welfare aspect of the killing and skinning of seals[17]

13 This article abstains from a close analysis of the political processes, which can be found elsewhere (see. e.g, Sellheim, *supra* note 3).

14 For the purpose of clear-cut problem identification, the Recitals of the legal texts as well as the introductions of the studies served as the sources for the problems and circumstances justifying the legislative steps.

15 European Parliament, Banning seal products in the European Union – Declaration of the European Parliament on banning seal products in the European Union, p6_ta(2006)0369, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//ep//nonsgml+ta+p6-ta-2006-0369+0+doc+pdf+v0//en> (visited 12 January 2013).

16 Council of Europe Parliamentary Assembly, Recommendation 1776 (2006) – Seal Hunting, available at <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta06/erec1776.htm> (visited 12 January 2013). The Council of Europe itself is a body independent from the European Union and holds a membership of 47 states – including Russia, Switzerland or Azerbaijan – on the European continent. The Council aims to establish a common democratic and legal region for the whole continent (Council of Europe, Our Objectives, available at <http://www.coe.int/aboutCoe/index.asp?page=nosObjectifs&l=en> (visited 16 June 2013).

17 See EFSA, *supra* note 12.

4. the 2008 Assessment of the Consultancy within Engineering, Environmental Science and Economics (COWI) on the potential impact of a ban on trade in seal products[18]
5. the 2008 EU Commission Proposal for a Regulation on trade in seal products[19]
6. the 2009 Regulation on the trade in seal products[20]
7. the 2010 COWI study on implementing measures for trade in seal products[21]
8. the 2010 Regulation implementing Regulation 1007/2009[22]

3.1 *The Incentives for the Creation of a Ban*

The problems identified in these documents are diverse in character. For the sake of argument, this section follows two problems as they are perceived in the EU Parliamentary Declaration, namely the inhumanness of the seal hunt and conservation concerns. First and foremost, the perceived shortcomings in animal welfare in the seal hunt constitute the main problem in the discourse. However, different actors take different stances on the issue. Regarding the Canadian commercial seal hunt – the centre point of this article – veterinary studies that were conducted on site during different hunts yielded contradictory results, also due to the lack of continuance in the observation.[23] Hunting and fur trading organisations, the seal hunters themselves, the Canadian national government as well as provincial governments (e.g. Newfoundland)

18 COWI, *Assessment of the potential Impact of a Ban on Trade in Seal Products* (2008), available at <http://ec.europa.eu/environment/biodiversity/animal_welfare/seals/pdf/seals_report.pdf> (visited 6 May 2013).

19 European Commission, Proposal for a Regulation of the European Parliament and of the Council concerning Trade in Seal Products, 2008/0160 (cod), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=com:2008:0469:fin:EN:PDF> (visited 12 January 2013).

20 Basic Regulation, *supra* note 1.

21 COWI, *Study on Implementing Measures for Trade in Seal Products – Final Report* (2010), available at <http://ec.europa.eu/environment/biodiversity/animal_welfare/seals/pdf/study_implementing_measures.pdf> (visited 4 March 2013).

22 Implementing Regulation, *supra* note 6.

23 Breitmeier et al. claim that "the relationship between science and policy can and often does become politicized in efforts to solve specific environmental problems" (Breitmeier, H., O. R. Young and M. Zürn, *Analyzing International Environmental Regimes – From Case Study to Database* (2006), p. 201). In the seal hunt case, opponents and proponents of the hunt use the contradictory findings for their purposes.

and also veterinarians all highlight the humaneness of the Canadian seal hunt. On the other hand, policy-makers as well as animal rights and welfare organisations highlight the perceived inherent inhumanness of the hunt.[24] Some environmental organisations such as the World Wildlife Fund for Nature (WWF) and the International Union for Conservation of Nature (IUCN) abstain from a clear-cut position.

However, in the context of indigenous peoples' culture and subsistence seal hunting, especially Inuit organisations like the Inuit Circumpolar Council (ICC)[25] and Inuit Tapiriit Kanatami (ITK)[26] – Canada's national Inuit organisation – play a prominent role in safeguarding seal hunting as a traditional livelihood. A highly emotional environment has been created due to these adversarial stances. Many of the actors oppose each other fiercely, such as the Canadian sealers and animal welfare organisations, who do not seek a dialogue to overcome their differences. Apart from the actors who are directly involved in the debate, in court cases or the conduct of seal hunting, other indirect actors including the media in many cases present a rather bad image of the commercial seal hunt.[27] European legal documents also often refer to the public as providing the incentive for invoking a trade ban.[28]

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24 See Sellheim, *supra* note 3.

25 As for example in the stakeholder meeting held in Brussels on 18 November 2009.

26 See case T-18/10 Inuit Tapriit Kanatami and Others v Parliament and Council before the European General Court (available at <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=T-18/10&td=ALL>, visited 3 June 2013).

27 A search in the search engines of the German Sueddeutsche Zeitung (available at <http://www.sueddeutsche.de>, visited 18 January 2013); the English Guardian (available at <http://www.guardian.co.uk>, visited 18 January 2013); and the French Le Monde (available at <http://www.lemonde.fr>, visited 18 January 2013) yielded several articles dealing with the commercial seal hunt. Most of the articles either openly or subtly question the sustainability of the hunt due to the large numbers that are killed – especially in 2008 when the Canadian government raised the total allowable catch (TAC) of harp seals to 280.000. A media analysis concerning the seal hunt goes beyond the scope of this paper, but would provide valuable insights into the discursive processes and presumably biased presentation of the hunt.

28 A public consultation commissioned by the European Commission was carried out online within the framework of the COWI Impact Assessment and was open between 20 December 2007 and 13 February 2008. It yielded 73.153 responses from 160 countries, to a large extent calling for a blanket ban on seal products. However, also COWI writes in its 2008 Impact Assessment that "[t]his consultation does neither claim to provide an overview of the general opinion towards seal hunt of the citizens of Europe, nor a policy recommendation from the general public" (COWI, *supra* note 18, p. 125).

Due to the multitude of actors involved and the inherently adversarial positions toward the conduct of the commercial seal hunt, the discursive and legislative consequences put the sealers, their skills and applied hunting methods to the test. The combination of these factors with ecological integrity have themselves given rise to the latest EU seal products trade regulation. It therefore depends on the vantage point to decide whether a one-off solution is possible or whether it is necessary to develop means to address the problem on a long-term basis. For the Canadian government and the sealers, there is first and foremost no problem regarding the sustainability of the seal population, and the applied hunting methods.[29] Ultimately, the one-off solution would be to lift the ban and re-open the markets for commercially produced seal products.

In contrast, for opponents of the commercial seal hunt who consider it inherently inhumane,[30] the one-off solution would be to not only shut down the markets for seal products, but to halt the hunt entirely. The coordinative effort would be, and is, to gather different powerful entities such as politicians, the media and celebrities, to publicly oppose the seal hunt and turn public opinion against it. Coordinative efforts to monitor and manage the seal populations after a possible abolishment of the seal hunt cannot, at the point of writing, be found in the discourse of organisations opposing the commercial seal hunt.

The EU ban, however, does not exclude this option. A clause was included allowing the non-profit placing on the market of products stemming from marine resource management.[31] While this implies a coordinative measure to manage the marine ecosystem that seals are a part of, it nevertheless stands in contrast to Recital 10 of the basic regulation, which references opposition to the killing of seals *per se*.[32] Yet, the ambit of the EU regulatory powers as well

29 See for example Department of Fisheries and Oceans (DFO), *Canadian Seal Harvest – Myths and Realities* (available at <http://www.dfo-mpo.gc.ca/fm-gp/seal-phoque/mytheng. htm>, visited 18 February 2013), or Canadian Sealers Association (CSA), Seal Management (available at <http://www.sealharvest.ca/site/?page_id=21>, visited 18 February 2013).

30 See for example International Fund for Animal Welfare (IFAW), *In midst of* WTO *challenge, new study says trade ban on seal products is justified* (available at <http://www.ifaw.org/international/news/midst-wto-challenge-new-study-says-trade-ban-seal-productsjustified>, visited 18 December 2012).

31 Basic regulation, supra note 1, Recital 17 and Art. 3.2 (b).

32 *Supra* note 1, Recital 10; Scotland's annual seal cull, which aims at maintaining a balance between the abundant seal populations and fisheries experiences opposition and is located within the context of unsuccessful conservation attempts. (see for example Herald Scotland, *Is Scotland's Seal Cull out of Control?,* available at <http://www.herald

as the design of the ban as a market harmonisation measure do not allow for an influence on the management scheme in the commercial Canadian seal hunt or elsewhere.

Due to the trade implications of the ban as a means to solve the alleged problem of animal welfare concerns,[33] at least one pre-existing organisation, i.e. the World Trade Organization (WTO) is impacted. Due to these implications, Canada, supported by Norway, has initiated dispute settlement procedures.[34] Apart from the WTO, the Comprehensive Economic and Trade Agreement (CETA) currently under negotiation between the EU and Canada may also be affected by resistance of Members of the European Parliament (MEPs) towards the commercial seal hunt.[35] However, in its resolution of 8 June 2011, on EU-Canada trade relations, the EU Parliament in Paragraph 14 does not reject the CETA, yet

> takes note of the recent legal developments regarding the EU's ban on seal products, in particular Canada's request to the WTO for the establishment of a formal dispute resolution panel; expects the Commission to remain firm on the EU's stance regarding the ban on seal products, and expresses its strong hope that Canada will withdraw the WTO challenge, which runs counter to positive trade relations, prior to the need for ratification of the CETA agreement by the European Parliament.[36]

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scotland.com/news/transport-environment/is-scotland-s-seal-cull-out-of-control-isscotland-s-seal-cull-out-of-control-1.1096625>, visited 5 June 2013). The coordinative approach to seal management is reinforced in Recital E and Paragraph 13 of the latest report of the EU Parliament's Committee on Fisheries (European Parliament, Committee on Fisheries, Report on reporting obligations under Regulation (EC) No 2371/2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy (2011/2291(INI), A7-0225/2012 (2012), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//ep//nonsgml+REPORT+A7–2012–0225+0+doc+pdf+v0//en>, visited 3 June 2013).

33 See European Commission, *supra* note 4.

34 World Trade Organization. Dispute Settlement: Dispute DS400 – European Communities – Measures Prohibiting the Importation and Marketing of Seal Products (available at <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds400_e.htm>, visited 25 February 2013).

35 In October 2011, about 100 MEPs signed an open letter calling for a halt of negotiations on the CETA until Canada withdraws it challenge of the ban under the WTO, as it constitutes an "attack on both European and Canadian values and European democratic processes" (Open Letter, available at <http://www.europarl.europa.eu/meetdocs/2009_2014/documents/d-ca/dv/openletter_/openletter_en.pdf>, visited 25 February 2013).

36 European Parliament. European Parliament Resolution of 8 June 2011 on EU-Canada trade relations, P7_ta(2011)0257, available at <http://www.europarl.europa.eu/sides/getDoc.do?type=ta&reference=P7-ta-2011–0257&language=en&ring=B7–2011–0344> (visited 3 October 2013).

The perception of the commercial seal hunt being 'inherently inhumane' implies a systemic flaw in the hunt itself that points to potential shortcomings in management, conduct and monitoring. However, the only possibility of the EU to exert influence is by shutting down its internal market, therefore affecting the trade and normative environment, yet without certainty of changes in the hunting management. Additionally, the potential of declining seal populations due to climate change constitutes the second substantial, parallel systemic problem that calls for protection of seals: the seal hunt opponents consider climate change in combination with the hunt as a problem that may contribute to a sharp decline in seal populations, thus threatening the survival of the species. The IUCN notes that "climate change poses a serious threat to this species and Harp Seals should be reassessed within a decade." However, the species is listed under 'Least Concern' due to its favourable population status.[37]

3.1.1 Problems Identified in the EU Documents

The problems that served to justify a ban are analysed in relation to their nature. This means that apart from animal welfare, environmental, trade, economic and managerial aspects were also considered in the different documents which either support imposing the ban or justify the ban after its imposition.[38] The problems identified dealing with trade numerically trump those referring to animal welfare, thereby creating the impression that trade considerations drive the ban. It can be argued that animal welfare concerns serve as the normative basis here while internal market harmonisation serves as the means to ponder those concerns since the European Union does not have the legal competence to legislate in the field of animal welfare or ethics as such.[39]

37 Kovacs, K. (IUCN SSC Pinniped Specialist Group). "*Pagophilus groenlandicus*". IUCN *Red List of Threatened Species* (Version 2013.1) (2008), available at <http://www.iucnredlist.org/details/41671/0> (visited 3 October 2013).

38 Airoldi identifies merely environmental and animal welfare considerations as the reason for adopting the 2006 Declaration (Airoldi, Adele, *The European Union and the Arctic – Policies and Actions* (2008), p. 89).

39 Commission Proposal, *supra* note 19, p. 3; However, the Protocol on Protection and Welfare of Animals to the Treaty of Amsterdam, amending the Treaty on European Union, the Treaties Establishing the European Communities and other Related Acts reads: "In formulating and implementing the Community's agriculture, transport, internal market and research policies, the Community and the Member States shall pay full regard to the welfare requirements of animals, while respecting the legislative or administrative

Since the Regulation does not reflect animal welfare as a prime objective, the EU General Court has ruled that the ban's purpose is the harmonisation of the internal market and not the improvement of animal welfare conditions in the seal hunt.[40]

Notwithstanding, although the EU is not capable of shaping the management of the Canadian commercial seal hunt, animal welfare concerns are referred to in all analysed documents serving as a ground for imposing a trade ban.[41] The Declaration of the European Parliament on trade in seal products reads in Paragraph D:

> […] [A] team of international veterinarians concluded that 42% of the slaughtered seals they examined may have been skinned whilst still conscious.[42]

The Parliamentary Assembly of the Council of Europe in its Recommendation Paragraph 9 makes reference to documented infringements upon animal welfare in seal hunting and the associated public resentments:

> The Assembly notes that, during the last decade, the cruelty of seal hunting has been documented by videos from several authoritative television channels as well as by the personal observations of many members of national and European parliaments, scientists, celebrities and representatives of non-governmental organisations (NGOs). Such cruelty has generated a public morality debate in Europe.[43]

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provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage" (available at <http://eur-lex.europa.eu/en/treaties/ dat/11997D/htm/11997D.html#0110010013>, visited 25 February 2013). Also the Declaration on the Protection of Animals to the Treaty on European Union which calls on Member States: "when drafting and implementing Community legislation on the common agricultural policy, transport, the internal market and research, to pay full regard to the welfare requirements of animals." (available at <http://eur-lex.europa.eu/en/treaties/dat/11992M/htm/11992M.html#0103000044>, visited 25 February 2013).

40 Judgement General Court, *supra* note 5.

41 Airoldi too, writes that the "perceived cruelty in the way seals were killed and skinned" serves as the main basis for taking legislative steps (Airoldi, Adele, *The European Union and the Arctic – Main Developments July 2008 – July 2010* (2010), p. 35).

42 European Parliament Declaration, *supra* note 15; EFSA concludes that this number is a misinterpretation of findings of a veterinary study whose research results do not reflect this outcome (EFSA, *supra* note 12, p. 46).

43 CoE Recommendation, *supra* note 16.

Similarly, the EFSA study reads:

> In response to recent public concerns relating to animal welfare aspects of the killing of seals, several EU Member States are considering, or are in the process of introducing, national legislative measures banning the use and importation of seal skins and seal products.[44]

The 2008 COWI study states that animal welfare concerns are the main reason for considering different policy measures.[45] The Commission Proposal for a Regulation therefore names animal welfare as a main point of reference in its Recitals:

> (1) Seals are animals that can experience pain, distress, fear and other forms of suffering.
>
> (3) The hunting of seals has led to expressions of serious concerns by members of the public, governments as well as the European Parliament sensitive to animal welfare considerations since there are indications that seals may not be killed and skinned without causing avoidable pain, distress and other forms of suffering […].[46]

The adopted Regulation 1007/2009 names public resentment towards these perceived welfare deficits in its Recital 4:

> The hunting of seals has led to expressions of serious concerns by members of the public and governments sensitive to animal welfare considerations due to the pain, distress, fear and other forms of suffering which the killing and skinning of seals, as they are most frequently performed, cause to those animals.

Environmental concerns, i.e. reference to the nature and status of the hunted seal population, are touched upon in both the EU Parliament Declaration and the Council of Europe Recommendation. While the Declaration in Paragraph A sets the high number of seals that are being hunted in relation to the number hunted in the 1950s and 1960s, which led to a detrimental decline, "two thirds" of the seal population, in Paragraph B the age of seals which are "less than

44 EFSA, *supra* note 12, p. 9.
45 COWI 2008, *supra* note 18, p. 6.
46 Commission Proposal, *supra* note 19.

three months old" when hunted is mentioned in this context.[47] Paragraph 11 of the Council of Europe (CoE) Recommendation refers to the Canadian seal management scheme and its implications for the seal population. A certain degree of mistrust is embedded in the formulation of the reference, entailing the fear of a threat to species conservation. Paragraph 11 therefore reads:

> It [the Assembly] notes that the management objectives for seal hunting announced by the Canadian Government are to ensure species conservation, long-term sustainable exploitation, humane hunting methods and the maximum possible use of the seals killed. However, the Assembly also notes that one of the current Canadian objectives is to reduce the size of the seal population.[48]

Recent estimates show that the population status of the harp seal (*pagophilus groenlandicus*) – the target of the Canadian commercial seal hunt – is stable and even growing, being estimated to be 8.6–9.6 million animals[49] showing a

47 While not explicitly mentioned in the Declaration, it can be assumed that reference is made to the commercial Canadian harp seal hunt, against which the open protest from organisations such as Sea Shepherd or International Fund for Animal Welfare were originally directed (cf. Davis, Brian, *Red Ice – My Fight to save the Seals* (undated); or Watson, Paul, *Seal Wars – My Twenty-five Year Struggle to save the Seals* (2004)). Due to overexploitation since the early 1950s, by 1971 the Northwest Atlantic harp seal population was believed to have declined by 50% from ca. 3 million animals (Barry, Donald, *Icy Battleground – Canada, the International Fund for Animal Welfare, and the Seal Hunt* (2004), p. 16, 34). In 2006, 296.812 seals were landed (species unspecified) with a total allowable catch of 325.000 (Newfoundland and Labrador Fisheries and Aquaculture, *Landings and Landed Value Revised*, available at <http://www.fishaq.gov.nl.ca/stats/landings/landings_2006_revised.pdf>, visited 27 February 2013; Fisheries and Oceans Canada, *Overview of the Atlantic Seal Hunt 2006–2010*, available at <http://www.dfo-mpo.gc.ca/fm-gp/seal-phoque/reports-rapports/mgtplan-plangest0610/mgtplan-plangest0610-eng.htm>, visited 27 February 2013).

48 The report of the Parliamentary Assembly accompanying the draft Recommendation on Seal Hunting lists several environmental and other factors contributing to the depletion of seal stocks in Canadian and Greenlandic waters, such as adverse effects of climate change; 'struck-and-lost' seals or seals killed as by-catch of fisheries (Council of Europe, Parliamentary Assembly, Doc. 11008, *Seal Hunting – Report* (2006), available at <http://assembly.coe.int/asp/Doc/XrefViewpdf.asp?Fileid=11436&Language=en> (visited 4 March 2013), p. 14).

49 National Oceanic and Atmospheric Administration (NOAA). *Stock Assessment Report – Harp Seal – 2012* (2012), available at <http://www.nmfs.noaa.gov/pr/pdfs/sars/ao2012sehpwn. pdf> (visited 3 October 2013), p. 105.

significant increase since 2005, when the IUCN estimated the population to be 5.9 million.[50] Although climate change does pose a threat,[51] the adaptation strategies of the harp seal are rather unknown, although leaving the traditional whelping grounds to move further north is a likely possibility.[52] In order to avoid overhunting and a sustainable seal population, the Department of Fisheries and Oceans (DFO) issues a yearly Total Allowable Catch (TAC), based on scientific data.[53] In 2013, the TAC for harp seal was 400.000, while in total, around 90.000 seals were landed.[54]

Further, Paragraph 10 of the Council of Europe Recommendation touches upon the Canadian management scheme by highlighting the efforts of the Canadian Government to tackle legislative and enforcement deficits in the seal hunting legislation.[55] The Paragraph reads: "the Assembly also notes that Canada currently lacks a general legal framework for the protection of animals."[56] Regulation 1007/2009 takes up the criticism of Canadian

50 See Kovacs, *supra* note 37.

51 *Ibid.*

52 Stenson, Garry B. and Mike Hammill. *Living on the edge: Observations of Northwest Atlantic harp seals in 2010 and 2011* (2011), p. 4, 5.

53 DFO. *Managing Canada's Commercial Seal Harvest* (2012), available at <http://www.dfompo.gc.ca/fm-gp/seal-phoque/facts-faits/facts-faitsd-eng.htm> (visited 3 October 2013).

54 DFO. *Landings and Landed Value by Species*, Preliminary data, Vessel Length Category (Nearshore: Vessels 35–64 ft. 11 in. (10.7–19.8m)) (2013), available at <http://www.nfl.dfo-mpo.gc.ca/publications/reports_rapports/Land_Nearshore_Debarquer_Pres_De_La_Cote_2013_eng.htm> (visited 3 October 2013); DFO. *Landings and Landed Value by Species*, Preliminary data, Vessel Length Category (Inshore: Vessels 0–34 ft. 11 in.(0–10.6m)) (2013), available at <http://www.nfl.dfo-mpo.gc.ca/publications/reports_rapports/Land_Inshore_Debarquer_cotiere_2013_eng.htm> (visited 3 October 2013).

55 Seal hunting in Canada is regulated by the DFO under multiyear management plans. Legally, seal hunting falls under Articles 26.1–34 of the 1993 Marine Mammal Regulations (MMR; available at <http://laws-lois.justice.gc.ca/eng/regulations/sor-93-56/index.html>, visited 28 February 2013). On 12 February 2009, following the recommendations set out in the EFSA 2007 Report, the Canadian Government included the three-step-process, i.e. striking, checking, bleeding, as a legally-binding element into the MMR (DFO, ARCHIVED-Amendments to the Marine Mammal Regulations – Seal Harvest, available at <http://www.dfo-mpo.gc.ca/media/back-fiche/2009/seal_hunt-chasse_au_phoque-eng.htm>, visited 28 February 2013).

56 Animal welfare in Canada is safeguarded under several different elements of Canadian law. First and foremost, the primary responsibility for animal protection lies with the provincial and territorial governments which have enacted multiple laws on animal welfare. On a federal level, the Health of Animal Act 1990, and its Health of Animals Regulations, the Meat Inspection Act 1985, and the Criminal Code of Canada 1985 which outlaws the willful bringing of harm to animals, regulate animal welfare.

enforcement measures in Recital 11 and notes that although the painless killing and skinning of seals is possible, "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."

Managerial deficits that justify a trade ban are also supported by other factors: Firstly the low economic value of seal hunting. The European Parliament Declaration claims in Paragraph C that the revenue stemming from seal hunting amounts only to 5% of the annual income of the hunters and the hunting of seals only provides for a few days of work in a year.[57] Secondly, there is the nature of the distribution of seal products. As the Proposal in Recital 2, as well as the Regulation in Recital 3, clarify, products such as meat, oil, blubber and fur skins are sold in a commercial fashion on different markets, including that of the European Union. Regulation 1007/2009 in the same Recital justifies the imposing of a Community-wide trade ban by stating that "[g]iven the nature of those products, it is difficult or impossible for consumers to distinguish them from similar products not derived from seals." The basic regulation makes further reference to different national provisions concerning the trade in seal products and reads in Recital 7

> [t]he existence of such diverse provisions may further discourage consumers from buying products not made from seals, but which may not be easily distinguishable from similar goods made from seals, or products which may include elements or ingredients obtained from seals without this being clearly recognisable, such as furs, Omega-3 capsules and oils and leather goods.[58]

57 It cannot with full confidence be said where this number stems from. In reference to an untraceable source, the 2008 COWI Report claims that "[s]even coastal communities derived 15–35% of their total earned income from sealing, and about 37 communities report that above 5% of their income originates from sealing in 2006." (COWI 2008, *supra* note 18, p. 24). Official sources from Newfoundland and Labrador state: "[S]ealers have stated that their income from sealing can represent from 25–35 percent of their total income" (Department of Fisheries and Aquaculture, *Key Messages and Facts on Canada's Sealing Industry*, available at <http://www.fishaq.gov.nl.ca/sealing/10key_messages_facts.pdf>, visited 3 March 2013). It must be noted that these numbers are not fixed and vary annually due to the overall fluctuations in the average price for a seal skin and other fluctuations in the annual income, e.g. based on fish prices.

58 Basic Regulation, *supra* note 1.

The functioning of the internal market of the EU is compromised by fragmentation due to national bans on the trade in seal products. The declaration by the European Parliament refers to steps Belgium, Luxembourg and Italy have taken for a ban as well as the considerations within the UK and the Netherlands, while outside the EU the United States, Mexico and Croatia have imposed bans on trade in seal products. The Council of Europe Recommendation also makes reference to these national bans, but adds Austria and Switzerland, which have also "adopted national measures to ban the import and trade of products deriving from seal hunting or have begun the procedure to ban imports of sealskins".[59]

The fragmentation of the internal market, therefore, serves as a technical reason to impose a blanket ban on seal products in the European Union. It is thus that the Explanatory Memorandum (EM) to the Proposal reads: "where there are differences between the laws, regulations or administrative provisions of the Member States which are such as to obstruct the fundamental freedoms and thus have a direct effect on the functioning of the internal market, Community measures are justified in order to prevent such obstacles"[60] The EM continues by noting that growing ethical concerns of members of the European public make it very likely that more Member States will adopt rules and measures that compromise the smooth functioning of the EU internal market. Therefore, a harmonisation measure that takes the welfare of seals into account is justified.[61] In Recital 5 the Proposal reads

> There are therefore differences between Member States' provisions governing the trade, import, production and marketing of seal products. Those differences between national measures affect the operation of the internal market. The measures provided for in this Regulation should therefore harmonise the rules across the Member States as regards commercial activities concerning seal products.

Two elements, i.e. public concerns over applied animal welfare standards in seal hunting and the subsequent fragmentation of the EU's internal market constitute the programmatic basis of a blanket ban, which go beyond the scope aspired to in the Proposal. While the Proposal would allow for derogations

59 CoE Recommendation, *supra* note 16, Para. 6.
60 Commission Proposal, *supra* note 19, p. 3.
61 *Ibid*., p. 4.

when animal welfare standards are met,[62] Regulation 1007/2009 no longer holds such a provision.

Airoldi points out that the more drastic conditions for trade in seal products as manifested in the basic regulation constitute a rather unusual occurrence.[63] Notwithstanding, while animal welfare concerns seem to be the decisive factor in imposing a blanket ban, the COWI study 2010 locates the ban not within the sphere of improving animal welfare in seal hunting, but merely "in order to avoid an increase in dissimilar national legislation of EU Member States."[64]

While not identified as a problem as such, the CoE Recommendation identifies in Paragraph 8 "conflicting values, objectives and attitudes" as a driver for the "first and foremost [. . .] political debate" in the "international controversy surrounding seal hunting." This statement must be considered parallel to a finding of the COWI study 2010, identifying a problem which is not dealt with in the political deliberation surrounding the seal products ban, but which can be considered a core element of the problems of perceiving the seal hunt: "[T]here is need to gain more knowledge of factors relevant for trade in seal products, including knowledge of seal hunting communities, seal products and the necessary measures to apply the conditions of the Regulation."[65] These problems in combination, however, have not been tackled during the crafting process of the legislation.

3.2 Political Elements

A detailed analysis of political processes leading up to the conclusion of the ban goes beyond the scope of this article and can be found elsewhere.[66] Taking political developments and lobbying efforts into consideration, it seems fair to say that in Europe, prior to the adoption of Regulation 1007/2009, there was a clear tilt towards a seemingly pre-determined opposition towards commercial sealing which favoured a ban before an impact assessment or an assessment of the hunt itself was conducted. Three factors underline this hypothesis: firstly, the EU Parliamentary Declaration already calls for a blanket ban, using reference points that are interpreted in a manner indicating opposition towards the commercial seal hunt.[67] Secondly, the number of signatories of the Parliamentary Declaration amounted to 373, more than half of the

62 *Ibid.*, Recital 12.
63 Airoldi 2010, *supra* note 41, p. 35.
64 COWI 2010, *supra* note 21, p. iii.
65 *Ibid.*
66 Sellheim, *supra* note 3.
67 EFSA, *supra* note 12, p. 56.

number of MEPs,[68] while the number of voters in favour of the final Regulation amounted to 550, with 49 voting against the Regulations and 41 abstentions,[69] constituting one of the highest parliamentary votes in favour of a Regulation.[70] Thirdly, the absence of a Green and White Paper that would call for a legislative proposal regarding trade in seal products allows for the conclusion of a pre-determined stance towards sealing and seal products trade. Consequently, dissenting opinions in the form of groups not opposed to sealing and the trade in seal products deriving from commercially hunted seals were weakened in the discursive, deliberative and political setting. Their inclusion occurred only when the political process to ban the trade in seal products was already in motion.[71]

If a Green Paper had been adopted, non-EU stakeholders such as the Canadian Sealers' Association might have found means and ways to become involved in the policy-shaping process. Indeed, an active inclusion of representatives of the sealing industry and seal hunters could have set a precedent for the EU's further involvement in Arctic affairs, as also a 2008 Commission Communication reads: "[M]odern human activities have put certain of these species in danger and there is growing concern in the EU about animal welfare. EU policies should continue to take all factors into account, seeking an open dialogue with the communities concerned."[72] Yet, the Inuit community also state that they "were not in any way properly consulted with by the EU on the development of a seal ban […]."[73] Inadequate consultation, as perceived

68 European Parliament, *MEPs adopt written declaration on banning seal products in the EU,* available at <http://www.europarl.europa.eu/sides/getDoc.do?type=IM-PRESS&reference=20060901BRI10216&secondRef=ITEM-011-en&format=xml&language=en>, visited 6 March 2013.

69 European Parliament, *Legislative Observatory, Statistics 2008/0160 (*COD*) A6-0118/2009*, available at <http://www.europarl.europa.eu/oeil/popups/sda.do?id=16846&l=en>, visited 6 March 2013.

70 Wallis, Diana. Personal communication, 16 May 2012. Telephone.

71 The first stakeholder meeting was held in conjunction with the EFSA assessment on the methods to kill and skin a seal. It was held in Parma, Italy, on October 4, 2007, and was attended by veterinarians; government officials; animal rights and welfare groups; trade organisations; indigenous and hunting organisations; and others.

72 European Commission. *Communication from the Commission to the European Parliament and the Council – The European Union and the arctic region,* COM *(2008)763 final*, available at <http://eeas.europa.eu/arctic_region/docs/com_08_763_en.pdf> (visited 3 October 2013), p. 4.

73 ITK/ICC (Canada) * *Statement from the Inuit of Canada to* EU *Parliament Concerning Proposed* EU*-Wide Seal Ban*, May 4, 2009, available at <https://www.itk.ca/media/statement/

by, for example, the Inuit, therefore delays the establishment of a sustainable dialogue with the Arctic's population. This, in turn, aggravates the EU's political aspirations in the Arctic, e.g. through becoming an observer to the Arctic Council, which has for now been merely on an ad-hoc basis.[74]

Ultimately, this tilt, before, during and after the deliberations on a trade ban, have led to the creation of negotiating blocs whose stances on the issue diverge drastically[75] and appear to be irreconcilable.[76] It remains questionable, based on the three points listed in the previous paragraph, if a negotiation over the intention to impose a trade ban on seal products was aspired to by EU policymakers in the first place, or whether the decision to create a trade barrier was negotiable at all. Since the seal hunt is interpreted differently from a veterinary perspective, political and scientific efforts to obtain consensual knowledge[77] as well as a deliberative setting that is based on the equal footing of all stakeholders concerned may have yielded a less stringent agreement. Contrary to the Proposal for the Regulation, the design of the basic regulation does not allow for a derogation following increased animal welfare standards and therefore reflects the will of strict opponents of the seal hunt, such as Humane Society International (HSI) and the International Fund for Animal Welfare (IFAW).[78] The regime itself shows characteristics that make it appear to have been designed to serve the interests of the side opposing the seal hunt as

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itkicc-canada-statement-inuit-canada-eu-parliament-concerning-proposed-eu-wideseal>, visited 3 June 2013).

74 See for example Arctic Council, Kiruna Declaration, 15 May 2013, available at <http://www.arctic-council.org/index.php/en/document-archive/category/5-declarations?download=1793:kiruna-declaration-signed-2013> (visited 3 October 2013), p. 6.

75 This may be best exemplified by the stakeholder meeting in Parma, which both representatives from Humane Society International (HSI) Rebecca Aldworth, Sherryl Fink of IFAW and Dion Dakins, now fur processing corporation GC Rieber, attended. According to Dakins, after about 1/3 the chair of the meeting ordered them to remain quite for the rest of the meeting due to their non-scientific comments on the issue. (Dakins, Dion, personal communication, 26 September 2012, Email).

76 The ongoing court cases; the absence of communication between animal rights groups and sealing advocates; or the lack of possibility of derogation based on improved animal welfare standards in the Regulation support this hypothesis.

77 Breitmeier et al. write that "member states typically have a limited understanding of the causes and effects of problems, especially when these causes and effects are transboundary in nature" (Breitmeier et al., *supra* note 23, p. 193). This problem is exacerbated by the fact that none of the three studies constituting the scientific basis for the trade ban, i.e. the EFSA study 2007; the COWI study 2008; and the COWI study 2010, was carried out on site, but were all conducted as desktop studies.

78 On the HSI campaign prior to the adoption of the ban, see Sellheim, *supra* note 3.

such. Otherwise, derogation provisions would not have been based on ethno-cultural considerations, i.e. the indigenous exemption, but would have taken animal welfare considerations into account.

3.3 *Actor Composition and Characteristics*

With regard to the actors involved in the deliberative processes, significant differences arise between those opposing and those supporting the seal hunt. Taking into consideration the first stakeholder workshop, the list of participants reflects the number of different actors considered legitimate in the seal hunting debate: 28 different organisations, institutions or advisers were present. At a later meeting on views concerning the implementation of Regulation 1007/2009, held in Brussels on 18 November 2009, 21 different organisations or departments were present.[79] The criteria that the decision-makers used to select stakeholders to be a part of making these decisions cannot be determined.[80] Apart from the number of representatives of an organisation in the stakeholder meeting, no numerical reference to the size of the organisations themselves can be made here. The political exertion of influence based on monetary considerations is also difficult to determine. However, the amount of money donated by animal rights sympathizers far exceeds the money that sealing proponents' organisations have available. This is particularly true in the case of non-governmental organisations (NGOs) with large pools of voluntary workers, supporters and sympathisers.[81]

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79 Seven of these were different DGs of the European Commission; one was COWI; one EFSA; four were the animal rights organisations IFAW, HSI, Brigitte Bardot Foundation and Eurogroup for Animals; two were conservation organisations; three were indigenous organisations; one was the International Fur Trade Federation; one hunters' organisation; and one was the European Consumers Organization. It is noteworthy that no commercial sealers organisation was present (European Commission, *Participant List – Stakeholder Hearing*, 18 November 2009, available at <http://ec.europa.eu/environment/biodiversity/animal_welfare/seals/pdf/participants_list_181109.pdf>, visited 1 June 2013).

80 While Commission Communication on Smart Regulation highlights the need to involve stakeholders already in the early stages of policy-making, it abstains from any guidance on how to identify a legitimate stakeholder (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – *Smart Regulation in the European Union*, /*COM/2010/0543 final*/, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52010dc0543:en:NOT>, visited 4 June 2013).

81 In 2009, member and support contributions from 1.2 million donors for IFAW alone amounted to almost 87 million US dollars plus additional support from "corporate and commercial partnerships." The 2009 net asset of this organisation alone amounted to around 77 million USD (IFAW, *Annual Report 1 July 2008–30 June 2009* (2010), available at

The groups of actors are diverse due to the differences in professions, social standings and nationalities. This applies particularly to organisations such as HSI whose supporter base is comprised of millions of members of the public, celebrities, politicians etc. With such a heterogeneous support base, questions remain regarding who creates information, how it is created and how it is disseminated, particularly regarding the commercial seal hunt, as emotionalisation and anthropomophisation constitute the main elements of the hunt's depiction.

On the other hand, support for the Canadian seal hunt comes from Canadian politicians, the seal hunters themselves, hunters' organisations, indigenous organisations, fur trade organisations and concerned individuals. Certain narratives do exist that serve to legitimize the hunt,[82] but most of these actors have to actively engage in debates and are personally impacted by the anti-sealing discourse,[83] whereas those opposing the hunt are not. Therefore, disregarding membership, composition or size of certain actors and bearing in mind their representation at stakeholder meetings during the crafting period both of the basic regulation and the implementing regulation, seal hunting proponents have a higher degree of heterogeneity than those opposing the hunt.

While the stakeholders within the seal hunting debate can be considered group actors, there is a clear individual dimension visible. On the one hand, the seal ban affects individual hunters and hunting families in Atlantic Canada, as well as individual Inuit in Nunavut who are meant to be exempted.[84] These individuals have to personally cope with the effects of the ban. On the other hand, individual celebrities use their influence to defend or advocate a particular cause like the shut-down of the commercial seal hunt. These individual contributions then strongly impact the direction of the discourse, which in turn motivates a large number of people to take the same positions.[85] PETA,

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<http://www.ifaw.org/sites/default/files/Annual%20Report%202009.pdf>, visited 3 March 2013; p. 21, 22). The Canadian Sealers Association (CSA), while taking 0.25 CAD per pelt has a fixed annual budget of around 125.000 CAD (Frank Pinhorn, personal communication, Email, 19 December 2012).

82 The hunt being humane, sustainable and necessary.

83 See for example the court cases before the EU General Court.

84 See for example Eye on the Arctic's video "Seal Ban: The Inuit Impact", available at <http://eyeonthearctic.rcinet.ca/videos/viewvideo/35/art-and-culture/seal-ban-the-inuitimpact>, visited 2 February 2013).

85 It is not a coincidence that celebrities serve as agents for conveying the anti-sealing cause to a wider public: For example, Paul and Heather McCartney travelled to the Magdalen Islands in order to oppose the seal hunt in 2006 (see for example MSNBC, *McCartneys step into seal hunt controversy* (2006), available at <http://www.msnbc.msn.com/id/11652309/

the organisation of People for the Ethical Treatment of Animals, consequently writes in its Annual Review 2012 that "[o]ne of the most effective ways of doing this [drawing the public's attention to the plight of animals] is to enlist the help of compassionate designers, performers and athletes who command public attention."[86] Consequently, numerous celebrities serve as board members in several animal welfare organisations, for example Leonardo di Caprio for IFAW or Martin Sheen for Sea Shepherd, or as outspoken supporters of these organisations such as Paul McCartney. Celebrities openly supporting the seal hunt are sparse. At the time of writing only one Canadian celebrity, award winning Inuit singer Tanya Tagaq, openly supports the seal hunt taking place on the entire Canadian East Coast.[87] Also Jacques Cousteau states: "The harp seal question is entirely emotional. We have to be logical. We have to aim our activity first to the endagered species. Those who are moved by the plight of the harp seal could also be moved by the plight of the pig – the way they are slaughtered is horrible."[88]

It seems fair to say that both the financial and reputational influence that anti-sealing groups and individuals exert trumps that of pro-sealing advocates. Therefore, the political will to enter into sustainable deliberation with sealing proponents appears to be unlikely if not impossible, given the irreconcilable rhetoric used by both sides.

3.4 *Practices, Processes and Interplay*

Social practices and everyday life shape the social and biophysical setting in which a regime operates and in which it addresses certain problems that arise. These 'metapractices' and the applied practices within a regime itself must show coherence, otherwise a regime may be prone to failure from the outset.[89] Hence, the applied practices in combination with the identified problems within a regime are of crucial importance here.

.unf7Dm_qmSo ns/world_news-world_environment/t/mccartneys-step-seal-hunt-controversy/#>, visited 2 February 2013).

86 PETA, *Annual Review* (2012), available at <http://www.mediapeta.com/petauk/pdf/ukar12sequential.pdf> (visited 2 February 2013), p. 3.

87 See for example "Polaris Prize winner Tanya Tagaq on her controversial acceptance speech", *The Globe and Mail*, 23 September 2014.

88 Paraphrased in Allen, Jeremiah, "Anti Sealing as an Industry", 87 *Journal of Political Economy* (1979) pp. 423–428.

89 It can be claimed that the metapractices, the practices applied within the regime as well as the content of the regime must correspond to the Zeitgeist, otherwise the functioning of the regime cannot be anticipated.

Since the crafting of the seal products ban and the final decision over the constitutive agreement was an EU internal process, outside actors were not included in the decision-making process. It was merely the MEPs that cast their votes either in favour or against the amended proposal. Also, the decision as such to adopt a blanket ban or other means to limit the trade in seal products stemming from hunts with alleged animal welfare deficits was not made by any actor other than the MEPs and the Council. However, lobbying efforts did contribute to a certain direction in which the MEPs decided.[90] Only in retrospect, after the ban had already been adopted, other actors set processes in motion to overthrow the ban and to change the nature of the ban itself, e.g. through the European General Court or the WTO.

Although MEPs were to a large extent in favour of a trade barrier, the parliamentary debate of 4 May 2009, after which the ban was adopted, also revealed some dissenting views amongst the parliamentarians.[91] But as the final vote shows this did not prevent a blanket ban on the trade in seal products being adopted. Since the ban is a blanket ban on all trade in *commercial* seal products, one could argue that common but differentiated responsibilities (CDR) are, at least in theory, partially recognised,[92] as it is aimed at excluding Inuit and other indigenous communities from this ban. The principle is intended to exempt those that have not contributed to a given negative situation or development from potential limiting policy decisions. In the context of seal products trade, however, the Inuit claim that they are adversely affected by the ban, regardless of their exemption.[93] Ultimately, although in theory recognised, the CDR principle does not apply.

A framework that would allow certain derogations based on applied practices and socio-economic impacts might decrease the impacts on those that are intended to be excluded. Yet, the basic regulation has not been set out as a framework regulation as it does not allow for derogations when certain animal welfare criteria are met. It is, therefore, unlikely that over time it will allow

90 Sellheim, *supra* note 3.

91 EU Parliament, *Debates, Monday, 4 May 2009*, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//ep//TEXT+cre+20090504+ITEM-021+doc+xml+v0//en> (visited 2 February 2013).

92 The CDR principle is "usually but not inevitably divided along a Rich-Poor axis. CDR is being pressed most vigorously in regard to the repair of the global environment. But the same issues arise in all areas that may benefit from collective action, ranging from peace and control of terrorism to regulation of epidemics and trade" (Stone, Christopher, "Common but Differentiated Responsibilities in International Law", In 98 *American Journal of International Law* (2004), pp. 276–301).

93 See Government of Nunavut, *supra* note 2.

for substantive amendments or protocols or a further development of the seal products trade regime away from its blanket ban character.

As such, Regulation 1007/2009 is not a stand-alone governance system. It is embedded into the EU's legal structure and thus bound to and shaped by the EU's laws, directive and regulations. Moreover, the EU is party to the WTO and therefore bound by WTO provisions, making it subject to WTO procedures as the WTO Dispute Settlement Procedure shows. While proponents claim the impetus for instituting the seal ban was animal welfare, the emotionally-charged debate and the opposition to the killing of seals as such[94] aligns the ban with the mere emotional basis of the EU Parliament's regulation banning the trade in cat and dog fur.[95] In Recital 1 of this regulation, the incentive is framed by highlighting the non-acceptance of utilization of cat and dog fur because they are pet animals. Ultimately, it is the killing of cats and dogs for commercial purposes that is condemned, irrespective of applied animal welfare standards. Further, in conservation contexts, the seal products trade ban cannot be seen in isolation, as conservation-based trade limitations or barriers are imposed under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES Convention).[96]

The basic regulation also constitutes a rather unique legislative act as it uses animal welfare incentives, combined with internal market considerations, to implement a seemingly emotional stance towards seals. While the alleged 'cruelty' of the seal hunt, e.g. due to the clubbing of 'baby' seals, was also debated in the EU Parliament, a double standard emerges. Annex I to Regulation 1099/2009 on the protection of animals at the time of killing,[97] which was adopted on 24 September 2009, legalizes killing methods for animals other than seals that are considered cruel for the killing of seals, but not for other

94 Basic regulation, *supra* note 1, Recital 10.

95 Regulation (EC) No. 1523/2007 of the European Parliament and of the Council of December 2007, banning the placing on the market and the import to, or export from, the Community of cat and dog fur, and products containing such fur, available at <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=oj:L:2007:343:0001:0004:EN:PDF>, visited 5 June 2013.

96 On a discussion on conservation-based trade bans see Cooney, Rosie and Paul Jepson, "The International Wild Bird Trade: What's wrong with Blanket Bans?", in 40 *Oryx* (No. 1, 2006).

97 Council Regulation (ec) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing, available at <http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=32009R1099> (visited 2 February 2013).

species.[98] Therefore, it can be argued that it is the seals themselves and the emotional response to seals that actually serves as the reason for the imposition of a trade ban rather than the methods of killing them. Otherwise, focus should have been on the killing methods themselves and not on the species to which they are applied.

4 The Problem of Fit

Ingold writes that in principle there are two modes of animal utilization and exploitation: firstly, the domesticated style of exploitation, in which animals are allowed to be killed industrially; secondly, the non-domesticated style of exploitation, i.e. hunting, in which animals are fugitive animals and the activity consists of pursuit and capture.[99] The commercial hunt of harp seals in Atlantic Canada is a hunt that combines these characteristics, creating significant differences to other means of animal utilization. The first distinctive element of the hunt is that, while taking place in the seals' natural environment, it involves the hunt of a vast number of seals[100] whose products are being used commercially.[101] This element differentiates it from other hunts. The second element is a characteristic of the seals themselves. The contemporary commercial seal hunt targets seals in the stage of the 'beater', which they reach after 3–4 weeks after birth. At that stage the seals have moulted their white fur and turned silvery. They are now independent from their mothers and have left the ice to hunt in the water.[102] However, the beaters rest on the ice and are not familiar with disturbance. Therefore, they do not flee when the sealing vessel approaches them. Fugitive instincts also do not arise when shots are fired.

The combination of the number and the lack of fugitive behaviour therefore raise the notion of 'harvest,'[103] ultimately 'industrializing' the hunt in a freely accessible area to the press or other groups covering the seal hunt. In this

98 See for example *ibid*. Art. 4 and Annex 1, Table 1.6, which allows for clubbing of piglets and lambs.

99 See also Ingold, Tim, *The Perception of the Environment – Essays on Livelihood, Dwellingand Skill* (2000), p. 62.

100 In the sealing season 2013, around 90.000 seals were landed (see *supra* note 54).

101 It must be noted that flippers, carcasses and hearts are also given to the communities for free consumption.

102 Caldow, James E., *Of Men and Seals – A History of the Newfoundland Seal Hunt* (1989), p. 14.

103 For example, the Canadian Sealers Association's (CSA) website can be reached under <www.sealharvest.ca> (visited June 3, 2013); Also the Department of Fisheries and Oceans

context, shortcomings in animal welfare standards have been documented. This documentation, combined with the emotional response provoked by attributing childlike characteristics and anthropomorphism onto hunted seals, further supported by evocative symbolism like red blood on white ice, and conservation concerns have led to a strong lobby that aims to shut down the seal hunt.

4.1 *Recognising the Seal Hunt*

In the crafting process of the EU seal ban, the above aspects coalesce, providing a quasi-legitimization of the ban. As set out in the COWI Assessment 2008,[104] an EU ban affects the number of seals that are killed and therefore animal welfare standards in the hunt itself. Thus, when reducing the number of seals that are killed, animal welfare is expected to rise, while the negative connotation of killing large numbers of a charismatic megafauna is also removed. While in the basic regulation no reference is made to the number of seals that are killed, the notion of seal hunting being a "natural and legitimate occupation and [which] in certain areas of the world forms an important part of the traditional way of life and economy"[105] is absent. Given the exemption for Inuit and other indigenous communities, a legitimate seal hunt indicates a small scale hunt, implying that the conservation status is not put in jeopardy, irrespective of any animal welfare aspects. The EU seal products ban therefore combines three normative approaches towards the hunting and killing of seals that are also prevalent in the whaling context: a preservationist approach, which de-legitimizes the killing and utilization of seals;[106] a conservationist approach, which aims at safeguarding the population status; and a subsistence approach, which legitimizes the hunt for subsistence purposes.[107]

Interestingly, the basic regulation legitimizes the killing of seals in a marine management context. In combination with the Habitats Directive, the killing of seals for the virtue of protecting fish stocks is accepted, while references to animal welfare are largely absent.[108] In Newfoundland, a common narrative among fishermen is that seals and fishermen compete over the same resource –

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makes reference to the 'harvest' on its websites: <http://www.dfo-mpo.gc.ca/fm-gp/sealphoque/index-eng.htm> (visited 3 June 2013).

104 COWI 2008, *supra* note 18, p. 1.

105 Seal Pups Directive, *supra* note 8, Preamble.

106 Basic Regulation, *supra* note 1, Recital 10.

107 Stoett, Peter J., *The International Politics of Whaling* (1997), p. 105.

108 Also Sweden and Finland have their own management plans for seals in the Baltic Sea. Scotland also maintains an annual quota for seals for management purposes.

fish. Since the population of harp seals has increased dramatically since the 1970s, DFO scientists claim that the seal population will reach its ecological carrying capacity, i.e. the maximum number of seals that an ecosystem can carry, soon.[109] However, when taking the public discourse into account, the Canadian seal hunt is never located within marine management initiatives. Arguments brought forth in sealers' representations about the overabundance of seals are often dismissed as non-factual.[110] With regard to the seal ban and its crafting process, the issue of marine management in Canada has been, to a large extent, disregarded as the hunt has been primarily associated with notions of 'cruelty' and 'conservation.'[111]

4.2 *Selective Ecosystem Services*

Young[112] states that "because practices are socially constructed, they are subject to change over time. [. . .] It does little good to advocate the creation of regimes that cannot work in the relevant setting." Bearing in mind the court cases before the EU General Court that were launched by Inuit and others, the question quickly emerges how well the blanket seal products ban matches the dynamics and nature of regional and local circumstances of seal hunting communities – both indigenous and non-indigenous. From a strict legal perspective, as re-affirmed by the EU General Court's latest judgement in response to the plaintiffs' claim of the ban's wrong legal basis, the primary goal of the basic regulation is the harmonisation of the EU's internal market. Therefore, there is a clear mismatch between the identified primary narrative – animal welfare shortcomings in the commercial seal hunt – and the goal of harmonising the internal market. Although this is the only way for the EU to influence hunting practices, it is questionable in how far these respond.

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109 DFO, Seals and Science at Fisheries and Oceans Canada, available at http://www.dfompo.gc.ca/fm-gp/seal-phoque/reports-rapports/facts-faits/facts-faits2012a-eng.htm (visited 28 May 2013); There is even evidence that suggests that the carrying capacity has already been reached and therefore causes a decline in the reproduction rate of females. Based on the reproduction rate, catches in other jurisdictions such as Greenland, struck-and-lost animals, as well as pup mortality related to ice conditions the DFO issues annual Total Allowable Catches for seals in order to avoid overhunting (Hammill, Mark, personal communication, 1 October 2012, Email).

110 See for example IFAW, Canadian Fisheries Data Directly Refutes Seal Cull Myth, available at <http://www.ifaw.org/united-states/node/347> (visited 3 June 2013).

111 See for example the debate in the EU Parliament prior to the final vote on the ban (European Parliament, supra note 91).

112 Young, *supra* note 7, p. 131.

Notwithstanding, this harmonisation measure holds a notion of 'right to life' for seals, as embedded in Recital 10 of the basic regulation, which isolates the seal from the socio-ecological system and merely ascribes the seal species services relevant for indigenous populations. It therefore does not consider non-indigenous people, who also benefit from the abundance of seals in their natural habitat, and ultimately outlaws a segment of maritime ecosystem services.[113] In addition, Galaz et al. write that "the vast importance of ecological feedbacks for societal development show that social and ecological systems are not merely linked but rather interconnected".[114] The inherent neglect of this relationship in the seal products ban and the absence of a mechanism in the ban itself that enables a response to changing socio-ecological conditions removes the seal ban from environmental discourses and identifies it as a mere technical legislation. Bearing in mind the political and discursive environment of the crafting process, this gives rise to the notion of 'selective ecosystem services'. Here, certain species within an ecosystem are recognised as legitimate service providers while others are not. Even within marine management initiatives, i.e. the culling of a larger number of seals to prevent a shift in an ecosystem, according to the regulation, no economic benefit stemming from those hunts is permitted in EU markets.

This selective approach distances the resource users from the abundant resource – both practically, as well as discursively. It has contributed to an environment which does not generate knowledge on resource users and the resource – here the sealers and the seals as part of the marine ecosystem.[115]

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113 The Millenium Ecosystem Assessment defines Ecosystem Services as "the benefits people obtain from ecosystems. These include provisioning services such as food, water, timber, and fiber; regulating services that affect climate, floods, disease, wastes, and water quality; cultural services that provide recreational, aesthetic, and spiritual benefits; and supporting services such as soil formation, photosynthesis, and nutrient cycling" (Millennium Ecosystem Assessment, *Ecosystems and Human Well-being: Synthesis* (2005), v).

114 Original emphasis; Galaz, Victor, Per Olsson, Thomas Hahn, Carl Folke and Uno Svedin, "The Problem of Fit among biophysical Systems, Environmental and Resource Regimes, and Broader Governance Systems: Insights and Emerging Challenges", in Young, O. R., L. A. King and H. Schroeder (eds.), *Institutions and Environmental Change – Principal Findings, Applications, and Research Frontiers* (2008), pp. 147–186, at 148.

115 On a normative discussion on the issue, see Folke, C., L. Pritchard, F. Berkes, J. Colding, and U. Svedin, "The problem of fit between ecosystems and institutions: ten years later", 12 *Ecology and Society* (2007), p. 30 (available at <http://www.ecologyandsociety.org/vol12/iss1/art30/>, visited 28 May 2013).

4.3 *System Shifts*

The problem of fit becomes very apparent when looking at the fit or misfit reference scales for environmental regimes as developed by Galaz et al.[116] Due to the absence of animal welfare elements and due to the fact that it does not directly manage commercial seal hunts, the ban is not an environmental regime. However, its threshold behaviour and effectual characteristics, due to its significant impacts on socio-ecological systems, must be considered. The threshold behaviour of an environmental regime is evaluated along the axis of recognising, leading to or being unable to avoid abrupt shifts in a biophysical system. The seal ban in part considers shifts in a biophysical system by recognising marine management as a legitimate context within which the killing of seals is justified. Yet, expanding the 'biophysical' to a socio-ecological system and applying it in northern Newfoundland, the ban falls short of a recognition of the marine ecosystem services to the local communities. Moreover, it does not allow for monetary compensation stemming from marine management initiatives in case the biophysical system experiences a shift, e.g. due to an increase in the population of seals.

Taking the notion of 'shift' a little further, killing methods applied in the seal hunt, the initial incentive for the adoption of a trade ban, must be considered. While in the proposal to the regulation, placing on the market was allowed if certain animal welfare standards were met, this provision has vanished from the final regulation. Therefore, the ban's adaptability to changing hunting methods and practices, as well as the potential fostering of best practices, is absent. It therefore seems fair to say that irrespective of the animal welfare standards in seal hunting – even into the future, where new technological developments may yet change the way seals are hunted – the Regulation puts a blanket ban on placing seal products from commercial hunts on the EU market. The criteria upon which the Regulation is based, therefore, constitute merely a snapshot of the seal hunt, especially as it was carried out in the past. No progressive elements have been included that would allow for the continuation of the hunt or that take into consideration potential developments of time and space, nor is there a recognition of the socio-ecological systems that prevail in regions such as Newfoundland. A clear mismatch exists between the scale and scope of socio-ecological processes and the institutions that manage them.[117] Ultimately, the seal products trade ban does not hold any potential

116 Galaz et al., *supra* note 114, pp. 150–153.

117 Although, of course, the ban does not manage the processes themselves, it nevertheless manages trade in the yield of the hunt which in turn influences these processes (See also Folke et al., *supra* note 115, p. 15).

for institutional learning, and its biased approach towards commercial sealing contradicts the concept of a 'knowledge society', which has increasingly found its way into political discourses in the EU.

4.4 *Cascading Effects*

Another concern within the context of environmental regime fit or misfit is the potential for cascading effects, meaning that the "[i]nstitution is unable to buffer, or trigger further effects between or among biophysical and/or social and economic systems."[118] Bearing the discursive environment of sealing in mind, a cascading effect may not as such occur, but the seal products ban may have effects on the normative landscape of the seal hunt in general. While it seems fair to say that the EU ban has not generated the current discourse on seal hunting, it nevertheless must be referred to regarding the imposition of a ban on the import and trade in seal products stemming from harp and hooded seals into the Customs Union of Russia, Kazakhstan and Belarus which came into force on 16 August 2012.[119] The EU ban may have fostered this ban. Just like the EU Regulation on trade in seal products, the import and trade ban of the Russian, Kazakh and Belarusian Customs Union holds two exemptions, namely the possibility of importation of products stemming from hunts traditionally conducted by Arctic and sub-Arctic indigenous communities[120] and products for personal use on a non-profit basis.[121] Moreover, with the adoption of the EU's and subsequently the Russian ban, a Google search reveals that reference is often made to a proclaimed 'victory' for the seals. The EU ban may have contributed to a stronger opposition between sealing proponents and opponents and contributed to the notion of the 'sacredness' of the seal,

118 Galaz, *supra* note 114, p. 153.

119 Евразийскаяэкономическаякомиссия (ЕЭК) (Eurasian Economic Commission), *Единый перечень товаров, к которым применяются запреты или ограничения на ввоз или вывоз государствами – членами Таможенного союза в рамках Евразийского экономического сообщества в торговле с третьими странами*, (*List of goods subject to bans or restrictions for Member States of the Customs Union of the Eurasian Economic Community on trade with third countries*) available at http://www.tsouz.ru/eek/RSEEK/RKEEK/zas22/Documents/P1_134.pdf (visited 9 March 2013), Art. 1.8.

120 The Customs Union ban recognizes therefore "Yupik, Inupiat (Alaska), Inuit, Inuvialuit (Canada) and Kalaallit (Greenland)" ("юпик, инупиат (Аляска), инуит, инувиалуит (Канада), калааллит (Гренландия") (ibid.). See also Basic Regulation, *supra* note 1, Art. 2.4.

121 "товарввозитсяфизическимилицамидляличногопользования (внекоммерческихце лях)" ("goods imported by individuals for personal use") (supra note 119). See also Basic Regulation, *supra* note 1, Art. 3.2 (a).

and the ethical costs associated with killing seals for human benefit.[122] For aboriginal and non-aboriginal sealers, seal product processers, and their political representatives, the potential for the ban's cascading effect is omnipresent. On 8 January 2013, Taiwan adopted a ban similar to the US Marine Mammal Protection Act (MMPA) of 1972, prohibiting the trade in marine mammal products with an aboriginal exemption. It is now feared by many that other wildlife trade will also be affected. For instance, the United States attempted to put a ban on the trade in polar bear products under CITES,[123] which does not ban, but merely regulates the trade. This attempt failed, yet it symbolizes that livelihoods, especially Inuit livelihoods, are increasingly threatened due to either conservation concerns or increasingly hostile discourses.

4.5 *Ethics and Needs*

Under the EU, US, and Russian bans, indigenous hunts are ethically acceptable and are therefore exempt from any prohibitions. While exempting Inuit from trade prohibitions corresponds to international standards on the rights of indigenous peoples, what other claims exist for not exempting non-indigenous coastal communities? The main argument is that the seal hunt is not economically viable and that the hunters can find other employment. Furthermore, the hunt does not hold any cultural value, but is merely an economic activity that produces luxury products. In other words, non-indigenous communities are perceived as having no 'need' to conduct seal hunting, and if they do hunt seals, they are participating in an unethical activity. *Argumentum e contrario*, Inuit and other indigenous communities are in need of the seal hunt, irrespective of the implications for animal welfare,[124] while non-indigenous sealing communities have access to other means of employment and food. This perception is highly problematic as it places indigenous sealing communities within a stereotypical and even racist discourse of the underdeveloped 'noble savage', both ethically and culturally, whereas non-indigenous sealing communities are further developed, no longer in need of the ethically despicable

122 The same applies to the killing of whales (see Friedheim, Robert L. "Introduction: The IWC as a Contested Regime", in Robert L. Friedheim (ed.), *Toward a Sustainable Whaling Regime* (2001), pp. 3–48, at 14).

123 In order to ban the trade in products of flora and fauna under cites, it needs to be listed under Appendix i to the Convention. Currently, polar bears are listed under Appendix ii, regulating the trade (CITES, u.s. Marine Mammal Advisory Body's Recommentation to transfer the Polar Bear (*Ursus Maritimus*) to Appendix i, available at http://www.cites.org/common/cop/16/inf/E-CoP16i-06.pdf (visited 3 June 2013)).

124 The use of harpoons was not included in the EFSA study as no "independent observer reports" were available to the study authors (EFSA, *supra* note 12, p. 50).

activity.[125] Indigenous communities, then, are portrayed in such a way that western conceptions of ethics and morality as embedded in the legislative acts do not apply to them.[126]

The discussion surrounding a perceived legitimate or illegitimate seal hunt is now framed by the principle of 'need.' The normative implications of 'need' are, however, problematic. The definition of sustainable development as brought forth by the World Commission on Environment and Development (WCED)[127] therefore creates several problems for determining who defines what the principle of 'need' entails for which group of people. Also, the Rio Declaration,[128] which in Principles 3, 5 and 6 makes reference to 'needs', abstains from a more detailed framing. Beauchamp and Childress[129] take up this problem and narrow the principle down to 'fundamental needs', without which an individual is fundamentally adversely affected. This, however, does not solve the problem of defining these needs. Self-determination, i.e. in this context meaning the right and ability to define one's own needs, is crucial. In the discussions surrounding seal hunting, the discourse on 'need' ultimately neglects any significance of the hunt for commercial sealers – both economically and culturally. They are denied the right to discursively frame their perceptions of the 'need' to hunt seals. The sealers themselves locate the commercial seal hunt in the framework of a life with the sea in which seals play a role amongst other marine species without which a significant source of identity and income is lost.[130]

125 This claim is backed up by Brian Roberts, former policy advisor to the Canadian Department of Aboriginal Affairs and Northern Development, who writes on the indigenous exemption in the EU seal products ban: "The rationalization for an Aboriginal exemption from an 'immoral' activity (ie. profiting from the killing of seals) is regarded by Canadian Inuit as ethnocentric, patronizing and insulting." (Roberts, Brian. Personal Communication. 6 November 2012. Email).

126 The same applies to the discourse on whaling. See Epstein, Charlotte, *The Power of Word in International Relations – Birth of an Anti-Whaling Discourse* (2008), pp. 177–182. See also Sellheim, *supra* note 3.

127 Development that "meets the needs of the present without compromising the ability of future generations to meet their own needs" (World Commission on Environment and Development, *Our Common Future* (1987), p. 8).

128 Rio Declaration on Environment and Development, 1992, available at <http://www.unep.org/documents.multilingual/default.asp?documentid=78&articleid=1163> (visited 20 March 2013).

129 Beauchamp, Tom L. and James F. Childress, *Biomedical Ethics* (Fifth Edition, 2001), p. 228.

130 Interviews conducted with Newfoundland and Magdalen Islands commercial sealers, 23 June 2012; Fieldnotes, April and May 2013.

5 Conclusion

The perspectives that provided the incentive to craft a regulation that limits the placing on the market of seal products to those stemming from indigenous hunts do not correspond to the final outcome of the regulation. Animal welfare is not an issue which is tackled in the regulation and ultimately it fails to alleviate potential animal welfare shortcomings in the commercial seal hunts. It does, however, harmonise the EU's internal market, since it appeared very likely that states would develop national bans, ultimately calling for action at the community level. The politicization of the seal hunt hints at a pre-determined stance on the outcomes of the studies upon which the regulation is built. Therefore, the lack of comprehensive and empirical knowledge on seal hunting communities, a non-representative public consultation, and the absence of provisions that foster best practices in the seal hunt give rise to the impression that the meta-goal of the regulation is to shut down the commercial seal hunt and not to improve animal welfare. It thus remains in the realm of speculation what the best possible outcome of the ban was for policy makers when they negotiated the regulation.

Stakeholders were included in the policy-making process. However, especially Inuit participation was marginal and the influence of those affected most by a ban did not significantly influence the final regulation. Moreover, commercial sealing representatives were not consulted at all. This is in contradiction to the aspirations of the EU in the Arctic, which aims to promote fruitful dialogues with the Arctic's population. In this case, indigenous and non-indigenous sealers did not feel adequately consulted. On the other hand, the influence of sealing opponents was strong and the wording of the regulation and preceding documents reflect their influential role.

Although the ban is not an environmental act, it must nevertheless be considered as such due to its repercussions on the socio-ecological systems and the reputational influence it has had both on the seal hunt and potentially hunts of other wildlife species. With the adoption of the regulation, the EU shows that it has not developed an adaptive legislative act that takes socio-ecological systems into account and that also provides for institutional learning aligning "with the dynamics of biophysical systems."[131] The way the regulation was crafted and the outcome in the form of the basic regulation do therefore influence the legal and normative environment relevant for the hunting of seals and generate a frozen sphere of legal stigmatisation. It must be noted that the ban furthermore contradicts the, albeit adopted only in 2011, EU Parliament

131 Galaz, *supra* note 114, p. 148.

Sustainable High North Policy, which aims to interact and establish dialogue with local communities and to gain more knowledge of living conditions in the North in order to improve living conditions.[132]

Both the shaping of the legislation and the final regulation show that animal welfare concerns have been replaced by internal market harmonisation. Since a re-opening of the EU market for products from commercially hunted seals is unlikely – irrespective of the applied animal welfare standards – the incentive to further the work on animal welfare in the seal hunts on a national or local level are removed since possible new markets, for instance in Asia, may not have animal welfare requirements. With a decline of the markets for seal products in the EU the number of seals that are killed has declined. Whether animal welfare or the actual socio-ecological systems in which seals, other marine species and humans live will benefit from this decline, remains questionable.

132 European Parliament Resolution of 20 January 2011 on a sustainable EU policy for the High North (2009/2214(ini)), P7_ta(2011)0024, available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2011–0024+0+DOC+PDF+V0//EN (visited 4 June 2013), Paragraph 7.

3. The goals of the EU seal products trade regulation – From effectiveness to consequence

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The goals of the EU seal products trade regulation: from effectiveness to consequence

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ABSTRACT. When policies are adopted, it seems reasonable to assume that they address a certain issue and provide means to mitigate specific problems. This seems the case with the EU's regime on trade in seal products, but it becomes evident that the goal formulation in this case is blurry and unclear. Taking animal welfare, the so-called 'Inuit exemption', and internal market harmonisation into account, this article examines the goals of the seal products trade regime and how they are applied. It becomes clear that the attainment of goals bears consequences that are unprecedented due to conceptual and formulation difficulties. Given the indistinct goal formulation during the policy-shaping process and the goal formulation in the policy itself, it seems fair to say that the regime does not aim to improve animal welfare standards in the commercial seal hunt, but rather aims to shut down the commercial hunt completely. This, however, affects Inuit and non-Inuit seal hunters equally and is inconsistent with secondary goals that are formulated in the EU's documents relating to the Arctic. Therefore, the seal products trade regime has consequences that challenge the EU's ambitions in the north.

Introduction

Many wars have clear victors and losers. The outcomes were often based on the size of the armies and their weaponry. This certainly oversimplified depiction of war has changed in recent decades to new types of hostility that have left countries in chaos and turmoil. The debate surrounding commercial sealing has in figurative speech taken on the characteristics of 'war', with discussions of 'winners' and 'losers' engaged in battle (Busch 1985; Henke 1985; Watson 2004; Kretzer 2013; COWI 2008: 101). The adoption of the European Union (EU) regulation 1007/2009 on trade in seal products (basic regulation; EP 2009a), which bans products stemming from commercially hunted seals from the European market, constitutes an important weapon in this 'war' to end the commercial seal hunt. But the implications of this align with the depiction of this new type of war with no victors or losers. Instead, the regulation has left a battlefield in which fighting has not ceased and in which victors and losers alike bear consequences that must be faced.

But is this the ultimate purpose of the regulation? What goal was the ban intended to attain? One direct result of the regulation is several court cases before the General Court of the European Union (EUGC) to overturn it. In its most recent judgement and based on the basic regulation, the court frames the primary and secondary goals of the regulation as internal market harmonisation as its prime objective, and external trade as its secondary objective (EUGC 2013a: paragraphs 35, 71). Yet, the arguments supporting the ban were mainly about animal welfare concerns in the commercial seal hunt and it was these concerns, not those of the market that shaped the process that led to the final regulation.

This article attempts to determine what the formulated and unformulated goals of the regulatory scheme for trade in seal products in the EU are. It comprehensively approaches the ban by not merely focusing on the basic regulation, but rather by taking the policy-making process and political environment into consideration when determining the ban's goals, objectives and consequences. For example, the deferring of the decision regarding the application of the EU as observer in the Arctic Council (AC 2013) is likely to be connected to the EU seal products ban and the resistance it triggered amongst the Inuit. The ban is then located within a context of the EU's aspirations in the Arctic while it is further embedded in the goals that are set forth in several documents that frame the EU's role and objectives in the north.

Seals, the EU and trade

The overhunting of seals in the 1950s and 60s led the European Community to adopt a ban on the importation of products stemming from harp and hooded seal pups ('Seal Pups Directive') in 1983, which is still in force today. In it, conservation concerns over the declining seal populations in the northwest Atlantic gave the incentive for imposing a ban. Bearing in mind these concerns, the preamble of the directive reads that 'the exploitation of seals and of other species, depending upon their capacity to withstand such exploitation and with due respect for the balance of nature, is a natural and legitimate occupation and in certain areas of the world forms an important part of the traditional way of life and economy' (ECoun 1983). Conservation concerns for earless seals (*phocidae*) within European waters were the reason for listing them in Annex IV of the Habitats Directive (ECoun 1992), which constitutes the European implementation measure required under the Convention on Biological Diversity, 1992. Under Annex IV of the Habitats Directive, member states of the European Communities are required strictly to implement protective measures for those species listed.

The Canadian commercial seal hunt aims at the harp seal (*Pagophilus groenlandicus*) of the northwest Atlantic population. This population is estimated to range between 8.6–9.6 million animals (United States 2012), showing a significant increase since 2005 when its population was estimated to be around 5.9 million animals (Kovacs 2008). Each year, the Canadian Department of Fisheries and Oceans (DFO) issues a science-based total allowable catch (TAC) in order to avoid overhunting. In 2013 the TAC was 400,000 while merely 90,000 seals were actually hunted.

In both the Seal Pups Directive and the Habitats Directive, no references are made regarding animal welfare. Under the Annex, the exploitation of those species listed is merely linked to the maintenance or establishment of a favourable conservation status.

Animal welfare in relation to the seal hunt found its first political manifestation in the EU in the European Parliament (EP) declaration on banning the trade in seal products (EP 2006). This declaration, which links conservation issues and animal welfare to the seal hunt, triggered the policy-crafting process that led to the adoption of Regulation 1007/2009 on 5 May 2009, and its implementation regulation in 2010 (EC 2010a). Throughout the different documents produced in the process, conservation concerns were largely absent (see Sellheim 2013a).

The goals of the EU seal products trade regulation

The linking of animal welfare and commercial seal hunting and the statements of policy makers regarding animal welfare deficits as the incentive to impose the ban may lead to a conclusion that the overall goal of the ban is the improvement of animal welfare in the seal hunt. This, however, appears premature as the goal setting within the ban is complex and yields several results. This is especially the case in the context of the EU as an Arctic actor. Breitmeier writes that '[g]lobal governance systems will be pointless or undesirable and will not deserve obedience if they will not contribute to problem-solving' and it must be determined which problems, as identified by Sellheim (forthcoming), are to be solved with which means in the context of the EU seal products trade regulation. Although the EU seal products trade regime is not a global governance system as such, it is nevertheless a regional governance system with a strong exterior dimension (Sellheim 2013b). In order to determine the primary, substantive goals and secondary goals that have shaped the outcome of the EU seal products ban, documents that have marked different segments of the drafting process are analysed: the EU parliamentary declaration that called for a trade ban, the study carried out by the European Food Safety Authority (EFSA) on animal welfare in the seal hunt (EFSA 2007), the impact assessment carried out by the Copenhagen-based consultancy firm COWI (COWI 2008), the commission regulation proposal (EC 2008a), the study on implementing measures for a ban on trade in seal products (COWI 2010), regulation 1007/2009 as such and commission regulation 737/2010 are examined to highlight the primary goals of the ban. Moreover, five EU documents, that set out secondary goals dealing with the Arctic and which are of relevance in the seal products trade ban context are taken into consideration:

2008 Commission communication 'The European Union and the Arctic region' (EC 2008 b);
2009 Council of the EU 'Council conclusions on Arctic issues' (ECoun 2009a);
2011 EP resolution on a high north policy (EP 2011);
2012 Joint communication 'Developing a European Union Policy towards the Arctic Region: progress since 2008 and next steps' (EC 2012a);
its accompanying joint staff document 'The inventory of activities in the framework of developing a European Union Arctic Policy' (EC 2012b).

Thirdly, normative or meta-goals of the regulation are discussed.

Primary (substantive) goals of the seal ban regime

The goals set out in the EU seal products trade regime are manifold and the technical nature of Regulation 1007/2009 combined with the goals set out in the documents used during the drafting process make the determination of the regulation's intention difficult.

However, since concerns over animal welfare aspects in the commercial seal hunt have dominated the drafting process of the ban, a shut-down of the European Union's internal market for seal products stemming from these hunts constitutes a primary goal of the seal products trade regime. Already the EU parliamentary declaration calls in paragraph H.1 for a 'ban on the import, export and sale of all harp and hooded seal products' (EP 2006). While the Union does not hold legal competence to legislate solely based on ethical concerns, it is nevertheless able to use other spheres of legislative competences to embed ethical concerns into its policies (EC 2008a: 3).

After the EP had issued its declaration on banning trade in seal products (EP 2006), Belgium and the Netherlands imposed national legislation that banned trade in seal products while other countries such as Germany, Italy or Austria stated an intention to follow suit. Consequently, conditions for trade in seal products within the EU's internal market showed fragmentation and provided the commission with a trade environment that called for community action. To this end, since it was primarily ethical concerns that led to the national bans, the community responded by justifying the inclusion of ethical concerns into its trade policy regarding seal products. The expected further fragmentation of the internal market became a primary element in the process, leading to the adoption of a regulation that harmonises the rules on trade in seal products in the EU. Both the EFSA (2007) and COWI (2008) studies make reference to the

fragmentation of the EU's internal market, and therefore COWI writes that it is necessary to '*regulate* [instead of banning; the author] the import, export and sale of all *harp* and *hooded* seal products' (own emphasis; COWI 2008: 1). Accordingly, Regulation 1007/2009 reads in recital 15: 'This Regulation establishes harmonised rules concerning the placing on the market of seal products. [. . .]' (EP 2009: recital 15). It is important to note that *all* seal species are included here. The legislative focus has shifted from the desire to reduce potential animal suffering to harmonising the internal market as recitals 5, 6, 8–13 and 15, 21 as well as article 1 of Regulation 1007/2009 show. Therefore, although ethical concerns over animal welfare aspects in commercial seal hunts on the part of the European public may have given the incentive to start a legislative process, the final regulation abstains from making animal welfare improvement a prime objective. This stands in stark contrast to the commissioned EFSA study that analyses different animal welfare elements of the seal hunt and makes animal welfare the core element of its assessment.

In spite of the blanket nature of these harmonised rules regarding trade in seal products, several exemptions for the importation of seal products can be found. Within the basic regulation itself and throughout the entire process a primary goal was to not affect the Inuit and other indigenous communities and their conduct of the hunt, as it was perceived as an important element of Inuit culture and needs. This is due to the fact that the bans imposed in the 1980s on seal pups had detrimental effects on the Inuit who were dependent on seal hunting (Lynge 1991; Wenzel 1991; Barry 2006: 59). This goal is already set out in the parliamentary declaration paragraph H.3 and therefore the 2008 COWI study assessed potential impacts of a trade ban also on the Inuit population. The goal is reiterated in the proposal's explanatory memorandum (EC 2008a: 5) as well as in recital 13 and article 3.2 of the proposal. It is turned into law in Regulation 1007/2009 recital 14 and article 3.1. In order to establish clear rules on this exemption, the 2010 COWI study focuses extensively on the Inuit and other indigenous communities and presents different schemes that are aimed at enabling Inuit to be exempted from the trade ban. Regulation 737/2010 stipulates the need to exempt Inuit hunts from the trade ban in recital 1 and frames the criteria to be exempted in article 3: '(a) seal hunts conducted by Inuit or other indigenous communities which have a tradition of seal hunting in the community and in the geographical region; (b) seal hunts the products of which are at least partly used, consumed or processed within the communities according to their traditions; (c) seal hunts which contribute to the subsistence of the community.'

Apart from this indigenous exemption a second derogation, as embedded in recital 17 and article 3.2 of the basic regulation, allows the occasional importation of seal products that are for the personal use of travellers and their families. Articles 4 and 5 of Regulation 737/2010 clarify these provisions and highlight the possible derogation when for example seal products can be found in the personal luggage of a traveller or when they are imported at a later stage, being accompanied by a certification of purchase in a third country. Technical and administrative guidance on how to achieve the goal of providing these exemptions are provided in the regulation.

Another means of derogation is importation of seal products stemming from national or regional marine resource management 'which uses scientific population models of marine resources and applies the ecosystem-based approach,' which do not 'exceed the total allowable catch quota' and which are placed on the market 'in a non-systematic way on a non-profit basis' (EC 2010a: article 5). This goal has found its way into the political process in the COWI study 2010 and is aimed to negate the commercial purpose behind placing such products on the EU market (COWI 2010: 34). Two elements fall in place here that embeds this goal in a difficult normative and practical environment. Firstly, as stipulated in the basic regulation recital 10, the opposition to the 'killing of seals as such' (EP 2009a: recital 10) has been used as an incentive to legislate in the field of trade in seal products. According to the public consultation that was carried out by the European Commission, 82.7% of the respondents disapproved the killing of seals irrespective of the hunt's purpose (COWI 2008: 130). To this end, marine management that reduces the number of seals sees itself confronted with ethical concerns over the killing of seals and it remains questionable if public morality, as reflected in the survey, which serves as an important indicative incentive for the adoption of the trade regulation, accepts such killing.

How this is the case can be seen when looking at, for instance, Scotland. On 31 January 2011, part 6 of the Marine (Scotland) Act 2010 came into force, which strictly regulates the killing of so-called nuisance seals in Scottish waters (Scotland 2010). Similar to arguments put forth by the Canadian government that the reduction of the seal population is necessary to protect fish stocks, animal welfare organisations protest against these claims and aim to abandon the killing of seals irrespective of the reason. While in Scotland animal welfare, that is humane killing methods, are included in the Marine (Scotland) Act, by and large animal welfare and painless killing are absent from the context of a marine management seal hunt. For example, the Swedish management plan for Baltic Sea grey seals as well as its Finnish counterpart hold no provisions on animal welfare requirements for the hunt on seals (Sweden 2007; Finland 2007). Both management plans are based on recommendation 27–28/2 on the conservation of seals in the Baltic Sea of the Baltic Marine Environment Protection Commission (HELCOM 2006). While creating general management principles (GMP) for seals in the Baltic Sea region relating to population size, distribution, and the overall health status, the recommendation also makes reference to animal welfare, identifying the national management

plans as appropriate means for exemption from the GMP *inter alia* based on animal welfare reasons. What this implies and what species these animal welfare considerations apply to is not elaborated upon.

In all derogations provided for in the EU seal products regulation, animal welfare aspects are absent. Neither the Inuit exemption nor the personal use or the marine management clauses have animal welfare references. Resource management schemes, for example, may include the drastic reduction of animal populations through a cull for the sake of maintaining ecosystem-balance (see for example Yodsis 2001; Sanz-Aguilar and others 2009;). As a recent EU Parliamentary report shows, ecosystem management, culling and animal welfare are not linked when lawmakers at a community level are considering the negative effects of seals on both fish stocks and the fishing industry (EP 2012: paragraph 13).

Improving animal welfare conditions is also only marginally touched upon in the proposal and the regulations, which ultimately raises the question whether the improvement of animal welfare conditions in seal hunting is merely a meta-goal of the EU seal product trade regime. While the EFSA 2007 terms of reference *inter alia* clearly make animal welfare a prime objective by assessing 'the most appropriate/suitable killing methods for seals which reduce as much as possible unnecessary pain, distress and suffering' (EFSA 2007: 10) the COWI 2008 study states that a 'possible EU ban of products derived from seal species would affect seal hunting activities and thus the extent of animal welfare aspects' (COWI 2008: 7). The regulation proposal, however, does not touch upon animal welfare elements in its operative clauses, but in recital 10 makes animal welfare merely the incentive for the proposal, responding to concerns of members of the public. In recital 11 it calls for the provision of criteria to improve animal welfare in seal hunting, which are vaguely manifested in article 4, which allows for derogations from a ban for example when seals are killed and skinned without causing avoidable pain and suffering. The proposal makes the importing states liable for the enforcement of animal welfare standards in article 5 and calls for national authorities to monitor and enforce specific requirements necessary to ensure a high level of animal welfare as set out in annex II of the proposal (such as animal welfare principles, hunting tools, hunting conditions or reporting requirements).

Practical elements for the improvement of animal welfare standards are absent in the basic regulation and the harmonisation of the EU's internal market is its driving element. Yet, while the meta-goal that has led to the adoption of the ban is the improvement of animal welfare in the seal hunt, the feasibility of this goal is questionable in practice. Firstly, as stated by EFSA, there is no uniform information on the animal welfare aspects and hunting methods in seal hunting (EFSA 2007: 52–54), which is reiterated by COWI, highlighting further the incompletion of information upon which political decisions will have to be based (COWI 2008: 114). As to how far the regulation contributes to the improvement of animal welfare standards in countries in which the EU does not have jurisdiction is unclear since the cooperative element, that is possible incentives to re-open the market for seal products stemming from hunts complying with EU animal welfare criteria, are non-existent.

Given the incentive for the legislative process, concerns over animal welfare, and the imposition of a ban through internal market harmonisation measures, however without any provisions that contribute to animal welfare improvements and any monetary benefits the following question must be asked. Has the meta-goal for the legislative process been animal welfare *improvement*? There are indications that neither the improvement of the hunting conditions nor the fostering of best practices has been the driving goal, but instead it is the banning of the commercial seal hunt which inevitably results in the shut-down of the EU's market for products stemming from hunts conducted for profit. In combination with the absence of a clear definition of the notion of 'welfare of seals' in the basic regulation as well as actual implementation regulation it remains questionable how the acceptance of marine management schemes and aboriginal hunts contribute to the welfare of seals (both imply a non-commercial hunt). Yet, in general EU animal welfare contexts as well as in marine management seal hunts, the inherent human-animal relationship implies human domination over animals, either because animals are bred for human consumption or by justifying the killing for the 'higher good' of ecosystem sustainability (Waldau 2011: 96).

Recital 10 of the basic regulation breaks with this relationship and makes seals unique in and of themselves, making their killing immoral. This claim becomes clearer in relation to Regulation 1099/2009 on the protection of animals at the time of killing (ECoun 2009b), which permits the application of several of the same killing methods as those used in seal hunting, such as a 'percussive blow to the head' (ECoun 2009b: L 303/20) in annex I. Ultimately, farmed animals do not enjoy the same degree of moral protection as seals and appear to not be valued as highly. In reference to international treaties, Bowman states that those dealing with the protection of animals are primarily concerned with species that are threatened, rare or endangered, which does not include reference to individual animals, but rather refers only to the conservation status. On the contrary, animals for domestic consumption do not enjoy such a high degree of international protection, elevating the infliction of cruelty upon them as a necessity (quoted in Fitzmaurice 2010: 261). The very conditions of animals living in captivity in general do not change, even if improvements are made that impact the welfare of specific animals. The species is still held in captivity, born and bred for human consumption, ultimately to be killed with no changes in basic conditions (Waldau 2011: 96, 97).

The inherently exploitative relationship between humans and animals is reflected in the European

Commission's Directorate General (DG) Health and Consumers, which 'is to protect and raise the health status and condition of animals in the Community, in particular *food-producing animals* [...]' (own emphasis; EU DG Health and Consumers). It is evident that animals falling under the category of 'food-producing animals' do not belong to species that legislators would single out in order to develop *sui generis* legislation for their protection. Seals, on the other hand, are singled out and the seal products ban can be considered to regulate trade in products stemming from charismatic animal species that due to conservation concerns or a strong lobby enjoy a higher degree of individual protection than animals traditionally perceived to serve humans. Also on the international parquet, with regard to international regimes protecting charismatic megafauna and associated hunting management, these protective mechanisms expose inherent cultural assumptions about human-animal relationships (see for example Hossain 2008).

Bearing the above in mind, contradictory meta-goals have arisen; the goal to end the overall killing of seals *vis-à-vis* the exemptions from the provisions aiming to achieve this. These goals are not justifiably reconcilable. It appears therefore that within the crafting process and the basic regulation itself, the wish to end the killing of seals has been replaced by the wish to end the killing of seals for commercial purposes irrespective of the consequences for the local population.

Secondary goals relevant in and for the trade in seal products

As of November 2008, the EU has constantly developed policy documents, which are to form the basis for an EU Arctic policy. The first of these documents was the communication 'The European Union and the Arctic region' (EC 2008b), which aims at promoting several policy objectives of relevance in the context of trade in seal products. Firstly, section 2 highlights the need to protect and preserve the Arctic environment in unison with its human population by *inter alia* developing an ecosystem-based management scheme and a holistic approach to all environmental considerations (EC 2008b: section 2.1). Under the subjection heading 'Support to indigenous and local population' it stipulates that the hunting of marine mammals has been an integral part of Arctic peoples' cultures and that the right to maintain this hunt is recognised. However, due to the modernisation of the hunt which has put certain species at risk, as well as EU concerns over animal welfare of these hunts, it proposes dialogue with those communities that have been traditionally engaged in the seal hunt. It further emphasises that in light of the then continuing crafting of the basic regulation, future trade should be allowed when certain criteria for animal welfare in the seal hunt are met (EC 2008b: section 2.2).

The adoption of the basic regulation on 5 May 2009 was followed by several EU documents that directly or indirectly refer to the seal issue and set certain goals of relevance in this context. The first post-adoption document is the EU's 'Council conclusions on Arctic issues' (ECoun 2009b), which was concluded at the 2985th Foreign Affairs Council meeting on 8 December 2009. In paragraph 2, the conclusions recognise possible adverse effects of EU policies on resource management in the Arctic. Therefore, the conclusions state that it is important that these policies are formulated in close dialogue with the Arctic states and the local communities while highlighting the 'importance of sustainable management of *all* natural resources in that region' (own emphasis). Contrary to the commission communication, however, which locates the notion of 'traditional livelihood' not only within an indigenous context but in the context of *local* communities, without further ethno-cultural specification, the council conclusions in paragraph 3 make reference to the necessity of supporting the *indigenous* Arctic populations and their traditional livelihoods in order to ensure their sustainability.

On 20 January 2011, the European Parliament then adopted its resolution on a 'Sustainable policy for the high north' (EP 2011). This resolution sets several general goals that are relevant in the context of the seal hunt and which should be applied to the EU's activities in the Arctic. It can certainly be argued that the EU seal products trade regulation is an EU-internal policy since it merely regulates the EU's internal market. Yet, bearing in mind its immediate and tangible effects in Arctic and sub-Arctic communities, it seems fair to embed it in an Arctic context and treat it as part of an overall EU Arctic policy. It can even be argued that in 2008, the potential effects of the seal products trade regulation as regards Arctic governance were not considered. It could also be speculated that Canada's refusal of the EU to become an observer to the AC in 2009 moved the issue onto the EU Arctic agenda. Against this backdrop, paragraph 4 of the resolution emphasises the importance of the creation of best scientific knowledge with regard to processes that affect the Arctic. In the same vein paragraph 7 stresses that there is a need to gain more knowledge on Arctic communities and cultures by interaction and dialogue as well as providing support for capacity-building programmes. To this end the EU is called upon to 'engage in policies that respect the interest in sustainable management and use of the land-based and marine, non-renewable and renewable natural resources of the Arctic region, which in turn provide important resources for Europe and are a major source of income to the inhabitants of the region' (EP 2011: paragraph 5). Direct reference to the seal products trade issue can be found in paragraph 40 in which the then continuing court cases before the EUGC as well as the dispute settlement procedures before the World Trade Organization are mentioned. The aspiration is that the rulings both of the court and the WTO will contribute to the overcoming of controversies between the different stakeholders. On a more general level, paragraph 57

calls for the protection of the Arctic environment, the safeguarding of the interests of the Arctic population and the sustainable use of the Arctic's resources. These principles should be applied in all activities.

In their joint communication on the development of a EU Arctic policy the European Commission and the EU's Foreign Affairs and Security Policy high representative (EC 2012a) reiterate the main points from previous communications and resolutions. To this end the EU's Arctic policy is aimed to create: knowledge on climate and environmental change in the Arctic; responsible action to contribute to the economic development of the Arctic based on sustainable use of natural resources and expertise; and an intensification of dialogue with Arctic states, indigenous peoples and other involved bodies (EC 2012a: 4). Knowledge creation through research is a priority for the EU as an Arctic actor, with a special focus on the socio-economic impacts of climate and environmental change on the local population (EC 2012a: 7). Through its different funding mechanisms the EU has made significant contributions to indigenous and local populations, especially concerning competitiveness of Sámi areas, as stipulated in the joint communication's accompanying staff document (EC 2012b: 8, 9). The communication emphasises both the continuous funding for projects related to sustainable development and the promotion of sustainable management and resource use. In this regard it is especially noteworthy that it highlights the necessity of considering 'the views of Arctic inhabitants [. . .] on issues of economic development' (EC 2012: 11). Notwithstanding, as regards the then legal proceedings before the EUGC and the WTO dispute settlement, the EU would respect their outcomes and rulings. In this case before the WTO Canada and Norway attempted to show that the trade ban is discriminatory and therefore is inconsistent with international trade law. In its final report of 25 November 2013, the panel established under the dispute settlement body of the WTO concluded, however, that the EU ban is a technical regulation that addresses public morality in the EU as regards seal hunting and therefore does not violate WTO rules (WTO 2013: 186).

The effectiveness of the seal products trade regime

In order to assess the effectiveness of the seal products trade regime, a causal relationship between the identified problems, the goals and changes in the biophysical environment and cultures need to be established. Therefore, the regime's effectiveness with regard to formulated primary goals (animal welfare, exempting Inuit and other indigenous communities, internal market harmonisation) and unformulated secondary goals (end of the commercial seal hunt, dialogue, knowledge creation) will be considered here.

Animal welfare

The point of departure that has led to the basic regulation as well as the main incentive for adopting a ban were perceived shortcomings in animal welfare practises in the commercial seal hunts. Ultimately, a major goal, although not present in the regulation itself, was the improvement of animal welfare conditions in the commercial seal hunt. Has the ban contributed to the attainment of this goal? Three aspects must be considered in order to find an answer to this question: firstly, regulatory and managerial aspects must be considered; secondly, enforcement schemes must be evaluated; thirdly, the hunters' application of possible changes must be evaluated in the field. However, a direct relationship between changes in Canadian seal hunting legislation, enforcement schemes and practices and the European seal products trade regulation cannot be established in a satisfactory manner. In order to do so, a close-up analysis of Canadian policy-making process needs to be undertaken, which would have to reflect the normative change in Canadian sealing discourses based on European actions. Obviously, the same would apply to other areas and countries where seal hunting is conducted. This, however, goes beyond the scope of this article.

Notwithstanding, there are indications that Canadian policy making processes have been influenced by the European initiatives to impose a ban on commercial seal products. In 2009 the Department for Fisheries and Oceans Canada (DFO) amended the Marine Mammal Regulations (MMR) under which sealing is regulated in order to increase the standards of animal welfare in seal hunting. Based on a report by the International Veterinarians working group (IVWG) and the recommendations it set forth (Smith and others 2005: 21, 22), the three-step-process, stunning, checking, bleeding, was included in the Canadian seal hunting legislation, while at the same time the *hakapik*, a wooden club with a hammer head and a spike, and a club were both prohibited as initial stunning tools for seals over one year of age. The DFO emphasises that these standards correspond to those standards set out by EFSA in its 2007 report (Canada 2009). While not the cause for the changes in MMR *per se*, this direct reference indicates the influence European initiatives have had on the policies embraced by Canada regarding seal hunting methods and standards. However, it is not regulation 1007/2009 that caused these changes. Rather, the language of the MMR shows that the discursive and legal environment surrounding seal hunting was influenced by this regulation. This, however, does not mean that animal welfare in practice has actually improved.

In order to determine this, it must be clarified what animal welfare entails. This is problematic as within the discourse of a trade ban and animal welfare improvement no clear-cut definition of 'animal welfare' has been enunciated. The concept is ambiguous. Generally, animal welfare is a broad concept, which refers to the ability of an *individual* animal to cope with its environment, and does not refer directly to the state of the overall species population. 'Welfare', however, is not equal to 'suffering'. The latter implies a state of consciousness and may

include pain, fear or distress. Welfare issues for wild animals may arise when the state of an individual animal is negatively affected by threats from its environment, stemming from for example, food scarcity, reproductive difficulties or general environmental conditions that make survival particularly difficult or even unlikely. These may occur without the animal consciously suffering (Broom 1991: 4168–4170), however in a state of degrading quality of life. The reduction of suffering in human-animal interaction does not untie the knot of human domination over animals. If the discussion surrounding animal welfare were to consider animals' right to life, the concept of 'animal welfare' would result in an abolishment of cruelty, suffering and ultimately death to animals, and would ensure that all animals can live in their natural environment without being exploited for human purposes. Consequently, a meta-goal of improving animal welfare as such in the commercial seal hunt creates significant conceptual difficulties.

Since the adoption of the EU ban and the coming into force of its implementation regulation, two studies have been carried out evaluating the animal welfare aspects of the Canadian commercial seal hunt (Butterworth and Richardson 2012; Daoust and Caraguel 2012). While seemingly indicating a recent evaluation of the hunt, both studies evaluate different seal hunts prior to 2009, and therefore cannot be taken as indicators of the improvement or degradation of animal welfare conditions in the hunt. Thus, it cannot yet be ascertained whether the EU's seal ban has had a direct impact on the hunting conditions. Interestingly, the two studies contradict each other. While Butterworth and Richardson identify the seal hunt as inherently inhumane, Daoust and Caraguel describe the applied killing methods as meeting high animal welfare standards. Given the absence of scientific proof of a change in the applied methods between the time before and after the EU seal products ban, at the time of writing it cannot be ascertained whether the EU ban has succeeded in improving animal welfare conditions in the seal hunt. Fieldwork on a commercial sealing vessel sailing from northern Newfoundland carried out by the author in April 2013 ascribes to the hunt very high animal welfare standards as instantaneous death or irretrievable unconsciousness of a seal occurred in some 98% of the approximately 2000 shot seals. However, according to non-structured interviews with first and second generation sealers from the area, hunting methods have not changed in spite of regulatory issues undergoing changes. As far as compliance is concerned, the mere potential presence of DFO and Coast Guard vessels in the area (the prevailing narrative of the sealers was 'We don't see them, but they see us') led to a continuous and stringent application of the three-step-process, ensuring the quick and painless killing and skinning of seals. It is therefore the Canadian regulations, not the EU regulation, that shape the application of animal welfare criteria, which in turn however have indeed experienced some influence by the policy shaping process of the basic regulation.

The regulation's impact on the overall welfare conditions of seals in their natural environment cannot be quantitatively measured. Although it can be argued that the ban has contributed to a reduction of the number of seals that are killed by creating an unfavourable trade environment for commercially hunted seal products and therefore elevated the hunting standards and regulations, there is no indication that the seal as part of the marine ecosystem has benefited from the ban. In fact, Newfoundland fishing communities are concerned with potential negative influences the ban may have had on the marine ecosystem, as a large-scale sustainable commercial hunt is perceived to contribute to avoiding an overabundance of seals.

Not affecting Inuit or other indigenous communities

The EU seal product trade ban is intended not to affect Inuit or other indigenous communities. But there is no universal definition of the term 'indigenous' as the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) abstains from a definition. Also 1989 ILO Convention 169 concerning tribal and indigenous peoples in independent countries does not define 'indigenous peoples'. Instead it highlights that the convention applies to disadvantaged culturally distinct peoples having lived in a certain area prior to colonisation (ILO 1989: article 1). In general, national laws define who indigenous peoples are. On a European level there is no definition of an indigenous people, but as protocol 3 to the accession treaty of Finland and Sweden to the EU shows, recognition of special rights to the Sámi people that are considered indigenous under Swedish and Finnish law occurs on a European level (EUPubl 1994).

EU Regulation 1007/2009 inserts a definition of the term 'Inuit' in article 2.4 but it does not define who else with regard to their 'indigenous' status it applies to. This creates problems in determining who is exempted from the regulation. In the 1983 directive on trade in products derived from harp and hooded seal pups, Inuit were already exempted. Wenzel has argued that the 1983 ban contributed heavily to a drop in seal pelt prices, ultimately adversely affecting the Inuit hunters who were dependent on access to the commercial markets for seal pelts in order to maintain their subsistence harvesting activities. Operational costs to conduct seal hunting for subsistence purposes were too high, ultimately leading to a decrease in subsistence economy in Inuit seal hunting communities, with negative changes for community viability and the ability to utilise resources for livelihood. While inserting the exemption for Inuit into the 1983 ban, Wenzel claims that European policy makers were reluctant to recognise the economic ties and practises that 100 years of contact and colonisation have created (Wenzel 1991: 128–133). Also, Usher and others highlight the interdependency of subsistence economy and market mechanisms. They refer to subsistence economy as acting as 'a sponge, absorbing labour when other opportunities decline, and releasing it when they arise.' They continue

noting that '[i]n subsistence-based systems, the ends of economic activity tend to be inseparable from the social system, and are more likely to be the maintenance of the system of social relations rather than accumulation at the level of enterprise' (Usher and others 2003: 178, 179). Disregarding the importance of the role of subsistence economy in Inuit communities, the cultural differences between Europeans and Inuit as well as Newfoundlanders in the underlying human-animal relationship were a main issue in the adoption of the 1983 directive (Lynge 1991: 28–35).

Inuit organisations and individuals claim the Inuit exemption to be ineffective and the ban to have adverse effects on the sustainability of their livelihoods. Therefore, spearheaded by the Inuit Tapiriit Kanatami (ITK), the Canadian Inuit representation, Inuit hunters from Canada and Greenland, hunters organisations, fur traders and seal product processors launched several court cases before the EUGC in order to overturn the ban and the implementing regulation. In its most recent judgement in case T-526/10, seeking the annulment of the implementing regulation, the court has underlined that the Inuit plaintiffs had not presented sufficient evidence of the adverse effects of the ban on their communities, but rather presented generalised statements without substantial proof (EUGC 2013: paragraph 97, 98). However, the 2008 COWI study remarked: '[P]olicy measures that have adverse impacts on the image of seal skins and other seal products will have a negative impact on the Inuit population anyway' (COWI 2008: 117). This impact is highlighted in a small report commissioned by the Nunavut Department of Environment, which presents the decline of the prices for seal skins at the fur harvesters auction (FHA), showing that since the start of the legislative process within the EU to impose a seal products trade ban, prices have dropped from more than 70 CAD per seal skin in 2005 to less than 20 CAD in 2011. Also, the similarity between commercially hunted harp seal products and Inuit-hunted ringed seals make it difficult for the purchasing manufacturers to distinguish between the two species and origins. Ultimately, they prefer abstaining from buying any seal products in the first place (Nunavut 2012: 4–10). Hossain notes that the commercial sale of products stemming from subsistence hunts is an important factor in maintaining the subsistence activities, and stresses that the 'EU regulation clearly failed to understand this complexity. The strict term 'traditionally conducted' provided within its regulation, ignores the broader meaning of the right to subsistence' (Hossain 2012: 10). This is further elaborated upon in COWI 2010, reaffirming that both Inuit and commercial hunters use the same marketing chains, and that substantial financial efforts would be necessary to separate Inuit seal products from others (COWI 2010: 84).

A difficult situation arises when providing evidence that may not be quantifiable and which is cumulative in nature. The reputational loss of seal hunting, which has traditionally been an integral part of the Inuit culture (Boas 1888; Wenzel 1991; Lynge 1991; Dahl 2000; Pelly 2001), may influence 'broader socio-cultural factors such as poverty, social disorganization, and loss of tradition' (Nunavut and others 2010: 7), contributing to an elevated suicide rate in Nunavut compared to the Canadian average. While the social and economic implications seem clear, it may be difficult to provide satisfactory legal evidence that proves that the seal products ban adversely affects Inuit culture.

In absence of legally valid evidence of the adverse impact of the ban on Inuit culture, the press release of the EUGC provides a public appraisal on the seal products ban *vis-à-vis* Inuit culture and notes that the fundamental economic and social interests of the Inuit are protected under EU law (EUGC 2013b). The ITK president Terry Audla responded to the press release by stating that '[t]he EU has no authority to speak on what is best for Inuit. We Inuit have been telling the EU all along that the ban is not good for us' (ITK 2013). Nunavut's Minister for Environment, James Arreak, according to *Nunatsiaq News*, denominates the EU's stance in the seal hunting debate as hypocritical and neo-colonialist (*Nunatsiaq News* (Iqaluit) 11 June 2013).

The applicability of the Inuit and indigenous exemption

Although absent in the basic regulation and its implementation regulation, COWI 2010 frames the term 'indigenous' within the context of seal products: 'distinct identity; historical continuity; basic rights (specifically the right to natural resources); respect for the integrity and non-discrimination; non-dominant part of society' (COWI 2010: 8). Given this framing, the Kihnu community of Estonia, living on a small island in the Gulf of Riga in the Baltic Sea, is also considered 'indigenous' by making reference to its recognition by UNESCO (COWI 2010: 22). The validity of this claim is doubtful. Although the Kihnu enjoy special recognition under UNESCO's 'Proclamation of masterpieces of the oral and intangible heritage of humanity' of 18 May 2001 (UNESCO 2001), under which the Kihnu cultural space was added in 2003, this alone does not grant them indigenous status. Hence, although not internationally recognised as 'indigenous', in the context of seal hunting COWI would enable trade in seal products stemming from Kihnu hunts.

The exemptions within the basic and implementing regulation do not fully take into consideration and seem to over-simplify the socio-economic realities of indigenous and non-indigenous seal hunting communities. To clarify this let us take a look at the case of the communities of Woodstock and LaScie, Newfoundland, Canada. Newfoundland is the Canadian province with the largest commercial seal hunt. All criteria brought forth by COWI, as well as the banning regulations, apply, although the seal hunters living in these non-indigenous communities are of European origin.

In these Newfoundland outports there is a tradition of seal hunting (distinct identity, historical continuity,

basic rights). The sea is omnipresent in these communities, which are built around small coves, with maritime references and activities as the dominant feature when crossing them. In combination with fisheries, of which seals are a part, as the prime employment opportunity, the notion of 'having the sea in the blood' (Three fishermen, personal communications, April 2013) emerges. This creates a distinct personal and cultural identity for the fishermen and their families. The seal hunt as such has been continuing for at least 3 generations with the possibility of future continuation if the markets allow. In Newfoundland in general, commercial seal hunting has been conducted since at least 1793 (Ryan 1994: 54) with deep rooted cultural manifestations in songs and poems (Ryan and Small 1978). As outlined in previous research, 'traditionality' is not framed by temporal limits and the commercial seal hunt can be located within such historical discourse (Sellheim 2013a). It can be argued that the 'basic right' of Newfoundlanders as Canadians to continue the utilisation of the abundant natural resources is a human right, manifested in common article I.2 of the two 1966 International Covenants which reads:

> All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence (UN 1966).

Products stemming from the hunt are indeed at least partially used according to tradition although both EU seal trade regulations avoid a definition of what 'accordance to tradition' entails. Inuit communities have voiced their concerns over the nature of this phrasing, as it may be interpreted as holding a backward, paternalistic worldview on Inuit culture and development. Inuit lawyer Aaju Peter writes that 'Inuit are not frozen in time, but must pursue economic opportunities just like everyone else in Canada or Europe' (Peter 2010: 7). The harvesting and socially embedded use of marine species in Inuit communities is well documented (see for example Nuttall 2005: 652). Parallels to this non-commercial meaning of seal products can be found in the outport of Woodstock where seal products are shared with family and friends. Seal flippers, hearts and carcasses are given, not sold, to members of the community for consumption. Upon arrival of the vessel in the local harbour, members of the community greet the arriving sealers and collect the goods that they ordered before the hunt. Thus, although the seal was hunted for commercial purposes, a partial distribution and use of seal products stemming from the commercial hunt within the community can be documented.

The seal hunt contributes to subsistence: subsistence or informal economy plays a vital role for human development and welfare in the Arctic (AHDR 2004: 74) and can be defined as 'local production for local consumption' (Nordic Council of Ministers 2010: 51) in which 'sharing' is an underlying feature (Gløsmrød and Aslaksen 2008: 9). It must be borne in mind that neither in the banning regulations nor in any of the above definitions of subsistence economy has a quantification of the utilisation of certain animals been undertaken. Therefore, the commercial seal hunt, while aimed to produce goods for commercial purposes, directly contributes to the subsistence of the communities through the sharing of carcasses and flippers as a non-monetary but direct support stemming from the hunt traditionally carried out in the region.

How indigenous peoples other than those represented in the court case before the EUGC, the Inuit, are impacted by the EU seal products trade ban cannot be assessed here. While there is no recent research data available for Alaskan or Russian Inuit, the exemption does not merely include Inuit, but also 'other' indigenous communities. Therefore, indigenous communities in Namibia, where a large scale seal hunt takes place, are also to be exempted. However, the lack of a clear definition of the term 'indigenous' in the EU regulation leads to a conceptual difficulty: who falls under the indigenous exemption? As shown above, the three criteria that provide the framework for the Inuit or indigenous exemption are also applicable to non-indigenous communities in Canada, whose hunters conduct the hunt that the EU aims to change. Therefore, the applicability of the exemption must be narrowed down to the 'indigeneity' of the concerned communities. Since the regulations do not clarify which people or communities are considered indigenous, it remains questionable which legal definition is applied. Two scenarios are possible. Firstly, in case of future court cases that will revolve around the indigenousness of a certain community or people, the court would have to decide on an *ad hoc*, case-to-case basis. Secondly, as a general rule, national legislation as regards indigenous peoples serves as the hallmark for being eligible to fall under the ban's indigenous exemption.

In the case of Namibia, this would prove to be particularly difficult. The seal hunt focuses on Cape Fur Seals (*Arctocephalus pusillus*) that live in colonies on land. There is no independent information on the animal welfare aspects of the Namibian seal hunt and the people who conduct it, ultimately making an indigenous exemption difficult to implement. The African Commission on Human and People's Rights (ACHPR) notes that in Africa, all people and peoples of the African continent that derive from colonised populations can be considered indigenous (ACHPR 2005: 88, 89). In the Namibian legislation regulating the seal hunt, no reference is made to the indigeneity of the hunters, but fishing (harvesting) rights are preferably given to Namibian individuals and companies under the principle of 'Namibianisation' depending on the percentage of Namibian versus foreign shareholders of the facility or vessel and the number of people employed (Namibia 2004: 13; Namibia 2009: 4–7). Since there is no independent information on how many people are engaged in the seal hunt, what

Table 1. Namibian exports of Cape fur seal skins. Reproduced from CITES nd.

Taxon	Term	Country	2006	2007	2008	2009	2010	2011	2012
Arctocephalus pusillus	Skins	NA	85525	26081	58133	45146	29937	74619	0

socio-economic significance the hunt and trade has for the communities, and what population groups are engaged in the hunt, no conclusions can be drawn on the effectiveness of the EU regulation's indigenous exemption in a Namibian context unless extensive field studies were to be carried out. Looking at the exports of Namibian seal skins deriving from Cape Fur Seals, between 2006 and 2012 based on the CITES Trade Database, gross exports have varied greatly with no clear signal of a steady decline (CITES nd), indicating that at least up to 2011 the trade in Namibian seal skins has not been impacted by the EU regulation. It cannot be assessed whether the absence of numerical data for the year 2012 indicates an absence of exports or a lack of data.

Internal market harmonisation

As reaffirmed by the EUGC, the primary goal of regulation 1007/2009 is the harmonisation of the EU's internal market with regard to trade in seal products. This harmonisation has been achieved by imposing an EU-wide trade ban in the form of a regulation and not a directive, which would allow for national implementation procedures. The points of departure for the harmonisation clause are the national bans that were imposed by Belgium and the Netherlands in 2007. According to article 95 TEC (now article 114 TFEU) in recourse to article 30 TEC (now article 36 TFEU), national trade bans that fragment the free movement of goods in the internal market of the EU can only be justified on grounds of 'public morality, public policy or public security; the protection of health and life of humans, animals or plants; [. . .]' (EU 2001: article 30). This, however, raises several problems, which two EU legal opinions have dealt with extensively (Council of the European Union Legal Council 2009; European Parliament Committee on Legal Affairs 2009). It can be argued that the seal products trade ban is indeed a means to harmonise the internal market as it harmonises the member states' national rules and does not affect the trade in other products whilst obliging public morality. On the other hand, it can be argued that a blanket ban makes the free movement of goods impossible. Arguing on the grounds of animal welfare considerations seems however arbitrary, as the protection of seals on these grounds would call for other animals to also be included, and would ultimately challenge the utilisation of animals for human consumption. At the same time, public morality cannot serve as a point of reference as the public consultation that was carried out, which was used to serve as the indicator for public morality cannot be considered representative (COWI 2008: 125).

The question of whether or not the seal product trade regulation harmonises the internal market focuses on the legality of instituting a ban that prohibits the commercial movement of seal products within the community. Article 3 (c) TEC constitutes the foundation for the smooth functioning of the internal market by making it a prime objective to establish and maintain 'an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital.'

The judgement of the EUGC of April 2013 picks up two crucial elements in the analysis of the question of the smooth functioning of the internal market with regard to seal products trade. Firstly, as stated in the explanatory memorandum to the commission proposal for a regulation concerning trade in seal products in 2008, several member states had already imposed national legislation shutting down their markets for seal products or were in the process of doing so (EC 2008a: 2). By stressing that these different national bans would create diverging conditions for the trade in seal products, the court concluded that there is a necessity to regulate based on internal market criteria. Consequently, the principle of subsidiarity, action taken on community level where national action proves less successful, allows for legislative steps on a community level. In its judgement the court highlights that internal market harmonisation, not animal welfare, is the primary goal of the regulation, and that both the legal basis and the principle of subsidiarity are justified (EUGC 2013a: paragraphs 26–86).

A second implication arises when looking at the claim that the regulation exceeds the means necessary to fulfil a certain goal, as brought forth by the applicants in case 526/10. The applicants argue that the regulation does not contribute to the improvement of the internal market and that it goes beyond its aspired objective: a breach of the principle of proportionality (EUGC 2013a: paragraphs 91–93). The court's responding argument is twofold. Firstly, it argues that the functioning of the internal market has improved due to harmonised rules that apply to all member states, enabling clear-cut rules for the trade in seal products. Since the regulation does not block the movement, warehousing, processing or manufacturing of seal products within the EU customs union, but merely the placing of these products on the EU market for commercial purposes, trade in seal products that uses the EU as a transit region is not negatively affected (EUGC 2013a: paragraphs 68–71). The second element is the ban's objective. While the plaintiffs refer to the animal welfare objective, the court argues that since the sole objective of the regulation is the harmonisation of the internal market, its objective is reached and it is within the proportionate measures that are to be taken.

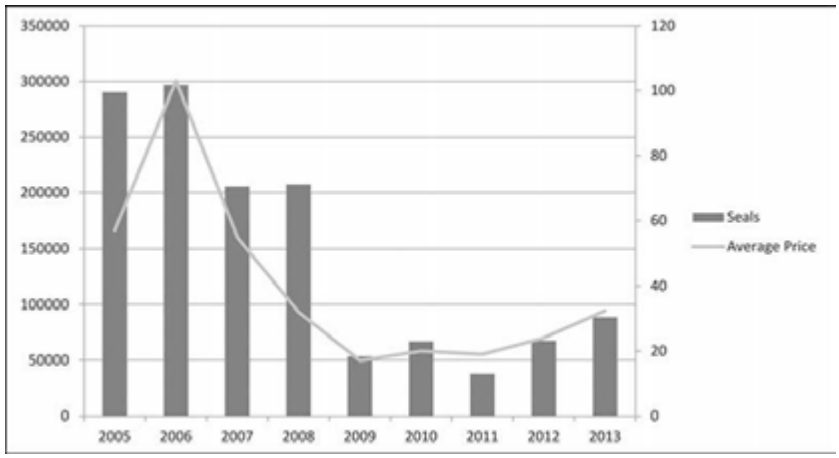

Fig. 1. The number of seals *vis–à–vis* the average price for a seal, Newfoundland.

However, it remains questionable if animal welfare can be completely taken out of the ban's context. After all, the ban was established because of the animal welfare concerns of European states and this ethical dimension ultimately led to the regulation that harmonised the internal market. The alignment of the rules pertaining to the trade in seal products on a community level can be considered an attempt of the EU to implement ethical concerns over seal hunts, since the community does not possess the legal competence to adopt measures directly linked to ethics. It is nevertheless permissible to use other means available to incorporate ethical considerations in its policies, which in the case of the trade in seal products has been done via internal market harmonisation (EC 2008a: 3).

The attainment of unformulated and secondary goals

As discussed earlier, an unformulated meta-goal of the political process that has led to the conclusion of regulation 1007/2009 was neither the improvement of animal welfare, nor ending the killing of seals as such, but appears to be ending the killing of seals for commercial purposes. Both the dwindling European market and the increasing reputational loss of commercial sealing have devalued seal products and led to a reduced number of seals killed since the launch of the legislative process within the EU. In Newfoundland, both the number of seals and the associated landed value are strongly impacted by the reputational as well as the market loss for seal products. While in 2006 almost 300,000 seals were landed, generating around 30 million Canadian dollars with an average of about 102 dollars per seal, a massive drop occurred in 2007 when the legislative process for a ban was in full progress. The following year around the same number of seals of around 200.000 was caught while the average price dropped to 32 dollars, amounting to a landed value of 6.6 million dollars.

In the adoption year of the ban, 2009, the number of seals dropped to 53,531, generating merely 857,000 dollars with an average of 17 dollars per seal. Since then, the average price has slightly increased and amounted to 19 dollars in 2011, with a number of seals ranging at around 38,000 with a landed value of 735,000 dollars. In 2012, almost 70,000 seals at an average of 24 dollars were landed, producing 1.6 million dollars (Newfoundland and Labrador Department for Fisheries and Aquaculture 2005–2012). For 2013, nearly 90,000 seals were landed, generating around 2.9 million dollars with an average value of ca. 33 dollars (Canada 2013a, 2013b).

As visible in Fig. 1 and Fig. 2, during the crafting process of the EU regulation, the average price for one seal fell drastically, decreasing the landed value by more than 50% within one year in spite of a landing of seals that had decreased by around one third. Yet, although the markets and reputation dwindled and the number of seals that were killed was reduced, the commercial sealing industry did not cease to exist. This may also be due to loans of 3.6 million Canadian dollars from the Newfoundland government to Carino processing Ltd. in 2012 and 2013 to be able to buy and process raw materials from seals (Newfoundland and Labrador Department for Fisheries and Aquaculture 2012; Newfoundland and Labrador Department for Fisheries and Aquaculture 2013). Given the most recent data on the average price and number of seals killed, although not comparable to the conditions before the launch of the legislative process in the EU, since 2009 the average price and the landed value seem to have experienced a recovery. Whether this trend continues remains to be seen. Notwithstanding, it seems that the EU's regulation has weakened the commercial sealing industry, but has not managed to shut it down. In fact, growing demand in Asia, where the largest part of seal skins are sold to via international fur traders, may

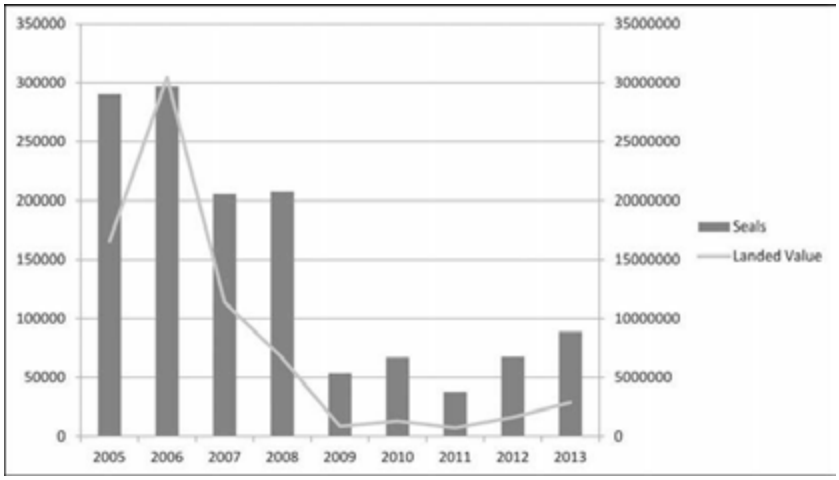

Fig. 2. The number of seals *vis–à–vis* the landed value.

indicate that the industry as such will continue to exist. Also a growing demand on the Canadian market for seal flippers, seal oil and seal skin products show that the normative change in the perception of seal products has not occurred.

As shown earlier an important secondary goal that is reflected in the EU's Arctic documents to at the earliest stage in the 2008 commission communication (EC 2008b), is dialogue with Arctic populations. Indeed, stakeholder consultations were held during the drafting process of the regulations. Nevertheless, in the court cases before the EUGC, the usefulness of these consultative meetings is questioned by the applicants. Yet, the court highlights that it was one of these meetings that introduced the indigenous exemption into the ban in the first place (EUGC 2013a: paragraph 114). An attempt to establish a fruitful dialogue with Arctic indigenous peoples was made with a workshop on 9 March 2010 in which indigenous organisations, the EU Commission, and national foreign ministries were represented. Although no clearly defined platform for future dialogue exists, the workshop yielded several topics for future discussion, amongst others discussions over animal products (EC 2010b). As to how far this was discussed in the second workshop, which was held on 25 January 2011 in Tromsø, Norway, cannot be reproduced here as the information is not publicly available (EC 2011). There is also no information on any follow-up workshops available. Indeed, given the recent deferral of EU observership in the AC and the preceding campaign by Inuit organisations to lobby the Canadian government to deny the EU observer status, a continuous constructive dialogue that will assist in the overcoming of differences is obviously necessary.

It seems fair to say that the seal products trade regime is not a policy that supports indigenous and local populations in the Arctic, safeguards their interests or takes their views adequately into account. It therefore contradicts fundamental elements of the goals as formulated in the EU's Arctic-related documents that make reference to the Arctic's inhabitants. This claim is based on the fact that it remains unclear how a regulation that the Inuit are attempting to annul in court could support them or safeguard their interest. While their needs may seem to have been considered in stakeholder consultations, the Inuit's claim of negative cultural impacts of the regulation as well as the associated reputation loss of the EU in Inuit areas creates an adversarial environment between the EU and the Inuit. Ultimately, this leads to difficulties in accepting the EU in the AC and in considering the EU an Arctic actor.

The EU Arctic documents emphasise the importance of supporting Arctic indigenous peoples, and they also highlight the idea that local people's views are to be supported and taken into consideration. Problematic in the context of commercial sealing is the fact that virtually no knowledge exists within the EU of the commercial sealing industry, the people involved, and the communities impacted by this industry. Instead, in the political discussions, such as the EU Parliamentary discussion prior to the adoption of the basic regulation (EP 2009b), the commercial seal hunt is, in line with anti-sealing lobby groups, commonly portrayed as 'barbaric', 'needless' and 'inherently inhumane.'

Therefore, neither the ban itself nor the political will in the EU are flexible enough to consider the commercial seal hunt and the commercial sealing industry as legitimate, and thus ultimately denying the sealer the right to his livelihood. This is a significant difference from the 1983 'Seal Pups Directive'. Instead, a labelling of the commercial hunt, the sealers and the industry has occurred which does not allow for a meaningful and sustainable dialogue

between the EU and the commercial sealing industry. Moreover, since knowledge on the commercial sealing industry and the people involved is mostly missing, neither the socio-economic impacts nor the long-term discursive impacts of the seal products trade ban on Newfoundland society, especially with regard to the dwindling fishing industry, can be understood.

Conclusion

The goals that the EU seal products trade regime sets forth are not clear-cut. Animal welfare considerations were the incentive to start the policy-making process that led to the imposition of the ban, but these considerations are absent in the final regime. Therefore, the ban's causal effects in terms of any improvements in the welfare conditions of the commercial seal hunt are doubtful. However, the EFSA 2007 report, which was part of the process of the ban, had an influence on the Canadian seal hunting legislation and may have contributed to the improvement of animal welfare standards in the hunt.

In order not to adversely impact the Inuit population, the EU inserted a clause that was to exempt Inuit and other indigenous communities from the ban on placing seal products on the European market. The Inuit claim, however, that this exemption does not fulfil its purpose and that the overall reputational loss of the hunt has contributed to a decline in the trade in seal products. This, in turn, has negatively affected their culture. This claim, which is difficult to prove due to its cumulative nature, has *inter alia* led to several court cases trying to annul the regulations. These attempts have so far been unsuccessful. While Inuit leaders perceive the EUGC's judgements as paternalistic, it can be argued that at the same time the entire process and the Inuit exemption also has unfolded to be discriminatory towards non-indigenous sealers. The criteria that exempt a local community from the ban apply also to non-indigenous communities and therefore make 'indigeneity' as such the main element allowing for an exemption. In Namibia, however, due to a lack of knowledge both on the hunt and on the people conducting it, the applicability and effectiveness of the indigenous exemption cannot be proved. In general, the Inuit and indigenous exemption of the ban neither reflects knowledge of seal hunting communities in general, nor the impacts and processes that influence Arctic inhabitants. Although COWI (2008) showed that Inuit and others may be adversely affected by a ban this was not fully investigated. This ultimately has led to a negative reputation of the EU in the Arctic which may create problems for the EU's future Arctic aspirations.

The regulation's impact on the functioning of the internal market in the EU does not yield a clear-cut result, and depends on the vantage point and scope of perception. On the one hand it can be argued that the likelihood of further fragmentation of the market would have ultimately led to scattered provisions and an unfavourable environment for the trade in seal products, and therefore community intervention through the imposition of the community-wide ban was necessary. Since the regulation merely bans the placing on the market of commercial seal products while transit through the community and the placing on the market of non-commercially hunted products is still possible, trade as such is not impacted.

On the other hand it can be argued that the prevention of any trade in seal products in the EU promotes the exact opposite of a smooth functioning of the internal market, as the free movement of goods is no longer provided for.

With the shut-down of the EU internal market for commercially obtained seal products, the EU followed an unformulated underlying goal, which the regulation and the policy-making process implied, the cessation of the commercial seal hunt. Both the discursive and market environments for Canadian commercial seal products have strongly been impacted by the ban, yet, it has not succeeded in shutting down the trade completely. Instead, there are indications that the Canadian sealing industry is experiencing a recovery regarding the number of seals hunted and the average value of seal skins with a gradual growth of Asian and domestic markets. The Namibian trade, meanwhile, seems to have been unimpeded by the European ban.

In conclusion, neither the primary nor the secondary goals of the EU seal products trade ban and its drafting process are attained in a satisfactory manner due to unclear goal formulation and insufficient knowledge of its causal effects. Instead, it has yielded an unfavourable environment both for the EU in the Arctic and for the individuals and communities involved in the (sub-) Arctic seal hunt. This is irrespective of their ethnicity and the nature of the hunt they conduct. Moreover, the ban contradicts fundamental goals that are formulated in the EU's Arctic documents. The significance of this cannot be ascertained at the time of writing, but as far as the EU's observer status in the AC shows, this EU-internal legislation significantly impacts external processes related to the legitimacy of the EU in the Arctic.

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4. 'Direct and individual concern' for Newfoundland's sealing industry? – When a legal concept and empirical data collide

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'Direct and Individual Concern' for Newfoundland's Sealing Industry? – When a Legal Concept and Empirical Data Collide

*Nikolas Sellheim**

Abstract

In the court cases aiming to annul EU Regulation 1007/2009 on trade in seal products the European Courts have *inter alia* ruled that a 'direct and individual' concern, a pre-condition for providing *locus standi* for the annulment of a contested regulation, does not exist for the commercial sealing industry in Canada. Based on Community case-law, the principle of 'direct and individual concern' is therefore interpreted in a restrictive manner, yet without hinting towards judicial activism. This article aims to ascertain whether this interpretation can be brought in conjunction with empirical findings stemming from field work conducted in the sealing industry in Newfoundland or whether the legal concept and empirical data contradict each other. While analysing the legal reasoning of the courts in two exemplary cases, a case study of three workers in the industry is presented to provide ethnographic insight into the commercial sealing industry and to provide empirical data on the 'direct and individual concern' of developments in the EU for them.

Keywords

Direct and individual concern; locus standi; legal concept; empirical data; commercial sealing industry; individual effects;

1 Introduction

The commercial seal hunt has for many decades been subject of intense and fierce debate due to its perceived cruelty and the claim that the industry

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is no longer necessary. While in 1983 when the European Community adopted Directive 83/129/EEC[1] that closed the Community markets for products stemming from harp and hooded seal pups due to concerns over their conservation status, the European Union adopted Regulation 1007/2009[2] on trade in seal products which barred all products stemming from commercial seal hunts from the European internal market.

With the adoption of Regulation 1007/2009, resistance among those engaged in the production and dissemination of seal products rose. Although the regulation as such is an EU internal measure to harmonize the EU's internal market it has had drastic impacts on the general trade environment regarding seal products. Even with the launch of the legislative process in the EU, the average price for seal products and the landed value experienced a severe bust, with a subsequent significant drop in the number of seals that were hunted.[3] Although the regulation in Article 3 exempts Inuit communities from a ban on trade in seal products,[4] Inuit livelihoods are also adversely affected by the ban.[5] Therefore, Inuit organizations, commercial seal traders, individual Inuit seal hunters, seal product producers and processors, as well as fur trading interest groups started legal proceedings before the European General Court (EGC) to annul Regulation 1007/2009.[6]

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1 Council Directive 83/129/EEC of 28 March 1983 concerning the importation into Member States of skins of certain seal pups and products derived therefrom, OJ L 091, 09/04/1983, p. 0030–0031.

2 Regulation (EC) 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products, OJ L 286, 31/10/2009, p. 36–39.

3 Sellheim, Nikolas. "The goals of the EU seal products trade regulation – from effectiveness to consequence." *Polar Record*, FirstView articles (2014).

4 With a further specification on the conditions under which this exemption occurs in Art. 3

5 See for example Peter, A. 2010. The European Parliament shuts down Seal Products Imports – Again. *Above & Beyond – Canada's Arctic Journal*, May/June 2010: 3–7; ITK (Inuit Tapiriit Kanatami). *EU General Court Rules against the Sustainable Use of Seals*, Media Release, April 25, 2013. https://www.itk.ca/media/media-release/eu-general-court-rules-against-sustainable-use-seals (accessed January 29, 2014); Government of Nunavut, Department of Environment. *Report on the Impacts of the European Union Seal Ban, (EC) 1007/2009, in Nunavut*. Iqaluit: Department of Environment, 2012; Hossain, Kamrul. "The EU ban on the import of seal products and the WTO regulations: neglected human rights of the Arctic indigenous peoples?" *Polar Record* Vol. 49, No. 2 (2014): 154–166.

6 Inuit Tapiriit Kanatami and Others v Parliament and Council, Case T-18/10 [2011]. Other proceedings of the same parties include different appeal cases before the General Court and the Court of Justice. See Case C-605/10 P (R), Case C-583/11 P, Case T-526/10 and the most recent

In these court cases numerous arguments were brought forth that supported the applicants' claims and in their view justified an overturning of the ban. These, however, were by and large rejected by the courts. The court cases and all arguments brought forth shall not be examined here. Instead, this article focuses on the legal concept of 'direct and individual concern' as it was argued by the courts. Special attention is paid to two court cases here, namely Case T-18/10 and Case C-583/11. In the former, admissibility for annulment was *inter alia* dismissed by the EGC in its order based on the claim that there is no 'direct and individual concern' for the commercial seal traders. In the latter the notion of 'regulatory act' and accompanying 'direct and individual concern' was further argued by the Court of Justice (ECJ) and the order of the EGC in essence supported.

This article aims to ascertain whether the legal finding that companies engaged in the trade in seal products are not 'directly and individually concerned' corresponds to *in situ* observations. To this end, a case study of workers in the seal processing industry, in which the author has conducted participatory observation in April and November 2013 respectively, is presented in order to develop empirical data on 'direct and individual concern'. Legally, the concept of 'direct and individual concern' in European jurisprudence is based on TFEU Art. 263, paragraph 4 which reads:

> 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.[7]

It is thus that the underlying questions that this article asks is: Are commercial seal products traders 'directly and individually concerned' by Regulation 1007/2009 on trade in seal products? Does the legal concept of 'direct and individual concern' correspond to empirical findings?

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appeal case Case C-398/13 P. Moreover, in November 2009 Canada, supported by Norway, initiated proceedings before the World Trade Organization (WTO) to overturn the ban. This will not be considered here (World Trade Organization (WTO). *Dispute Settlement: Dispute DS400 – European Communities – measures prohibiting the importation and marketing of seal products,* 2009. http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds400_e.htm (accessed February 14, 2014)).

7 Treaty on the Functioning of the European Union (TFEU), Art. 263, para. 4.

2 The Genesis of the 'Regulatory Act'

In order to answer the research questions, attention must be paid to the concept of 'regulatory act'. In EU law there are four different types of legal instruments,[8] which create different legal environments with regard to their annulment and which are of relevance for the cases surrounding the trade in seal products. From a legal perspective, regulations that are of a legislative character and decisions that are of a regulative character hold different implications for their ability to be challenged by private parties.[9] Moreover, through its case law, the ECJ has created a rather restrictive environment for the admissibility of cases brought forth by private applicants for the annulment of legal acts directly concerning them.[10] Notwithstanding, the framing of the legal acts implies that both regulations and directives – albeit different in their application – are of a normative character and therefore do not hold notions of individual effects while decisions, due to their precise and regulative framing, provide sufficient ground to be challenged under TFEU article 263 (4). As this article shows, however, this interpretation is premature and demands closer scrutiny.

The emergence of the term 'regulatory act' can for the first time be found in the defunct Treaty establishing a Constitution for Europe (hereinafter called Constitution Treaty).[11] The Constitution Treaty failed to be ratified at the 2004 Intergovernmental Conference (IGC) due to negative referenda in France and in the Netherlands. Instead, a new reform treaty was drafted for the IGC 2007

8 Regulations, directives, decisions and recommendations. See article 288 TFEU (ex. Article 249 TEC)

9 Arnull, Anthony. *The European Union and its Court of Justice.* Oxford: Oxford University Press, 2006, 184.

10 Cambou, Dorothée. "The impact of the ban on seal products on the rights of indigenous peoples: a European issue." In *The Yearbook of Polar Law* 5, edited by Gudmundur Alfredsson, Timo Koivurova and Adam Stepien, 389-416, Leiden: Martinus Nijhoff, 2013, 408; Kombos, Constantinos. "A recent case law on locus standi of private applicants under Art. 230 (4) EC: A missed opportunity or a velvet revolution?" *European Integration online Papers (EIoP)* No. 9m Vol.17 (2005). http://eiop.or.at/eiop/pdf/2005-017.pdf (accessed February 13, 2014), 1.

11 Cf. Article III-365(4): Any natural or legal person may, under the conditions laid down in paragraphs 1 and 2, institute proceedings against an act addressed to that person or which is of direct and individual concern to him or her, and against a regulatory act which is of direct concern to him or her and does not entail implementing measures; see also Bast, Jürgen. " New categories of acts after the Lisbon Reform: Dynamics of parliamentarization in EU law." *Common Market Law Review*, No. 49 (2012): 887 and 888.

in Lisbon in order to abolish the constitutional attempts, but to create a legal personality for the Union and to maintain its dual treaty character. The Lisbon Treaty introduced the 'ordinary legislative procedure' as the main indicator for a legislative act of general application. It is thus that article 294 TFEU sets out the main procedure for the adoption of a legislative act in which the European Parliament and the Council act as co-legislators. On the other hand, article III 365(4) of the Constitution Treaty was slightly amended and inserted into the TFEU as article 263 (4). However, although it now contains the concept of 'regulatory acts', a reference to its legal characteristics or adoption procedure cannot be found.[12]

It cannot be ascertained why the term 'regulatory act' was left undefined. Doing so allows the ECJ great leeway to define it through its interpretation. In the debates surrounding the Constitution Treaty, the Final Report of the Discussion Circle on the Court of Justice[13] shows that the inclusion of the term 'regulatory act' was not unanimous. Paragraph 22 states that an undefined "majority was in favour of inserting the term 'act of general application' instead of 'regulatory act." Why the Praesidium did not follow this majority is not revealed. The reason for abolishing implementing measures in this context is that the circle was of the opinion, as reflected in paragraph 21, that applicants that are individually and directly concerned by a measure should not break the law before they are able to access the court. Ultimately it is the general application in a wide and abstract manner that is of crucial importance here.

However, the discussion circle did not aim to alter the overall meaning and scope of article 230 TEC, which was to be amended and later to become article 263 TFEU. Therefore, it was also suggested to simply replace the term 'decision' with the term 'act' as under Community case law and established in *IBM v Commission* it is in essence irrelevant which procedural type of legislation affects the natural or legal person. The main criterion is that it is binding and capable "to affect the applicant's interests by clearly altering his legal position."[14] Bearing in mind this judgement, it is not explainable why the

12 Dougan, Michael. "The Treaty of Lisbon 2007: Winning minds, not hearts." *Common Market Law Review*, No. 45 (2007), 617-703, 677; Jacobs, Francis G. "The Lisbon Treaty and the Court of Justice." In *EU Law after Lisbon,* edited by Andrea Biondi, Piet Eeckhout and Stefanie Ripley, 197–212, Oxford: Oxford University Press, 2012, 201.

13 The European Convention, Secretariat. 2003. Report, 25 March 2003. Final report of the discussion circle on the Court of Justice, CONV 636/03, CERCLE I 13. http://european-convention.eu.int/pdf/reg/en/03/cv00/cv00636.en03.pdf (accessed February 13, 2014).

14 International Business Machines Corporation v Commission of the European Communities, Case 60/81 [1981], ECR 2639, para. 1.

term 'regulatory act' was introduced and later integrated into the TFEU in the first place. Also, the Final report of Working Group IX on Simplification does not suggest the introduction of new wording for or a new type of act. Instead the report highlights that the scope of a 'decision' under article 249 TEC was to be broadened and would therefore be binding in its entirety, with or without specific addressees, which was the main criterion up to then.[15]

3 Legislative Acts and the Applicants' Concern

It is in the context of the seal hunt that the 'regulatory act' has gained significance. Before looking at empirical data it is necessary to take the notions of 'direct and individual concern' into consideration in order to be able to empirically appraise the Court's judgement with regard to the sealing cases.

In general, the Court is said to make access to the court difficult for private applicants seeking annulment of an act that is not directly addressed to them[16]. According to TFEU Art. 263 (4) the 'regulatory act' must be of 'direct and individual concern' to the applicants, which in many cases is particularly difficult to prove. The case law of the ECJ refers to the direct or individual standard for deciding a case's admissibility. In *Extramet Industrie SA v. Council*[17] the Court ruled for the annulment of an anti-dumping regulation that disrupted the competition rules of the Community market. Here, the applicant was able to prove that it was directly and individually concerned with an anti-dumping Council regulation. The court ruled that "measures imposing anti-dumping duties may, without losing their character as regulations, be of individual concern."[18] Ultimately, although admitting that regulations do have the ability to affect legal or natural persons, their legislative characteristics and therefore their non-individual inferences, are highlighted.

Codorníu SA v Council[19] supports this finding. In this case, the applicant challenged a Council regulation which prevented it from using the word 'crémant' to describe the quality of sparkling wines. The Court ruled that

15 The European Convention, Secretariat. Report, 29 November 2002. Final report of Working Group IX on Simplification, CONV 424/02, WG IX 13, 2002. (accessed February 13, 2014); See also Bast, *supra* note 11 at 888 and 889.

16 Arnull, *supra* note 9 at 69; Jacobs, *supra* note 12 at 201; Cambou, *supra* note 10 at 408.

17 Extramet Industrie SA v Council of the European Communities, Case C-358/89 [1991], ECR I-250.

18 Extramet para. 14.

19 Codorníu SA v Council of the European Union, Case C-309/89 [1994], ECR I-1853.

although the regulation was legislative in nature, due to the prior usage of the term 'crémant' before the adoption of the regulation, it did indeed affect *Codorníu SA* individually.

In *Industrie des Poudres Sphériques v Council*[20] the Court expands the criteria upon which an act of legislative character can be of individual concern. The Court notes that these regulations

> must be regarded as of individual concern to a trader who is both the largest importer of the product forming the subject-matter of the anti-dumping measure and the end-user of that product, and who shows in addition that his business activities depend to a very large extent on his imports and are seriously affected by the contested regulation in view of the limited number of producers of the product concerned and of the difficulties which he encounters in obtaining supplies from the sole Community producer, who is his main competitor for the processed product.[21]

Thus, the Court has reaffirmed that as such legislative acts, or true regulations, can affect natural or legal persons directly and individually, and can therefore be challenged under Art. 263 (4) TFEU.

3.1. *Direct Concern*

Under community law 'direct and individual concern' is crucial in applying for annulment of a regulation. But how is the concept of *locus standi* "or the right of appearance in the European Court"[22] framed? And how has the ECJ responded to this right?

The concept was already framed in the 1970s when the Court established in *CAM v Commission* that a measure "directly concerns the said traders."[23] This means, as Arnull points out, that a direct cause and effect relationship between a given legal measure and the status of an applicant can be established and that "the effect the act would produce was substantially certain."[24]

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20 Industrie des Poudres Sphériques v Council of the European Union, Case T-2/95 [1998], ECR II-3939.

21 Ibid., para. 1.

22 Tabaczyk, Edward J. "Establishing locus standi under article 173 (2) of the EEC Treaty." *Northwestern Journal of International Law & Business* Vol. 7, No.1 (1985), 157–183. http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1195&context=njilb (accessed February 13, 2014), 158.

23 CAM SA v Commission of the European Communities, Case 100-74 [1975], ECR 1393, at para. 1.

24 Arnull, *supra* note 9 at 74.

This, however, does not necessarily mean that representative bodies that challenge a legal act before the court would be directly affected by a measure when the bodies' interests themselves are not affected.[25] To this end, legislative acts such as regulations are difficult to challenge vis-à-vis decisions with concrete addressees and concrete topical elements. To this end, Advocate General Lagrange writes in *Confereration Nationale des Producteurs de Fruits et Legumes v Council*[26]: "What distinguishes a regulation is not the greater or lesser extent of its application, material or territorial, but the fact that its provisions apply impersonally in objective situations."[27] Storey and Turner write that a regulation can only be subject to a legal challenge when its provisions are decisions of individual concern.[28] This stems from *NV International Fruit Company and others v Commission*[29] in which regulation provisions, i.e. provisions of legal acts with legislative application, were considered decisions and therefore of individual concern. The Court stated in this case that the provision of the contested article was "not a provision of general application within the meaning of the second paragraph of Article 189 of the Treaty, but must be regarded as a conglomeration of individual decisions taken by the Commission under the guise of a regulation [...], each of which decisions affects the legal position of each author of an application [...]."[30]

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25 This was established in the famous merger case *Nestlé / Perrier* when the Court ruled that although the members of the representative organizations were affected individually and therefore an individual concern could be established, the interests of the organizations themselves and their legal status were not affected, rendering the claim of a direct concern inadmissible.

26 Confédération nationale des producteurs de fruits et légumes and others v Council of the European Economic Community, Joined Cases 16/62 and 17/62 [1962], ECR 471.

27 Quoted in Türk, Alexander. *The Concept of Legislation in European Community Law: A Comparative Perspective.* Alphen: Kluwer Law International, 2006, 121; and Storey, Tony and Chris Turner. *Unlocking EU Law*. London: Hodder Arnold, 2005, 100; In its judgment the Court in essence adheres to the Advocate General's assessment and states: "A regulation, being essentially of a legislative nature, is not addressed to a restricted number of persons, defined or identifiable, but applies to objectively determined situations. It involves immediate legal consequences in all member states for categories of persons viewed in a general and abstract manner" (Confédération nationale v Council, *supra* note 26 at para. 3)

28 Storey and Turner, *supra* note 27 at 100.

29 NV International Fruit Company and others v Commission of the European Communities, Joined cases 41 to 44–70 [1971],ECR 411.

30 Ibid., at para. 21.

3.2. *Individual Concern*

The application of 'individual concern' in the jurisprudence of the ECJ goes back to *Plaumann v Commission*[31] in which the so-called *Plaumann* formula was established. This formula states that

> [p]ersons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the person addressed.[32]

This formula marks the starting point for a rather restrictive approach towards individual concern and can be found, in slightly amended form in the case law of the Community.[33]

Arnull sees a softening of this approach in *Extramet* and *Codorníu*, however being merely of a short duration, as in *Greenpeace and Others v Commission*[34] the *Plaumann* formula was applied radically.[35] On the basis of 'individual concern' in the latter case the applicants sought the annulment of a decision of the Commission which delegated financial support to the Spanish government through the European Development Fund for the construction of two electric power stations in the Canary Islands. The three applicant organizations claimed to represent the interests of the people in Gran Canaria and Tenerife, and since individual members are entitled to bring forth claims for their environmental protection agenda due to the fact that they are individually affected by the measure, their parent organization should also be entitled to *locus standi* given the same normative interest. The Court dismissed this claim and noted that "[p]ersons other than the addressees may claim that a decision is of individual concern to them only if that decision affects them by reason of certain attributes which are peculiar to them, or by reason of factual circumstances which differentiate them from all other persons and thereby distinguish them individually in the same way as the person addressed."[36] The Court then stated that the

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31 Plaumann & Co. v Commission of the European Economic Community, Case 25-62 [1963], ECR 95.

32 Ibid., at para. 4.

33 See for example Société CAM SA v Commission of the European Communities, Case 100-74 [1975], ECR 1393; Deutz und Geldermann, Sektkellerei Breisach (Baden) GmbH v Council of the European Communities, Case 26/86 [1987], ECR 941;

34 Stichting Greenpeace Council (Greenpeace International) and others v Commission of the European Communities, Case T-585/93, ECR II-2205.

35 Arnull, *supra* note 9 at 77.

36 Greenpeace v Commission, *supra* note 34 at para. 1

concrete number of people represented by the applicant organizations could not be determined in advance, and therefore, the applicants' reasoning does not allow for *locus standi* because it cannot be ascertained how to distinguish them from an addressee of a decision As regards the individual applicants, the Court maintains that they are not affected differently by the decision than all others in the region. The individual concern can therefore not be based on the applicants' environmental interest alone.[37]

Given this restrictive environment for individuals and associations to show individual or direct concern, the establishment of the Court of First Instance (CFI; after Lisbon restructured to become the General Court), and an increasing case-law that deals with the concept the legal divergence between direct and individual concern has become blurry. Throughout the application of the *Plaumann* formula in the case law, two cases stand out, namely *International Fruit Co v Commission*[38] and *Piraiki-Patraiki v Commission*[39]. In the former the concept of 'closed group' was introduced, depicting that a finite number of individuals is affected by a measure, thus challenging the *Plaumann* formula. In the latter case the applicants sought to annul a decision by the Commission, which enabled a French quota system on imports of Greek yarn. Although the Court accepted *locus standi* of some of the applicants, it was not based on the reasoning of a 'closed group' found in *International Fruit*, but was based on the date of entry into force of the Commission decision. In this sense for some of the applicants the Commission decision was declared void when contracts were made before the decision, while for others the application for annulment was dismissed as inadmissible. Hence, these traders were individually concerned while the others were directly concerned by the Commission decision. Notwithstanding, the 'closed group' argument was not applied here.[40]

37 Greenpeace, *supra* note 34 at para 51; See Federolio v Commission, paragraph 61, for three distinct types of situations in which actions for annulment brought forth by representative organizations are admissible before the Court (Federazione Nazionale del Commercial Oleario (Federolio) v Commission of the European Communities, Case T-122/96 [1997], ECR II-1561).

38 NV International Fruit Company and others v Commission of the European Communities, Joined cases 41 to 44-70 [1971], ECR 411.

39 SA Piraiki-Patraiki and others v Commission of the European Communities, Case 11/82 [1985], ECR 207

40 See also Arnull, *supra* note 9 at 74; Storey and Turner, *supra* note 27 at 98.

4 The Legal Reasoning of the EGC in the Seal Cases

4.1. *Methods*

Determining a detailed account on the legal reasoning of the EGC in case T-18/10 is an arduous task and calls for an analysis that goes beyond the scope of this paper. The basis of this analysis is neither a semiotic nor teleological approach, but takes the political charging of the judgment into account in combination with a heuristic focus on the applied case law. This approach was chosen due to the claim of Newfoundland sealers and representatives of the sealing industry as well as other applicants that the judgment is political and emotional, relying on a moral understanding of the seal hunt and industry, which is prevalent in the policy-making process that led to the adoption of Regulation 1007/2009, and thus should be annulled.[41]

The Newfoundlanders' perception of the judgement is a naturalist approach, applying a degree of moral scepticism that identifies normative statements devoid of objectivity applied in the judges' assessment, and that are based on specific understandings of morality and ethics. *Argumentum a contrario*, a judgement can only be valid if fact-based objectivity is applied, devoid of notions of morality and ethics. Assessing legal reasoning in this way leads to contradictory outcomes and should therefore not be applied here.[42]

Instead, the methodology focuses on political developments and applied case law vis-à-vis empirical research data that was collected during the author's field work in the Newfoundland seal hunt and sealing industry in April and November 2013 respectively. It is in this sense that the notion of 'fate control' as identified in the Arctic Social Indicators report[43] is used to determine the degree of 'direct' or 'individual' concern. Therefore, the analysis of the legal reasoning in this case is linked to ethnographic research based on 'participant observation'. The results of this study are by no means complete, and can merely be considered a first step in linking judgements of European courts concerning the trade in seal products with sealers and the sealing industry in Newfoundland. Since the study only focuses on this easternmost Canadian province, no normative conclusions can be drawn, but it must be considered a case study on the external effects of judgements issued by a European judicial body.

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41 See Sellheim, Nikolas. "The Neglected Tradition? – The Genesis of the EU Seal Products Trade Ban and Commercial Sealing." In *The Yearbook of Polar Law* 5, edited by Gudmundur Alfredsson, Timo Koivurova and Adam Stepien. 417–450, Leiden: Martinus Nijhoff, 2013.

42 On legal reasoning, scepticism and objectivity, see Šušnjar, Davor. *Proportionality, fundamental rights, and balance of powers*. Leiden: Martinus Nijhoff, 2010.

43 Arctic Social Indicators. *Arctic Social Indicators – A Follow-up to the Arctic Human Development Report*. TemaNord 2010: 519. Copenhagen: Nordic Council of Ministers, 2010.

3.2. *The Application for Annulment – Case T-18/10*

In order to annul Regulation 1007/2009, legal proceedings were lodged on 11 January 2010, but declared inadmissible by the EGC in its order on 6 September 2011. Fundamental to admissibility determinations is the notion of 'regulatory act'. Here, the Court is clearly in line with previous case law regarding the distinction between legislative and regulatory measures in the interpretation of this new concept. The applicants argue that the term 'regulatory act' can be contested under TFEU article 263 (4), which allows natural and legal persons to challenge Community measures when they are directly and individually affected by it. The Court argues that TFEU article 263 (4) cannot be read independently, but in this case needs to be read in conjunction with TFEU article 263 (1). This paragraph reads:

> The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.

Therefore, the term 'regulatory' as interpreted by the Court cannot be regarded as being a qualifier or as being opposed to the term 'legislative', but rather as way of framing all acts of the union that produce legal effects on third parties.

The applicants further claim that Art. 263 (4) TFEU should be broadly interpreted in order to be consistent with international law, namely the Aarhus Convention[44] as well as the Convention on Biodiversity (CBD).[45] In support of these claims the preliminary ruling[46] cases *Gianni Bettati v Safety Hi-Tech Srl*.[47] and *Bellio F.lli Srl v Prefettura di Treviso*[48] were brought forth, but without clarification of how they are relevant to the issue of admissibility. Therefore, the court rejected these arguments and clarified that the case

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44 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Aarhus, Denmark, 25 June 1998.

45 Convention on Biological Diversity, Rio de Janeiro, Brazil, 5 June 1992.

46 The 'preliminary rulings procedure' encompasses that an issue concerning Community law which is being negotiated before a national court can be brought before the ECJ. The ECJ's findings will then in turn be applied by the national court within the context of the case (see also Arnull, *supra* note 9 at 95-97).

47 Gianni Bettati v Safety Hi-Tech Srl., Case C-341/95 [1998], ECR I-4355 at para. 20.

48 Bellio F.lli Srl v Prefettura di Treviso, Case C-286/02 [2004], ECR I-3465 at para. 33.

law only refers to the validity of provisions of secondary Community legislation. Therefore, the primacy of these agreements over primary sources of Union law cannot be established under the judicial review mechanisms set out in the Treaties.[49]

Two issues that the court did not address in this context emerge: 1. it cannot be established with full confidence that the contested Regulation 1007/2009 deals with environmental matters in the first place, and therefore whether it falls under the scope of the Aarhus Convention as established in Art II.3 of the convention; 2., It also cannot be established whether the CBD is a correct point of reference because the contextualization of the contested regulation cannot be considered vis-à-vis biological diversity. These two points stem from the fact that, as the Court would decide in a later judgement,[50] the contested regulation is not linked to animal welfare or species conservation and is therefore not an environmental measure. Instead it is linked to internal market harmonization. Moreover, the goals of the contested regulation and its institutional response to a certain set of perceived problems do place it in the context of market harmonization and not within a context of animal welfare, environment or biodiversity.[51]

The court limits the scope of 'regulatory act' to "all acts of general application *apart from* legislative acts. Consequently, a legislative act may, for the subject-matter of an action for annulment, be brought by a natural or legal person *only* if it is of direct and individual concern to them" [own emphasis].[52] Thus, the EGC argues that it is the adoption procedure in combination with a limited interpretation of TFEU article 263 (4) that would enable the applicants with *locus standi* for application of annulment of a contested act.

It becomes obvious that it is still unclear how to categorize the contested regulation: whether it is a legislative act of a general application, or a regulatory act of specific application that may be contested under TFEU Art. 263 (4). The Court argues here that it is the legal basis on which the contested regulation was adopted. This occurred on the basis of Art. 95 TEC (now Art. 114 TFEU) and the 'ordinary legislative procedure' as set out therein. In practice, the 'ordinary legislative procedure' is a co-decision procedure between the Parliament and

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49 Order General Court, Case T-18/10, Inuit Tapiriit and Others v European Parliament and Council, 6 September 2011, paras. 52-55.

50 Judgment of the General Court, Case T-526/10 Inuit Tapiriit Kanatami and Others v Commission, 25 April 2013.

51 See Sellheim, *supra* note 3; Sellheim, Nikolas. "Policies and influence – tracing and locating the EU seal products trade regulation." *International Community Law Review* 17 (1) (forthcoming, 2015).

52 *Supra* note 49, at para. 56.

the Council and follows a stringent adoption scheme as manifested in Art. 251 TEC (now Art. 294 TFEU). Since Regulation 1007/2009 was adopted based on this co-decision procedure, Art. 289 TFEU clarifies that all acts that are adopted in this manner constitute legislative acts. Ultimately, based on the TFEU, the contested regulation is not a regulatory act, but is instead of an act of general applicability.

However without providing a sound legal basis for their argument, the applicants state that it is not the way an act was adopted but its scope that delimits its character. Here the Court responds by referencing *Veromar di Tudisco Alfio & Salvatore v Commission*[53] which creates the concept a 'closed group' that is affected by a given act and which is an admissible factor for challenging the act before the Court.[54] While this may be the case, the Court holds that the applicants did not aim to challenge the application of the contested regulation, but instead merely challenged whether or not the application is a 'regulatory act'. Therefore, since the TFEU clearly sets out which acts are regulatory and legislative, the Court rules that the applicants' challenge of the term 'legislative act' in this context must be considered inadmissible.[55]

Given the above dismissal of the challenge of the act as a 'legislative' act, the EGC also considers whether the applicants are directly concerned. Indeed, the Parliament and the Council, supported by the Netherlands and the Commission, did not raise any objections against the admissibility of the applicants based on 'direct concern'. The EGC therefore makes use of paragraph 10 of its judgement in *d.M. v Council and ESC*[56] in which the rule of absolute bar to proceedings was established, leaving it to the discretion of the Court to decide the admissibility of the claim of direct concern. In order to do so, the Court applies a strict interpretation and states that "for an individual to be directly concerned by a European Union measure, first, that measure must directly affect the legal situation of that individual and, secondly, there must be no discretion left to the addressees of that measure who are responsible for its implementation, that implementation being purely automatic and resulting from European Union rules alone without the application of other intermediate rules."[57] Reference is made here to the formulation found in paragraph 39

53 Veromar di Tudisco Alfio & Salvatore E.A. v Commission, Case T-313/08 [2009], not published in the ECR.

54 Veromar at para. 30.

55 General Court, *supra* note 49 at paras. 63–66.

56 G.d. M. v. Council and Economic and Social Committee of the European Communities, Case 108/86 [1987], ECR 3933.

57 General Court, *supra* note 49 at para. 71.

of *Lootus Teine Osaühing v Council*[58] in which the Court dramatically tightens the applicability of Art. 263 (4) by excluding the concept of a 'closed group' and inserting that there can be 'no discretion left'. Hence, the Court make two cumulative conditions relevant in this context: firstly, the effect of the measure on the legal situation of the applicants; and secondly that the addressees are identified without leaving any discretion. In order to determine the scope of the application and the addressees of the contested regulation, the Court makes reference to Article 3.1 of Regulation 1007/2009 which reads: "The 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 subsistence. These conditions shall apply at the time or point of import for imported products."

The EGC's interpretation does not allow Inuit and other indigenous communities to be considered directly concerned by the measure, as the addressees are "those applicants who are active in the placing on the market of the European Union of seal products."[59] However, the EGC supports the claim that people involved in the trade in seal products in different functions are indeed affected by Regulation 1007/2009. Yet, these effects cannot be solely related to the regulation itself.[60] While the regulation does affect the factual situation of the applicants, a change in the legal situation cannot be related to the contested regulation.[61]

This interpretation neglects the secondary effects that the contested regulation has on applicants, and only considers those applicants directly concerned by the regulation that are engaged in the placing of seal products on the European market. Following the above argument the Court dismisses the claim of direct concern for individual Inuit seal hunters and manufacturers, Inuit representatives and hunting and trapping organisations since 1. they are exempted from the regulation as they are Inuit and the trade ban does not affect them, and 2. as they are not concerned with placing their products on the European market, Regulation 1007/2009 does not directly affect them.

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58 Lootus Teine Osaühing v Council of the European Union, Case T-127/05 [2007], ECR II-1.

59 General Court, *supra* note 49 at para. 75.

60 Recourse is made to *Bonino and Others v Parliament and Council* in which a political party challenged a regulation with regard to funding of political parties. In paragraph 56 of the judgment of this case it is made clear that although changes in the funding situation do indeed affect individual members, the party itself is not affected (Bonino and Others v Parliament and Council, Case T-40/04 [2005], ECR II-2690).

61 General Court, *supra* note 49 at para. 75.

To this end, the legal status of only four applicants – *Ta Ma Su Seal Products*, *NuTan Furs*, *GC Rieber Skinn* and the *Canadian Seal Marketing Group* – is affected by the contested regulation. Here the Court consequently applies the *Plaumann* formula to determine whether the applicants are individually affected by the regulation and which attributes are "peculiar to them or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee of a decision."[62] According to the Court, the applicants failed to present evidence of a factual situation that differentiates them from other traders. It held that the prohibition on placing seal products not stemming from Inuit hunts is one of a general character and therefore applies to any other trader engaged in placing seal products on the EU market. This resulted in a dismissal of the 'direct concern' of the seal products processors and, in the end, in a dismissal of the applicants for annulment of the contested regulation.

3.3. *Lodging the Appeal – How is 'Direct and Individual Concern' Argued?*

The order of the General Court to dismiss the action for annulment was published on 6 September 2011, followed by a written appeal of the applicants on 21 November 2011 before the European Court of Justice under Case C-583/11.[63] Three reasons for the appeal were brought forth: 1. An erroneous interpretation of Article 263 TFEU and accompanying misinterpretation of a 'regulatory act' vis-à-vis 'legislative act;' 2. Inadequate reasoning for the claim of violating Article 47 of the European Charter of Fundamental Rights and a violation of Article 47 of the European Charter based on the EGC's interpretation of TEFU Article 263 (4); 3. Misinterpretation of claims brought forth by the applicants with regard to 'regulatory act.' Attention, however, lies only with the first claim, and the following sections then focus only on the concepts of 'regulatory act' and 'direct and individual concern'.

Advocate General (AG) Kokott delivered her opinion on 17 January 2013[64] in which she appraised the claims brought forth by the appellants and the

62 Ibid., para. 88.

63 Appeal brought on 23 November 2011 by Inuit Tapiriit Kanatami and others against the order of the General Court (Seventh Chamber, Extended Composition) delivered on 6 September 2011 in Case T-18/10: Inuit Tapiriit Kanatami and others v European Parliament, Council of the European Union, Kingdom of the Netherlands, European Commission, Case C-583/11 P.

64 Opinion of Advocate General Kokott, Case C-583/11 P Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union.

legal opinion of the EGC. Interestingly, Kokott highlighted that, although in the end she supports the EGC's interpretation of the term 'regulatory act', the term is contested in legal literature, with equal numbers of proponents and opponents.[65] For example, Kokott referred to Dougan, who supports the appellants' claim that the EGC's distinction between legislative and regulatory acts is very restrictive. Borrowing from national, constitutional processes, Dougan argues that access to justice when challenging EU measures is ultimately more difficult when it comes to "democratically elected legislature, as compared to measures adopted by the unelected executive authorities."[66] On the other hand, Görlitz and Kubicki argue that the choice to include the new term 'regulatory act' as to be interpreted by referencing the defunct Constitutional Treaty cannot convince. They contend that the utilization of the term 'regulatory' in article 263 (4) has to be considered autonomously and does not allow for inferences about the legislative procedure, since this clearly occurs in Article 290.1 TFEU establishing the connection between 'legislative' and 'non-legislative' acts. Therefore, a restrictive approach to 'regulatory act' in the context of Article 263 (4) appears justified.[67]

Kokott stated that the interpretation of the EGC, claiming that all Union acts of general applicability are 'regulatory acts', is correct. Yet, she clarified, this does not entail that all acts of general application are 'regulatory acts'.[68] Interestingly, Kokott referenced different language versions of the Treaty. She held that, although there are similarities in several different languages of the application of the term as used in Article 288 (2) and Article 263 (4) TFEU, no etymological link exists between the (English) terms 'regulation' and "regulatory act'. However, since all Union languages are equally authentic, even if a majority of etymological links between two terms point to a certain interpretation, the Court cannot rule that this interpretation of the link is correct.[69] This could cause difficulties when applying Article 31.1 of the Vienna

65 Kokott, *supra* note 64 at para. 28.

66 Dougan *supra* note 12, at 678.

67 Görlitz, Niklas and Philip Kubicki. "Rechtsakte mit 'schwierigem Charakter' – Zum bislang unterschätzten, deutlich erweiterten Rechtsschutz des Individualklägers im Rahmen des neuen Art. 263 IV AEUV." *Europäische Zeitschrift für Wirtschaftsrecht* 22 (2011), 248-254, 250.

68 Kokott, *supra* note 64 at para. 30

69 See Ćapeta, Tamara. "Multilingual law and judicial interpretation in the EU". *Croatian Yearbook of European Law and Policy,* Vol. 5 (2009), 1–17. http://www.cyelp.com/index.php/cyelp/article/view/88/62 (accessed February 13, 2014), 6, 7; This principle was for instance applied in paragraph 16 *Commission v UK* in which the Court held: "[A] comparative examination of the various language versions of the regulation does not enable a conclusion to be reached in favour of any of the arguments put forward and so no legal consequences

Convention on the Law of Treaties, which reads: "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."[70]

In order to avoid a legal interpretation that contradicts both the Vienna Convention and established case law, it is necessary to take the 'travaux préparatoires' into consideration. They are only to be considered as aids, and as a legal tool to determine the overall scope and objective of a specific regulation.[71] As Kokott points out, they "should be used as supplementary means of interpretation if [...] the meaning of a provision is still unclear."[72]

In its judgement[73] the ECJ makes use of the arguments brought forth by the AG and supports the interpretation of the EGC regarding what is a 'regulatory act'. Upon close analysis of Article 263 (4) the ECJ holds that the notion of 'act' is "any European Union act which produces binding legal effects. [...] That concept covers acts of general application, legislative or otherwise, and individual acts."[74] Therefore, under *Plaumann*, the standard that natural or legal persons who are affected by an act that does not have implementing measures and does not address them directly do not meet the necessary criterion of individual concern, is actually considered a relaxation of requirements, and makes the formerly difficult task of challenging acts much more possible.[75]

Kokott has provided interesting interpretations of the scope of the contested Regulation 1007/2009. Firstly, it is merely a legislative act and is, despite a possible broad interpretation of Article 263 (4) not an act that can be

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can be based on the terminology used" (Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland, Case 100/84, ECR 1177).

70 Vienna Convention on the Law of Treaties 1969, United Nations Treaty Series, Vol. 1155, p. 331.

71 See for example the Opinion of Advocate General Fennelly in Quelle Schickedanz v Oberfinanzdirektion Frankfurt am Main, Case C-80/96 [1997], ECR I-125 at para. 29. The practice of including the 'travaux préparatoires' into the interpretation of EU law is of rather recent origin, although it has now become a more common standard in EU legislature. In the context of the seal products trade ban, Sellheim (*supra* note 41) shows how significant an indicator for the tilt towards a certain direction the 'travaux préparatoires' for Regulation 1007/2009 are. Legally, Advocate General Kokott makes reference to the ECJ judgement in Pringle v Ireland in which the Court makes clear reference to the preparatory work of the Treaty of Maastricht as a component of its judgement (see Thomas Pringle v Government of Ireland, Case C-370/12 [2012], para. 135.

72 Kokott, *supra* note 64 at para. 32.

73 Judgment of the Court (Grand Chamber), 3 October 2013, Case C-583/11 P, Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union.

74 Ibid., at para. 56.

75 Ibid., at paras. 56, 57.

challenged before the Court. Secondly, although increasingly found in Union case law, 'travaux préparatoires' in the context of the contested regulation are not touched upon. It must also be noted that the appellants did not make use of this provision to argue their claim that a breach under Article 47 of the European Charter may have occurred.

As can be seen, the Court has limited the notion of 'direct concern' to only four of the appellants and has dismissed the claim that others upstream of the seal products trade, such as hunters, trappers and seal products producers, are affected by the regulation directly. This is based on the perception that they are not the addressees of the regulation, and therefore are legally unaffected. This claim is contested by the appellants. Kokott, on the other hand, pointed to several cases in which standing before the Court with regard to 'direct concern' occurred based on the factual, not legal effects of the applicants.[76] However, Kokott limited the scope of the factual effects to the addressees of a regulation and the nature of the factual effects and wrote: "Even if it is assumed that under the second variant of the fourth paragraph of Article 263 TFEU consideration must be given not only to the effects of a European Union act on an individual's legal situation, but also to its factual effects on the individual, such effects must be more than merely indirect."[77] Consequently, Kokott applied a slightly altered form of the *Plaumann* formula here and it becomes crucial to determine who the addressees of a contested Union act are. In line with the EGC's appraisal of the scope of contested Regulation 1007/2009, Kokott's analysis supports the view that it is not the seal hunters and seal products producers who are addressed by it, but merely those engaged in placing seal products on the Union market. Therefore, in order to make the concept of 'direct concern' valuable, its scope needs to be limited. Otherwise, the number of persons falling under this category could be expanded endlessly.[78] Ultimately, Kokott considered this ground for appeal unfounded.

This is an interesting interpretation of the concept and raises questions regarding the 'travaux préparatoires' concerning stakeholder involvement. If the legal scope of those directly concerned is limited with regard to standing before the Court, how can this be brought in reconciliation with stakeholder involvement? Why are stakeholders involved in the first place if they do not

76 See Kokott, *supra* note 64 at para. 71; In Spain v Lenzing, for example, no reference is made regarding the legal effect of a regulation on a company, but in recourse to Plaumann its effect on the company's situation on the market, i.e. factual effect (see for example Kingdom of Spain v Commission of the European Communities and Lenzing AG, Case C-525/04 [2007], ECR I-9972, para. 39).

77 Kokott, *supra* note 64 at para. 72.

78 Kokott, *supra* note 64 at paras. 74, 75.

have the capability to challenge a legal act even though possible adverse effects were recognised during the preparatory stages of the act?[79] It cannot be ascertained whether legal standing before the Court based on 'direct and individual concern' is in any way based on the 'travaux préparatoires' and the identified stakeholders. In fact, TFEU article 263 (4) refers to "*any* natural or legal person" [own emphasis]. While stakeholder involvement is a policy directive, no legal conclusions can be drawn here as this would have implications on "*any* natural or legal person" and their standing before the court.

Also in the context of individual concern and the applied *Plaumann* formula, Kokott, in line with the EGC, held that the appellants cannot be considered individually concerned by the contested regulation as it is formulated in a general manner and applies to any other trader in seal products. Therefore, the appellants cannot fall under the category of showing any peculiar characteristics that distinguish them from others. The same interpretation is given by the ECJ. Indeed, the approach chosen by Kokott and the ECJ is very formalistic and narrow. It does not leave room for challenging the contested regulation based on the *de facto* effects it has on those involved, one way or the other, in the seal products trade, and puts prime emphasis on the *de jure* interpretation of legal contexts. Interestingly, the narrow and formalistic approach chosen by the Court and the AG show that the overall context under which the contested regulation was drafted – animal welfare shortcomings in the commercial seal hunt – is *ad absurdum*. If the goal of the regulation was to improve animal welfare in the commercial seal hunt, the ECJ has proved that Regulation 1007/2009 has missed its purpose.[80] It can therefore not be considered an environmental measure and should be removed from any animal welfare / environment contexts.[81] If the environmental context is to be maintained, a narrow and formalistic approach as applied in the judgement and the Opinion cannot be justified, and aforementioned contextualization in recourse to the Aarhus Convention and the Convention on Biological Diversity are indeed justifiable. Moreover, the approach applied by the Court and the

79 See also Sellheim, *supra* note 41 at 425–427.

80 See also Sellheim, *supra* note 3; The panel of the Dispute Settlement Body under the WTO dispute settlement procedure found that it was indeed seal welfare and moral concerns by European citizens which served as the prime objective for the adoption of Regulation 1007/2009 (see World Trade Organization (WTO). *European Communities – Measures prohibiting the importation and marketing of Seal products - Reports of the Panel*. WT/DS400/R, WT/DS401/R. 25 November 2013, para. 7.401.)

81 At the time of writing in January 2014, all information concerning Regulation 1007/2009 and Commission Regulation 737/2010 is listed under the Commission's DG Environment – Animal Welfare (http://ec.europa.eu/environment/biodiversity/animal_welfare/seals/seal_hunting.htm, accessed January 13, 2015).

Advocate General is not intended to reflect upon the realities of the commercial sealing industry, especially in Canada, and the trade in seal products, but is treated as if applicable in other trade contexts. Therefore, the scope of impact that contested Regulation 1007/2009 has, due to its trade-restricting nature on a very specific and very limited group of people, is not of relevance from a formalistic and strictly legal perspective. Notwithstanding, can it be argued that there is a 'direct and individual concern' for the appellants? In order to establish an empirical linkage, the following section will deal with effects of Regulation 1007/2009 on the commercial sealing industry in Newfoundland, Canada.

5 The Empirical Linkage of an EU Law and the Newfoundland Sealing Industry

In order to understand the implications of the ban on sealing communities in Canada and to empirically establish a 'direct and individual concern', it is important to not look at seal hunters themselves, but at those working in the sealing industry in Newfoundland. In the public debates surrounding seal hunting and the sealing industry, two primary subjects prevail: the seals themselves and the seal hunters. While the welfare of seals is the focus of attention for those wishing to abandon the seal hunt completely, those in support of the hunt often refer to the economic necessity for seal hunters and communities. However, the chain of seal products does not end with the hunt. It ends with the placement of final products on the market. Interestingly, industry workers are, by and large, not considered.

Results that document the direct and individual concern of Newfoundland workers regarding the European seal ban stem from two field trips in April and November 2013 respectively, in which the author served as a participant observer in a seal processing plant in South Dildo, southern Newfoundland. During the 'wet season' in April 2013, i.e. the coming in of seal pelts (skin and fat) and flippers from the ongoing seal hunt, interview partners were chosen from the (non-) permanent workers that participated in the processing. Interview partners were selected based on age and gender. Semi-structured interviews were conducted in order to gain an overview of possible trends within different gender and age groups.

The November 2013 results stem from participant observation in the plant. While working and living with the workers, except for one office worker and one security guard, each employee of the plant was interviewed face-to-face

on a survey basis. That means that each worker was asked the same questions in order to gain a streamlined understanding of the European ban vis-à-vis the workers' lives. To assess whether the European ban is of 'concern' to the workers, a broad understanding of the term is applied. This means that not only empirical and direct causal effects of the ban are taken into consideration, but also how the plant workers perceive the role of the EU ban.

4.1. *The Setting*

The Newfoundland sealing industry has shrunken dramatically within the last few years. At the time of writing there are two seal processing plants left in the province: One in Fleur-de-Lys on the north shore of the island, one in South Dildo on the Avalon Peninsula, the south east side of the island. The former produces raw products, permanently employs 16 people and is run by the *North East Coast Sealers Cooperative*. Raw seal products are transported from Fleur-de-Lys to the plant in South Dildo for further processing. The plant in South Dildo is run by *Carino Ltd.*, a sub-unit of the Norwegian company *GC Rieber Skinn*, and employs 38 people permanently. Each spring during the 'wet season' an additional 60–70 are hired to help in the processing of newly incoming seal products.

Given the difficulties in the trade environment for seal products, another facility located in Catalina, which provided 16 permanent jobs[82] and which was operated by *NuTan Furs*, was forced to close down in 2012.[83] Although *NuTan* and *Carino* were direct business competitors, a merger between the two companies occurred when the plant shut down. In order to provide as many employees of the *NuTan* facility as possible with job opportunities, *Carino* took over the contracts of six former workers.

The plant in South Dildo was constructed in 1947 as a plant for the processing of whale oil and served as such until 1972. In 1957 *Carino Ltd.* was established in Halifax, Nova Scotia, and the company started to produce seal skins at the facility in South Dildo in 1969. With the demise of the whaling industry the plant was increasingly used for the processing of seal products and has done so

82 According to *Carino*'s CEO and former *NuTan* president Dion Dakins, in the peak of production in 2005/06 the Catalina plant provided permanent employment for 44 people (Dion Dakins, personal communication, November 2013).

83 No official documentation on the closing process is available. See, however, CBC, "NuTan Furs is closing its seal tannery in Catalina", March 29, 2012, The Fisheries Broadcast, http://www.cbc.ca/fisheriesbroadcast/2012/03/29/nutan-furs-is-closing-its-seal-tannery-in-catalina/ (accessed February 5, 2014).

ever since.[84] The plant was expanded in 2002 to include a larger tannery with equipment also stemming from the *NuTan* facility in Catalina after that facility was shut down.[85]

4.2. *Characteristics of the Carino Plant Workers*[86]

During field work, 38 people were employed in the plant in South Dildo. The median age of the workers is 48 years with 12 women and 26 men employed as of November 2013. The youngest permanent employee is 28 years old while the oldest is 65. On average 77.3% of a plant worker's family's income is dependent on the work in the plant with a statistical average of 2.55 dependents per plant worker. Not all interview partners enjoyed year-round employment, but their contracts are directly dependent on the boom-and-bust-cycles the sealing industry undergoes. In case of unemployment, the Canadian social security system protects the workers from poverty. On average, however, interview partners stated that 91.1% of the annual income is self-generated and not based on unemployment or other social benefits.

The length of employment in the sealing industry, i.e. in the processing sector, varied greatly among the workers and no gender-based differences could be found. The most recent worker started as shortly as two months before the survey, while the longest employee had been working in the plant for 40 years. The average length of employment was 10.41 consecutive years. It must be noted, however, that even if employment in the *Carino* plant had started rather recently, many worked in fish or crab processing plants prior to joining the sealing sector. Several factors have have made the *Carino* plant an attractive place to work: 1. the lack of other means of employment in their home regions; 2. close proximity to their homes; 3. Good working times and conditions[87]; 4. year-round employment. All interview partners indicated that their financial situation had improved since joining the sealing sector and that, provided that the markets for seal products stabilise, they would like to stay in the industry.

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84 Dickinson, Anthony D. and Chesley W. Sanger. *Twentieth-Century Shore-Station Whaling in Newfoundland and Labrador.* Montreal: McGill Queens University Press, 2005, 134-141.

85 Carino Company Ltd. 2002. Registration Form. http://www.env.gov.nl.ca/env/env_assessment/projects/Y2002/1022/south_dildo_carino_tannery.pdf> (accessed February 13, 2014); Field notes, November 2013.

86 The results stem from the survey carried out in the *Carino* plant and from face-to-face interviews with each worker.

87 This is especially relevant for younger workers that have small children. A normal working day at the plant starts at 7 a.m. and ends at 3 p.m.

In case the plant / industry were to shut down completely, 22 interview partners indicated that they would have employment alternatives under worse conditions. Of these, eight would have to permanently relocate to find work or, as another additional four interview partners showed, would have to commute very long distances.[88] A major contributor to changes in the working conditions of the plant and therefore perceived as a direct threat to family and community integrity is the EU seal products trade ban. Contrary to the Russian ban, which interviewees perceived as negative, most interview partners ascribed to the European ban a direct effect on the working capabilities of the *Carino* plant.[89] Consequently, increased employment, living standards and quality of life, which the workers consider directly connected to the sealing sector, are adversely affected by the EU ban. However, while most respondents did not link the ban directly to their current financial situations due to their permanent employment, 9 indicated that due to their seasonal, demand-based work, the decrease of hunted seals and the subsequent decrease in *Carino*'s purchase of seal pelts affected their financial situation adversely. Yet, an opening of markets in China is considered to have a positively affected the whole region.

4.3. *The EU Ban and its 'Direct Concern'*

Looking at the arguments brought forth both by the AG and the ECJ, a clear cut legal and thus argumentative distinction is being drawn between 'direct and individual concern'. This distinction is difficult to apply in an empirical context. Both the ECJ and the AG have held that those engaged in placing seal products on the market are addressees of Regulation 1007/2009 and are therefore considered 'directly concerned' by it. This, however, applies to the business level of the applicants. To clarify, *NuTan Furs* was one of the applicants under case C-583/11 P, which was filed on 21 November 2011 and which established the appeal case of the Order of the General Court.[90] During the course of the appeal, in March 2012 *NuTan Furs* announced that it would not buy seal pelts due to the uncertain market conditions for seal products. Consequently, with the continuing adversarial trade environment, the plant did not re-open and has remained closed. *NuTan* as a company with a legal status in Canada was

88 As in other communities in Newfoundland, a major employer for those leaving the communities is situated in the 'main land' in Fort McMurray where a constant workforce for work in the tar sands is sought for.

89 With regard to the *Carino* plant, two workers ascribed the ban a positive effect as more pelts are processed since the shut-down of *NuTan*.

90 Appeal case, *supra* note 63.

taken over by *Carino Ltd.* in the same year. Ultimately, the legal status of *NuTan* changed dramatically as a direct result of the European trade ban.

However, it is difficult to establish a direct cause-and-effect relationship between the plant's closure, the company's dissolution and the European ban. While this may be the case, an interesting combination of legal and empirical effects arises here: firstly, *NuTan* is an addressee of the ban and therefore enjoys legal standing before the Court. The ban shut down the European marketing of seal products stemming from *NuTan*. Secondly, the ban has created a precedent and has become an important element that contributes to the political 'greening' of the European Union. Other countries or customs unions are now more prone to follow suit in order to apply equal 'environmental standards' as the EU. This has happened in the customs union of Russia, Belarus and Kazakhstan in 2011 as well as in Taiwan in 2013.[91] The influential role the wording of the EU ban has played and the associated indirect normative effect of the ban can best be exemplified when looking at ban of the Russian customs union: Here, both products from indigenous hunts and products that are imported as personal use and on a non-profit basis are allowed to enter the customs union.[92]

With an on-going process that would lead to further closings of international markets, and given that the legal proceedings before the ECJ and the WTO have been decided in favour of the EU, it is likely that the last remaining plant / company, *Carino Ltd.*, may eventually have to close its doors permanently. Given the adverse trade environment, *Carino*'s CEO Dion Dakins wonders "why we are even here. The Russian ban effectively closed the facility [in Catalina]."[93]

4.4. *Establishing 'Individual Concern' for Newfoundland's Seal Plant Workers*

Looking at the above shows how each plant worker is individually concerned by the decisions made in Brussels and by the judgements of the European

91 See Sellheim, *supra* note 51.

92 Евразийская экономическая комиссия (ЕЭК) (Eurasian Economic Commission), *Единый перечень товаров, к которым применяются запреты или ограничения на ввоз или вывоз государствами – членами Таможенного союза в рамках Евразийского экономического сообщества в торговле с третьими странами,* (*List of goods subject to bans or restrictions for Member States of the Customs Union of the Eurasian Economic Community on trade with third countries*), 16 августа 2012 г. № 134, (accessed February 10, 2014) at Art. 1.8 (1) and (2). See also Sellheim *supra* note 51.

93 Dion Dakins, personal communication, November 2013.

Court of Justice. This, however, does not provide legal standing before the courts and shows the deficiency of real-life legal applications.

4.4.1. 'Closed Group' Claim

Two elements, both on a business and individual level, fall into place that do not suffice for *locus standi,* but do empirically provide evidence of an 'individual concern'. As stated above, the Court argued that individual concern for the applicants could not be established since the wording was formulated in a general manner that may be relevant for all traders involved in the trade in seal products. Therefore, the four applicants that were directly concerned due to their engagement in the placing of seal products on the European market could not establish that they were individually affected. Taking into account the factual situation of the trade in seal products, however, the picture changes: since the applicants were the only companies involved in the seal products trade, they were individually concerned. In the legal proceedings before the Court this fact has not played a role at the time of writing. This is surprising, because the notion of a 'limited number' that is based on *de facto* circumstances was established in *Industrie des Poudres Sphériques v Council.*[94]

Notwithstanding, the concept of a 'closed group' as established in International Fruit can empirically be supported, although not legally supportable. Even if the formulation in the regulation is interpreted very generally, empirically very few fur traders are *de facto* engaged in the trade in seal products.[95] In essence, Regulation 1007/2009 affects only a very finite group of actors that are involved in the trade in seal products. Therefore it could be argued that, based on *CAM v Commission*, a closed group of actors is affected by the ban, and this could provide *locus standi* before the Court. This, however, is premature as it merely provides standing if "the defendant institution was obliged to take into account the effect of the disputed act on members of the class concerned."[96] Moreover, as in *Buralux and Others v Council*, the objective special circumstances of the fur traders "do not constitute a limited class

94 Cf. *supra* note 20.

95 In 2013 Canadian and Norwegian seal skins are traded by *GC Rieber Skinn* and one German fur trader who wishes to remain anonymous (Sellheim, Nikolas, Field notes, November 2013). Namibian seal skins are purchased by one fur trader while *Great Greenland A/S* constitutes the only skin trader within Greenland. The *North Atlantic Fur Group* constitutes the main international trader in Greenlandic and Canadian seal garments (see also COWI. *Study on implementing measures for trade in seal products – Final report*. Copenhagen: COWI, 2010, 42–45).

96 Arnull, *supra* note 9 at 79.

of identified or identifiable operators who are particularly concerned by that provision on account of their special situation."[97] Since the contested regulation does not make use of a formulation which references the factual situation of a 'closed group' of actors, and the Parliament and Council are not legally bound to take adverse effects into consideration, this claim cannot stand.

However, as established in *Commission v Nederlandse Antillen*,[98] even if the above paragraph had been established, a second requirement to obtain *locus standi* before the Court based on the notion of 'closed group' is that those affected do carry the burden of proof still is required. In other words, even if factual effects exist, they must be brought forth and substantiated with the claim that these effects differentiate them from all other persons.[99]

4.4.2. Individual Effects

In a judgement of 25 April 2013 the EGC makes exclusive reference to evidence of an adverse effect. Since the appellants have not provided such evidence, the mere claim of an adverse effect on the right to property cannot alone provide standing before the Court. This is also true given the legal exemption of Inuit from any trade restrictive provisions.[100]

The case of *NuTan* becomes a very difficult case study that needs examining with regard to individual effect. Although *NuTan* is an addressee of Regulation 1007/2009 as recognised by the Court, it cannot be considered individually affected, because the formulation is held in a general manner and the legal status of the company does not change. But here 'direct and individual concern' merge. As shown above, the company eventually employed 16 people and was therefore a very small-scale enterprise. Since a change in the trade environment for seal products affects the economic capabilities of the company due to the small and highly competitive size of the seal business combined with the small size of the company, these changes directly and individually affect the company's integrity and economic sustainability. Furthermore, the merger between *NuTan* and *Carino* and the decision to move production to the facilities in South Dildo was facilitated by the closer proximity of South

97 Buralux SA, Satrod SA and Ourry SA v Council of the European Union, Case C-209/94 P [1996], ECR I-615 at 'Summary'. See also paras. 26-29.

98 Commission of the European Communities, French Republic and Council of the European Union v Nederlandse Antillen and Kingdom of Spain Case, C-142/00 P[2003], ECR I-3490.

99 Commission v Nederlandse Antillen supra note 100 at para. 76.

100 Inuit Tapiriit Kanatami and Others v European Commission, European Parliament and Council of the European Union, Case T-526/10 [2013], para. 108.

Dildo to the province's capital St. John's.[101] Therefore it can be argued that *NuTan*'s position within the context of seal products trade is peculiar and is individually affected. Interestingly, the 'travaux préparatoires' that led to the adoption of the ban do not take into consideration individual effects on workers in the industry. The impact assessment conducted prior to adoption merely mentioned that coastal communities in seal hunting areas would be adversely affected.[102]

Individual concerns for plant workers are best exemplified by three workers from the *Carino* plant that used to work in *NuTan*. Ray, Herman and Kevin[103] are middle-aged men who have been engaged in the sealing industry for at least 15 years. They have permanent residences in Catalina where their families still live.[104]

Another major employer in the region is the *Ocean Choice International* shrimp plant in Port Union, which is about 3 km from Catalina. The plant employed around 170 people and was shut down in 2011 followed by the closure of the *NuTan* seal plant in 2012. The community of Catalina and the surrounding communities were struck hard with fallout closures of other businesses including the local convenience store. Consequently, local or regional employment opportunities were sparse. Since *NuTan* and *Carino* merged in 2012, former employees of *NuTan* were now confronted with two basic choices: 1. remain in their home community and run a very high risk of unemployment; 2. start work in the *Carino* plant, which is located around 250 km away. In order to maintain their livelihoods, be able to pay for their children's education and to not experience unemployment, Ray, Herman and Kevin decided to start work in the *Carino* plant.[105]

Altogether six workers of *NuTan* at the time of writing work in the *Carino* plant. While three have resettled to (South) Dildo, Ray, Herman and Kevin commute between their home and work. During the week they stay in a company-rented house in Dildo. The interior is simple and looks rather like a holiday cottage than living quarters. All three share one bathroom, but each has his own room. After work in the plant, which often lasts from 7 a.m. to 5 p.m.[106] they return to their house, drink beer, eat and watch TV. On the weekends, that

101 Dion Dakins, personal communication, November 2013.
102 COWI, *supra* note 95 at 116.
103 All names are changed for the protection of informants. The author lived with these three men throughout his fieldwork trip in November 2013.
104 Field notes, November 2013
105 Field notes, November 2013
106 "What else should we do"? (Field notes, November 2013)

is after work on Fridays, they return to Catalina to see their families and friends and to engage in regular activities.[107] They leave for Dildo on Monday mornings at 3 a.m. to reach the plant in time for work.[108]

Although all three are happy that they have permanent work and are able to pay for their expenses, they are still frustrated about the impact that outside forces, especially the European Union seal products ban, is having on their lives. Within Newfoundland's coastal communities family and other social ties are very strong. Therefore, living away from their homes leaves the men feeling 'empty' and the work in the plant is the only element of their everyday lives that provides them with a sense of purpose during the week.[109]

Notwithstanding, it is interesting to note that the difficult situation these three men live in from day to day is overcome through hospitality and friendliness. As Ray noted, "[t]hey [the *Carino* plant workers] make you feel welcome and that made the transition from Catalina to Dildo much easier."[110] This is also reflected in the level of cooperation and interaction between the men who not only share every meal, but who also share laughter, support and good will with each other. As in the seal hunt, sharing among the workers and especially among Ray, Herman and Kevin is an overarching feature.[111] Although each one of them is responsible for an equal share of the daily grocery expenses,[112] each also contributes something for the enjoyment of everyone such as special foods or beer to share. To this end, conflict resolution occurs calmly and with the overall goal to solve disputes and not to facilitate long-term disagreements in order to not to aggravate a difficult situation.[113]

4.4.3. Concerns of Individuals

As the above has shown Ray, Herman and Kevin are greatly concerned about the developments in the European Union and the status of the EU's ban on trade in commercial seal products. It must therefore be empirically argued

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107 Ray, for example, is a freelance carpenter.

108 Ray, Herman, Kevin, personal communication, November 2013; Field notes, November 2013

109 Field notes, November 2013;.

110 Ray, personal communication, November 7, 2013

111 See also Sellheim, Nikolas. "Living with 'Barbarians' – Within the commercial sealing industry." In *Proceedings of the 7th NRF Open Assembly,* August 23, Akureyri, Iceland. Akureyri: Northern Research Forum, 2013. http://www.nrf.is/images/stories/Akureyri/nikolas_sellheim.pdf (accessed February 13, 2014).

112 Compared to the European Union countries, expenses for groceries in Newfoundland are very high.

113 Field notes, November 2013

that although the ban itself is a measure that serves the harmonization of the EU's internal market, its effects on the small trade environment of seal products, are felt outside of its legal scope. For the plant workers who are currently employed in the *Carino* plant, the judgements of the European courts are regarded as judicial activism that underlines ongoing political trends within the EU.[114] Although knowledge of the EU and its institutions is sparse among the plant workers, it is predominantly believed that it is 'the Europeans' who are against the seal hunt and the sealing industry and who "don't care if we lose our jobs."[115]

The fear of losing the last remaining jobs for an aging workforce in the sealing industry makes workers especially interested in European developments. Although the European ban is certainly not the only element that puts stress on the sealing industry, the workers believe that lifting the ban would be very beneficial for their families and for the region. Local workers believe that their personal freedom and life quality will be significantly increased if the European ban and therefore the global discursive and political environment concerning the seal hunt and the sealing industry is changed towards an acceptance of these activities as a legitimate means of occupation.[116]

6 Conclusion

As the European case law has shown, 'direct and individual concern' is not considered through an empirical lens, and the challenge of this concept can consequently not be evidence-based. Instead it must be argued through a formalistic legal approach. Although the concept has appeared in numerous cases, it is especially found in the seal cases through the role of the workers and the nature of the sealing industry, which do not allow for a reconciliation of the law with its tangible effects. Although a direct cause-and-effect chain cannot be established, the notion of 'direct and individual concern' in an empirical context cannot be dismissed.

As the example of the plant workers has shown, their lives are directly affected by any change in the environment for trade in seal products. In addition, the small size of the companies that employ them and the low level of resiliency of these companies combined with a low level of diversity in the

114 Field notes, April 2013.
115 Plant worker, personal communication, 25 April 2013
116 Field notes, November 2013.

local and regional employment sectors, establishes an empirical direct concern. The overall nature of the trade in seal products makes the effects of the ban peculiar to those companies and individuals involved, albeit the fact that the legislative act that has established the seal products trade ban is formulated in a general manner and could apply to any other trader.

Given the established case law, the claim of judicial activism cannot be supported. Although it cannot be ascertained what stance the individual judges hold toward the seal hunt and the industry, the case law provides a solid ground for legal reasoning and no political or activist strains can be found. Instead, the judges have shown a very thorough interpretation of EU law and applied a narrow and formalistic approach to the concept of 'direct and individual concern'. Although this has in essence led to the neglect of empirical evidence that establishes a 'direct and individual concern' for the workers that are employed in companies identified as addressees of the contested regulation, it must be considered that the applicants have also failed to provide sufficient empirical and legal leverage to support the claim of Regulation 1007/2009 being of 'direct and individual concern' to them.

However, as this article has shown, in this case legal and empirical findings yield results that stand in stark contrast to one another. Although the reasoning of the European courts is legally sound, the factual situation of the workers in the sealing industry does not change. The combination of an adverse political environment for seal hunting and associated pressure on the sealing industry with an inherent neglect of the interests of the workers in the debates, especially in the European Union, increase the difficulties for and 'emptiness' of the plant workers.

5. Morality, practice and economy in a commercial sealing community

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Morality, Practice, and Economy in a Commercial Sealing Community

Nikolas Sellheim

Abstract. In small social groups dependent on specific resources, it is difficult to separate actions, moral understandings, and the resource itself. It is the response to the affordances of a given environment that shapes the moral framework of social interaction. Therefore, changes in the market sphere also impact the conscious and unconscious actions relating to the affordances of the environment, as well as a community's socioeconomic values. It is argued that moral relativism is justified when it is approached through an "affordance lens," meaning that if the role and relevance of a resource for a community is not understood, its moral environment cannot be understood either. With ethnographic data stemming from the 2013 sealing season in a fishing-and-sealing community in northern Newfoundland, this interplay of morality, practices, and socioeconomic values is documented.

Introduction

The moral relativistic claims have been widely criticized and the statement that "judgements issued from within one culture to another are therefore necessarily meaningless" (Laidlaw 2014:24) does not withstand the scrutiny of intellectual deliberation. Bernard Williams argued,

> for standard relativism . . . it is always too early or too late. It is too early, when the parties have no contact with each other, and neither can think of itself as "we" and the other as "they." It is too late, when they have encountered one another: the moment that they have done so, there is a new "we" to be negotiated (Williams 2007:69).

This is undoubtedly true for peoples within an explorer–explored dichotomy but only partly relates to traditional societies within a larger societal framework for which resource affordances shape the moral and socioeconomic environment.

In order to understand a specific set of moral values it is necessary to understand the moral environment in which it operates. This article examines how the seal hunt as part of the affordances of the sea influences the moral structure of a small fishing-and-sealing community, exemplified by the community of Woodstock, Newfoundland, Canada. It further shows that conscious and unconscious actions and practices on the sealing vessel itself and within the community are directly linked to the overarching moral determinant of being able to provide for the community. The social and economic value of the seal hunt is discussed with a direct reference to the interaction between community and market spheres of exchange (Gudeman 2001), engaging in a wider discussion on water as a "theory machine" (Galison 2003) and change—in this case economic. This article provides an insight into the socioeconomic environment of an activity that has been largely inaccessible for outsiders. The lack of knowledge and the predetermined stances towards the hunt based on rather outdated hunting conditions, and the inherent neglect for the well-being of the sealers and their

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communities (Sellheim 2013), call for extensive ethnographic analysis.

Methodology

The results of the analysis are based on distant observation and participant observation in multitemporal fieldwork. The collected data has been screened through the lens of affordances, values, morality, and economy. Gibson's theory of affordance (Gibson 1979:127) has undergone several revisions and has contributed to a lively academic debate within anthropology. While the concept itself has not been altered, it has nevertheless been subject to extension or redirection (see for example Chemero 2003; Keane 2014). This article contributes to this debate by linking the affordances of the seal as part of the marine ecosystem to the moral and value-based landscape in a remote, resource-based community, exemplified by the fishing and commercial sealing community of Woodstock, Newfoundland. The close linkage between affordances and the moral environment allows for a "segmented moral relativism." Segmented moral relativism implies that the morality surrounding one particular element of human life, such as the seal, can only be understood when understanding its particular affordances. The repercussions of the affordance on the social fabric thus constitute one segment of an overarching morality. No generalizing relativistic conclusions in the Boasian sense can therefore be drawn on the morality of a given society or community.

The commercial seal hunt has thus far not been linked with an anthropology of morality and accompanying debates on affordances, values, and the interplay of the community and the market spheres. The community of Woodstock therefore serves as a first attempt to embed the commercial seal hunt in a framework of anthropological inquiry. This is particularly relevant as in the commercial seal hunt several spheres of theoretical approaches influence one another: while Gibson's affordance theory constitutes the theoretical basis of the analysis, an anthropology of morality in a seal-hunting community is supplemented by an anthropology of economy (Gudeman 2001). It is shown how market fluctuations alter morals and values in the community while certain affordances themselves do not change. Given the limited scope of the paper, however, a concluding discussion on the topics raised is not possible and further research is needed.

Distant Observation

When I began research in 2011, my contacts in Newfoundland were nonexistent. In order to empirically understand the seal hunt and the industry, the organization to contact was the Canadian Sealers' Association (CSA) so as to establish a sustainable exchange of information and learn about the hunt and the industry from the sealers' perspective.

The CSA, as the spearhead of the sealing industry, has been the target of repeated verbal attacks and threats, making trust an important issue. Upon contact, the CSA's Director asked for further information on the type and size of the institution I work for, telephone number, and address before any further information would be given (CSA Director, personal communication 2011). Upon assurance that I did not intend to harm the CSA, its employees, or the sealers, contact was established and maintained via phone calls and email exchanges throughout 2012 until today. These initial contacts with the sealing industry allowed for a first consideration of the seal hunt beyond economics. Additionally, a week-long stay in Iqaluit, Canada, in June 2012 for a gathering of Canadian indigenous and nonindigenous hunters, trappers, and sealers allowed for personal contacts and trust building.

Multitemporal Fieldwork

The importance of returning to the field cannot be underestimated for the deepening of acquired knowledge (Howell and Talle 2011:3). Therefore, fieldwork was conducted on two occasions and on several locations in 2013 as "follow-up visits of samples" (Talle 2011:73). The participation in a full season of the seal hunt occurred within three weeks during April 2013 on the sealing-vessel *Steff&Tahn*, sailing from Woodstock, Newfoundland. Without shore leave I participated in the complete hunting season, including preparation and processing on land. Three weeks in April and May 2013 were spent travelling to other sealing communities in northern Newfoundland and to the seal-processing industry on the Avalon Peninsula. Return to the sealing industry, as well as several sealing communities, occurred throughout November 2013. Sustainable postfieldwork information exchange with the sealers, their families, the CSA, and the sealing industry is ongoing. As observers in the past used their onboard information on several occasions to paint a negative picture of the seal hunt, finding a vessel to take me on board proved therefore to be difficult. Through the CSA's continuous insurance prior to the fieldwork that I was not a threat to the sealing industry and due to a phone call with a well-known and respected sealer from La Scie, Newfoundland (La Scie sealer, personal communication 2013), a rather young skipper of 38 years accepted me—after long hesitation—as a participant observer on his vessel the *Steff&Tahn* (Fig. 1).

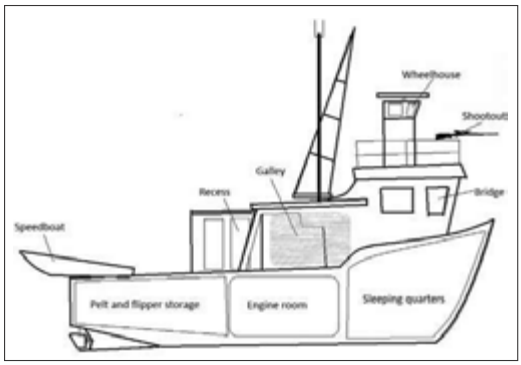

Figure 1. Sketch of the *Steff&Tahn*. Illustration by Nikolas Sellheim.

Steff&Tahn is a vessel of 45 ft (13.7 m) in length with an approximate width of 15 ft (4.6 m). Most of the space in the aft part of the vessel is used for storage, limiting living quarters to approximately 11 m^2. The hunt lasted for approximately 12 days, seven of which were active hunting days. Following the sea ice to find the seals, the boat, often zigzagging through the ice, covered a distance of around 800 nautical miles (1,480 km) towards the southern coast of Labrador and touching the Strait of Belle Isle (Fig. 2).

The regulations under which the seal hunt falls require the sealing vessels to report every night to the Coast Guard—both on their position and on the number of taken seals per day. Each boat is allocated a daily catch of 400 seals with a maximum limit of seal pelts, which was not to exceed 2,000 for the *Steff&Tahn*. Upon return to port, 1,987 pelts were landed.

In Woodstock, the crew of six greeted me with hesitation, yet welcomingly. Conversely, my host in Woodstock, the skipper's father—a retired fisherman and sealer—and mother greeted me very openly. I quickly became known in the community as the "European who wants to go sealing." On board, the crew could not understand why an outsider voluntarily joined a sealing vessel, and the subliminal mistrust towards me and my intentions was broken after I thoroughly explained my research and actively participated in the work of a deckhand (i.e., striking, bleeding, and pelting seals).

My participation in the hunt was not bound to any conditions or rules. Although in the beginning I was unable to understand the skipper due to his traditional Newfoundland way of speaking, I quickly understood I was not forced to anything that I did not want, nor was I excluded from anything that I wanted to participate in. Control over my role as a participant observer was therefore in my hands alone. The Woodstockers, as well as the crew, were happy about that fact that somebody travels "all the way from Europe and bothers to come to have a look."

Interview participants were chosen based on their knowledge and experience within the seal hunt. This occurred in an unstructured manner with the crew of the *Steff&Tahn* and in a semistructured manner on land. Here, interview participants from the community, from the sealing industry, and academia were chosen based on their expertise in order to draw a more representative picture. To assess the significance of the hunt for Woodstock directly, semistructured, and nonrepresentative interviews occurred with Woodstockers of both sexes and of mixed age groups. Given the small size of the community, findings allow for inductive conclusions.

Canada's Commercial Seal Hunt

The Harp Seal

The Canadian commercial seal hunt targets the harp seal (*Pagophilus groenlandicus*) of between three weeks to 14 months of age, the so-called "beaters," of the Western North Atlantic stock that whelps on the Labrador Current (Caldow 1989:14; Lavigne 2009:542, 543). The International Union for the Conservation of Nature (IUCN) lists the harp seal under "Least Concern," with an estimated population of 5.9 million animals in 2005 and an increasing population trend; however, climate change poses a long-term threat (Kovacs 2008). Most recent estimates indicate the harp seal population to be at 9.6 million in 2010 (DFO 2011; NOAA 2012:105).

The current commercial seal hunt is conducted when the winter ice has broken up and the seals have reached the "Front," the waters northeast of Newfoundland. Since the transition from the "beater" to the "bedlamer" stage, when the pup's silvery fur is turning browner, occurs very quickly, the seal hunt is of very short duration and lasts only for 3–4 weeks in April.

Literature Review

Accounts of the commercial seal hunt both in the past and present are limited and predominantly descriptive without considering sealing communities.

The first written account was given by George Allan England in his book *Vikings of the Ice* in 1924. This book has been reprinted four times under the title *The Greatest Hunt in the World* (England 1924). England colorfully and vividly describes his experiences during a six-week seal hunt in the Front in 1922, conveying

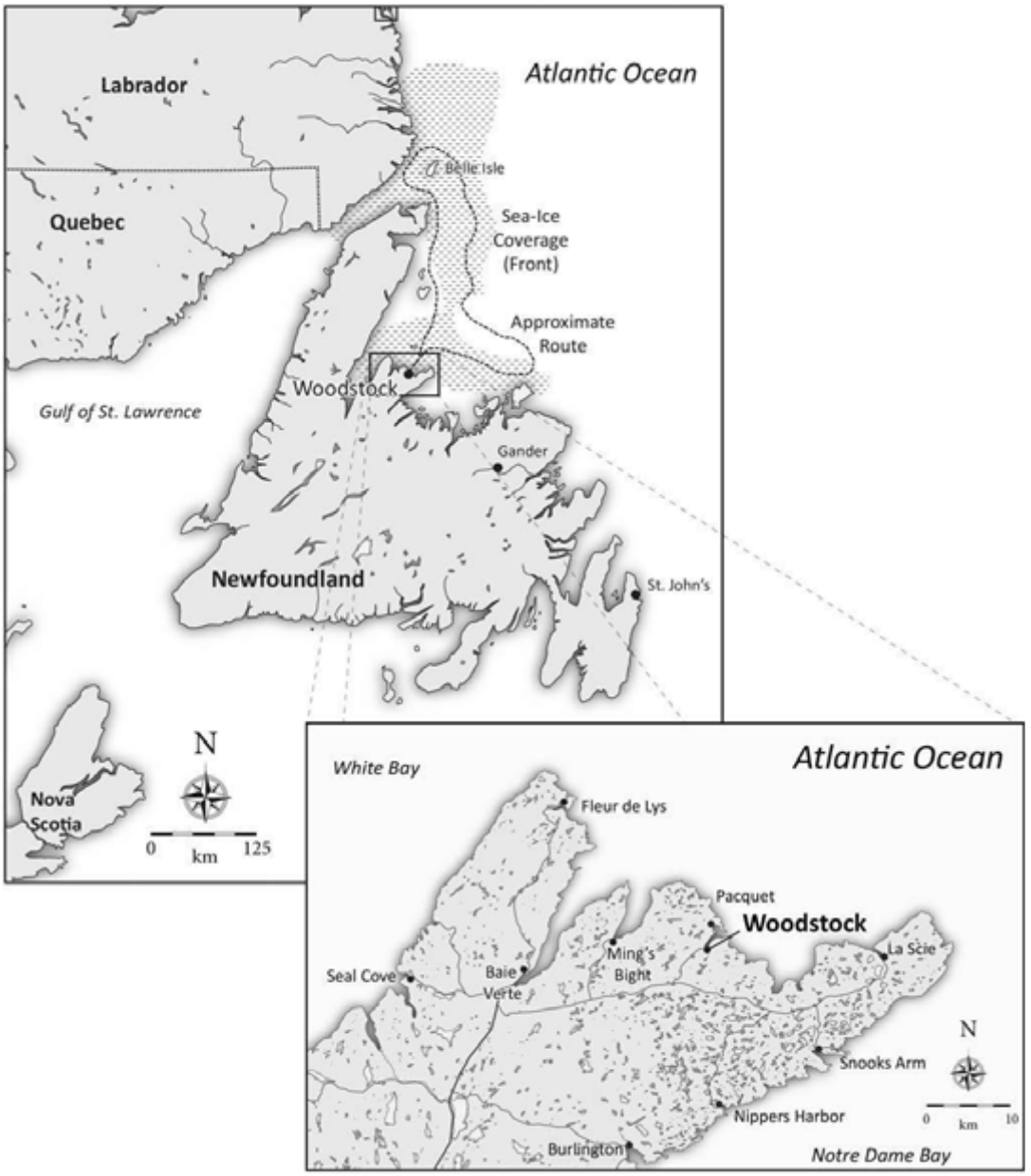

Figure 2. Location of approximate sailing route of the *Steff&Tahn* and the location of Woodstock in Newfoundland.

the hardships, dangers, and crude reality of the hunt to the reader.

Major W. Howe Greene's (1933) *The Wooden Walls among the Ice Floes* paints a picture that presents by and large a "clean" image of the seal hunt, the sealers, and life on board. It can be considered a counterpart to England's graphic account as the hunt, the sealers,

and the landscapes are described in an embellished manner.

In 1973, Farley Mowat published a rather prosaic account of the late 19th- and early 20th-century seal hunt. His book *Wake of the Great Sealers* is accompanied by drawings and paintings of the artist David Blackwood to create a vivid picture of the hunt and hunting conditions (Mowat and Blackwood 1973).

CBC journalist Jim Winter engaged in the Newfoundland seal hunt in 1977, describing the conditions of the hunt and on board. His work made reference to ongoing protests by Greenpeace on the ice, as well as his personal feelings toward killing seals and spending time onboard the vessel. His documentary *Berthed Swiler* was reproduced on CD in 1999 (Winter 1999).

In 1980, *La grande mouvée, l'histoire des phoques et des hommes dans le golfe du Saint-Laurent* was published by Pol Chantraine (1980) and translated into English in the same year. Trained as a journalist, Chaintraine provided a personal depiction of the hunt in the Magdalen Islands and a history of the hunt in the region. Yet, it cannot be ascertained which year he participated in the seal hunt.

It was not until 1983 that an ethnographic depiction of the seal hunt was available, when Guy Wright's master's thesis in anthropology (Wright 1983) was turned into the popularized book *Sons & Seals* (Wright 1984). Wright describes his experiences in the 1979 seal hunt on the *Hector* and provides an ethnography of the sealing crew.

Michael J. Dwyer's *Over the Side, Mickey* was published in 1998. Written from Dwyer's perspective, the drastic conditions in which the seal hunt took place in 1997 paint a very human picture of the hunt, making the author conclude that "I'll never do it again" (Dwyer 1998:185).

The most recent in situ description of the commercial seal hunt appeared in 2010, based on the diary of Newfoundland artist George Noseworthy's participation in the 1970 seal hunt. His diary and the difficult situations he encountered are reprinted and accompanied by his paintings, giving a visual impression of the hunt (Noseworthy 2010).

Newfoundland's History of Commercial Sealing

Newfoundland's archaic settlers and later on the Beothuk made use of abundant marine resources (Caldow 1989:21, 22; Kristensen and Curtis 2012:80, 81; Rankin 2008:12; Tuck 1998). With the arrival of European settlers in the early 1500s, abundant marine resources such as cod, seals, and whales were heavily exploited by European vessels. This provided the colony, as well as the European continent, with valuable resources, leading to permanent settlement of Newfoundland in the first half of the 17th century (Pope 2008:25, 33; Ryan 1994:25).

As of 1723, seal oil was officially documented as a resource and the northern outports of Newfoundland had incorporated the emerging sealing industry into their local economies (Ryan 1994:50, 51). In 1793, a merchant sent the first two vessels from St. John's to hunt seals commercially, followed by four more in 1796 (Coleman 1949:42; Dunn 1977:1; Ryan 1994:55; Wright 1984:10). With the introduction of larger steam vessels, the importance of the sealing industry rose dramatically until the mid-18th century, when one-third of Newfoundland's economy and about one-fourth of the island's exports were based on the seal hunt (Busch 1985:50; Caldow 1989:30; Ryan 1994:98). During the 18th century, Newfoundland enacted its first law to protect seal stocks from overhunting. Moral considerations within these laws were, by and large, referring to the wastefulness of the seal hunts (Ryan 1994:113–117, 165, 182) linking the seal as an important resource with the limits of the stocks.

With the introduction of iron steamers in the early 20th century, the seal hunt had already passed its zenith. Due to overhunting, seal stocks began to dwindle while innovations in fossil fuels had reduced the importance of seal oil. During the First World War many steamers were used in the service of Britain and the seal-rich waters of Newfoundland triggered the interests of Norwegian merchants, while Newfoundland's sealing industry experienced steady decline (Barry 2005:15; Caldow 1989:52; Coleman 1949:44).

After the Second World War, the introduction of outboard engines allowed small communities to engage in the hunt with small vessels. But with the further decline of the industry and with Newfoundland joining Canada in 1949, fewer Newfoundland fishermen went out to hunt seals. Seals were overhunted by primarily Norwegian vessels, largely out of Canadian control. Responding to the growing lack of control over its marine resources, in 1977 Canada introduced its 200 nm Exclusive Economic Zone. In 1983, the European Communities enacted a trade ban on products stemming from seal pups. The average annual revenue for individual sealers dropped dramatically, triggering unemployment benefits for sealers and for the workers in the industry (Lynge 1992:31, 32; Malouf 1986:342; Myers 2005:1863).

In light of the declining industry and ongoing protests, the Canadian government initiated a process to assess the socioeconomic relevance of the seal hunt for the communities as well as the commercial hunt's impact on the seal stocks. The findings of this effort were published in the 1986

Report of the Royal Commission on Seals and Sealing (Malouf 1986), which inter alia recommended banning the hunting of seal pups due to image reasons (Malouf 1986:202, 372).

The federal government responded to the Commission's recommendation in 1987 (Caldow 1989:189). Throughout the 1990s and the 2000s, stringent animal-welfare requirements have manifested in Canadian seal-hunting legislation while the sealing industry is undergoing significant boom and bust cycles. The European Union enacted a total ban on trade in seal products in 2009, which came into force in 2010 and Russia following suit in 2011 (Sellheim 2014).

Affordances, Moralities, and Values in the Commercial Seal Hunt

The Setting: Woodstock, Newfoundland

The community of Woodstock is located on the north shore of Newfoundland (Fig. 2). Located in a cove of around 3.5 km length, the community is surrounded by mountains approximately 150 m in height, covered predominantly by black spruce. The region is considered to have the warmest mean summer temperature of the coastal areas (12.5° C), while the mean winter temperature is –3.5° C and the annual average 4° C. It is furthermore the driest area of the island with an average annual precipitation of 900–1000 mm. As found on the whole of Newfoundland, the areas around Woodstock are rich in birds and mammals (Bell 2002a, 2002b).

Woodstock was first settled in the late 1800s and called Southwest Paquet but was renamed to Woodstock when it received its first post office in 1911. The community is accessible from the waters of the Front or from a road that enables a direct connection between the community and Newfoundland's capital St. John's, 630 km to the south. Until 1961, when the first gravel road was built, the community was merely accessible via sea, dogsled, or foot (Letto 2009:1, 2). Communication in Woodstock is based on landline telephones, fax, and email. Cell-phone coverage does not exist in the area, and the paved road ends in the town center.

Although the population of Woodstock has been rather low—between 154 and 188 in the years 1914–1938—three churches were built: The United Church, the Salvation Army in 1960, and the United Pentecostal Church in 1968 (Letto 2009:2). Services today are, however, rather sparsely attended. Woodstock's population was 311 in 1991 but dropped again to 190 in 2011. Due to the emigration of primarily young people, the median age has risen from 38.4 years in 1996 to 51.5 years in 2011 (Statistics Canada 1996; Statistics Canada 2011) (figs. 3 and 4).

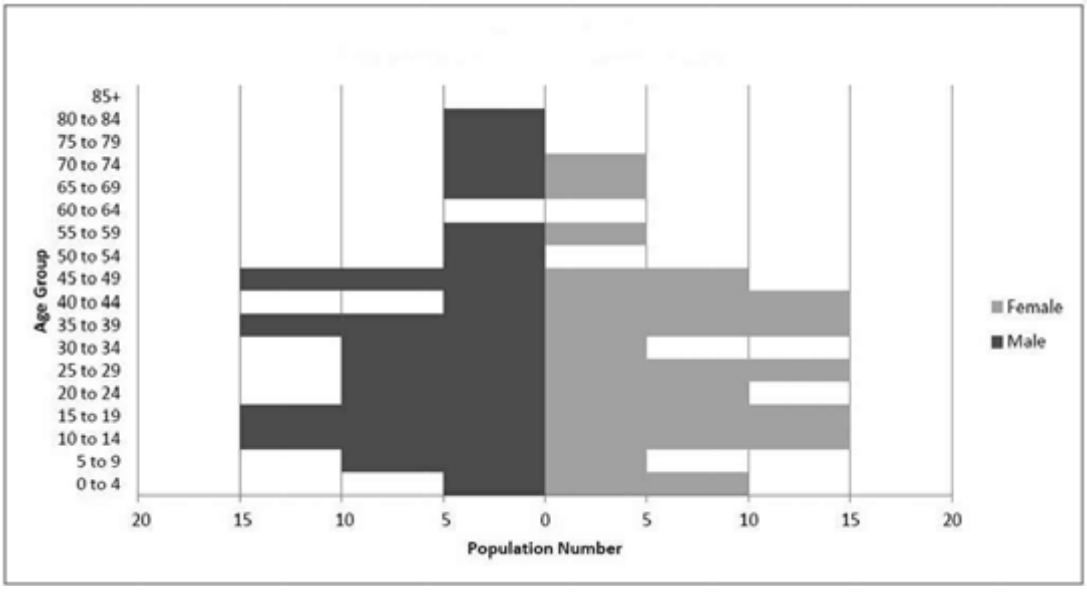

Figure 3. Population pyramid for Woodstock in 1996.

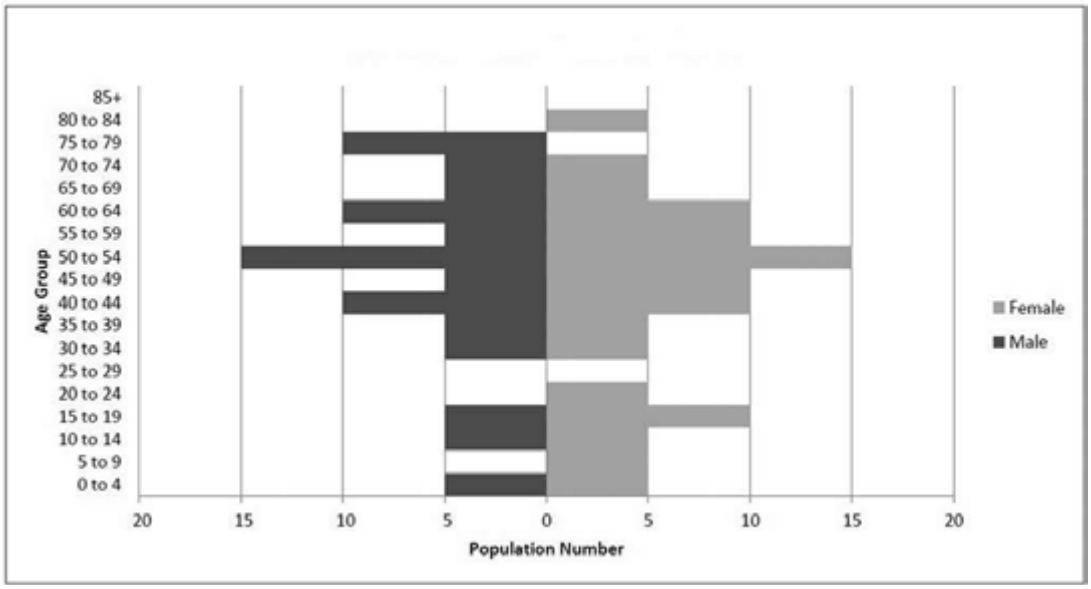

Figure 4. Population pyramid for Woodstock in 2011.

Woodstock experiences emigration due to low employment opportunities resulting in an aging population (Letto 2009:1, 2). This led to the closure of the primary school in 2008 that served both the community of Woodstock and nearby Pacquet, whose school closed down in 1991 (Letto 2009:2). Therefore as of September 2008, Woodstock's school children are forced to attend Baie Verte Primary School, about 25 km from Woodstock (Nova Central School District 2008:4). Higher education cannot be found in northern Newfoundland, which requires young adults to relocate to larger communities, such as St. John's or Corner Brook, or move out of the province entirely.

In Newfoundland, the emigration trend has been documented since at least 1991, when the Canadian government initiated population censuses on a five-year basis throughout the country. Northern Newfoundland in particular has experienced a population loss from around 49,000 in 1996 to 35,000 in 2011–2012. Except for Newfoundland's capital area, which has a rising population, all census divisions have lost inhabitants (Statistics Canada 2013).

Fishing, mining, and forestry constitute the main activities of land use in northeastern Newfoundland (Bell 2002a). While exact current numbers of employment in Woodstock cannot be ascertained, based on the latest available employment data from 2006, Woodstock's then 199 inhabitants had a workforce of 85, of which 25 worked as fishermen and sealers. Ten were working in the fish processing industry, while retail and mechanics constitute two more pillars of economics in Woodstock (Statistics Canada 2006). The only retail market in Woodstock currently provides employment for three inhabitants. Others work elsewhere in the region but reside in Woodstock (Letto 2009:2). In 2001, 120 people were employed in a more diverse employment sector, including schoolteachers and construction workers (Statistics Canada 2001), while the decline in population inevitably has contributed to a decline in the diversity of the labor market in the community.

The Normative Role of the Sea

In general, everyday morals and sets of values in Woodstock are linked to the sea, as the sealers are also fishermen and spend around half of the year on the water. Water therefore has agentive powers for the community and "*does something in society*" (Hastrup and Rubow [ed.] 2014:23, original emphasis): Apart from economic considerations that drive Woodstock's fishing economy, an important element is the sea as a shaper of moral and societal values, thus becoming an identity-giving means. Woodstock, as well as virtually all other communities in Newfoundland, is based around the sea. The importance of the sea for the self-understanding of Newfoundlanders is omnipresent in different forms, and the importance of marine

resources for the development and maintenance of the former colony is reflected in arts, songs, and poetry. However, it is not the resource per se, which is the focus of attention, but rather the captains, crews, ships, and events. This is also the case for sealing. Ryan and Small (1978) collected numerous traditional and yet-unrecorded songs and poems related to the seal hunt, which reflect hardships and dangers, as well as perceived heroism of sealing captains and their crews in 1978, reflecting the significant social value of sealing and mastering the sea for Newfoundlanders. Chukotkan whale hunts have shown similar traits for native hunters with complex social and ideological values connected to them (Krupnik 1987). With a transition from regionally recognized hunts to hunts under international scrutiny, these values have begun to erode, changing the socioeconomic structure of hunting communities (Krupnik 1987). Similarly, Newfoundland's long-standing history of seafaring and seal hunting with associated social values is undergoing significant changes that alter the social fabric of coastal communities.

The sea appears to give meaning to the lives of Woodstockers, and the community shares a perception of the sea as a means without which life in this remote part of the island would not be possible. It is thus that marine living resources have always been considered elementary in establishing and maintaining human settlements in Newfoundland (see for example Bock 1991). Moreover, it is the harvest of marine resources that has created close ties within and between families in Woodstock and in other nearby communities, which in turn have generated the sociality in the communities. It is thus the practical dimension of aiming to maintain life on the island, by which sealers perceive the affordances of the sea with which they identify themselves (on sociality, see Ingold 2011:176).

"We have the sea in our blood," as stated during the sealing trip, denotes Woodstockers as seamen that consider the sea as their home, including knowledge about its conditions and the location of the human being in it. With all its facets of stormy weather or calm sunny waters, the crew on many occasions expressed how they would never want to do anything else than making a living from harvesting marine resources. It is therefore not without explanation that the seal hunt in Newfoundland is commonly referred to as the seal "fishery" or "harvest," although its mammalian nature is known. Busch (1985) notes that the denotation of the seal hunt as a fishery can be traced back to the Catholic influence in Newfoundland, which forbade the consumption of meat on Fridays. Considering the seal as fish enabled sealmeat consumption (Busch 1985:41). The same occurred also, for example, with the South American capybara that the Catholic Church denoted as fish in order to enable increased human consumption.

Currently, the consideration of seals as a fish should not be regarded a conscious choice but should rather be related to the sea's affordances. In this sense, it is "Gibson's ecological psychology and Bourdieu's theory of practice [that] re-embed perception and cognition within the practical contexts of people's ongoing engagement with their environments in the ordinary course of life" (Ingold 2011:167). The moral approach towards seal hunting is therefore grounded in the encounter of the sea in everyday life. It does not circle around whether or not to use the seal but rather to be able to provide for the community through the affordances of the sea in general (Gudeman 2001:43–45).

The Affordances of the Seal

Singling out the seal from the overall affordances of the sea does not do justice to the moral landscape of Woodstockers. In this paper it occurs notwithstanding as a response to special treatment of seals in global discourse and law.

Woodstockers perceive seals to be contributors to the sustainability of the community by affording monetary income and food. Moreover they are part of the long-standing tradition of seal hunting in Newfoundland and are therefore integral to the utilization of marine resources (Field notes, April and November 2013). Seals hold a certain value—both economically and emotionally—that is embedded in the overall value of the sea based on which moral and economic integrity of Woodstock is shaped. This integrity in turn makes the capability of exploiting a resource (i.e., the access to and taking of a resource) more efficient.

Chemero (2003:190) recognizes that affordances in the animal kingdom are linked to evolution, and that an animal can only recognize an affordance due to its evolutionary place within an ecosystem. In sociocultural terms, it can be argued that the recognition of an affordance is inevitably linked to the ability to respond to it. In other words, if the potential of the seal to provide for a community is recognized, skills and social practices must be developed to be able to exploit it, reflecting into technical, sociocultural, and moral skills, as well as knowledge of the sea. Therefore, I argue that the recognition of affordances results in morally charged actions that are aimed to respond to the affordance. Following Lambek (2010:3), these are "prospective (evaluating what to do, how to live), immediate (doing the right thing, drawing on what is at hand, jumping in), and retrospective (acknowledging what has been done, what it was and is)." Judgment on these actions does not necessarily occur consciously, but evaluation and

reflection are inherent part everyday life (Keane 2014:4). Thus, ethical affordances that are acted upon in different situations are also recognizable on a sealing vessel (Keane 2014:7).

The main criteria for acting according to ethical affordance in Woodstock are rooted in one overarching perception of human–seal interaction: using the seal for the good of the community, rendering the hunt on seals an ethical activity as such. All actions on board thus must be in accordance with this. Lambek (2010:45) writes: "When the state of affairs is in conformity with the performative act, then the state can be said to be 'true' (or correct, right, or good)." Argumentum e contrario, if the performative act compromises the state of affairs, actions and ethical considerations must be undertaken to bring it back into conformity, as will be shown later.

The direct supply for the community of Woodstock is generated through monetary income for the sealers upon sale of the pelts and the flippers as well as through providing the community with seal parts upon return. In 2013, approximately 150 seal carcasses, 300 flippers, and 60 seal hearts were given to community members for consumption. In Woodstock, each resident receiving the seal products had ordered them prior to the trip and received them without monetary exchange directly upon arrival in port. Other goods and services are exchanged as payment for the seal products or these served as payments for previous goods or services. In one case, seal hearts were given to one community member without exchanging other goods or services because his brined seal hearts were considered a delicacy.

Sharing in communities dependent on hunting and in arctic communities has been documented widely (Dahl 2000; Dorais 1997; Freeman [ed.] 2000; Henriksen 2010; Vitebsky 2005). Kalland and Sejersen (2005:80) write that "communities all over the North Atlantic repeatedly underline the social aspect of sharing. Sharing is a key issue in northern communities, a dominant moral standard that integrates households, families, and communities."

Several examples from the *Steff&Tahn* demonstrate how conscious and unconscious judgment to fulfill the overarching moral determinant to provide for the community shapes life on board and thus the moral landscape within a seal hunting environment.

Immediate, Conscious Evaluation of What to Do

Skill and conscious judgment are crucial in maximizing the efficiency of the seal hunt. Prior to sailing different sealing crews meet in the local Connie's Store to buy supplies for the hunt and to equip the boat. Since it is the only store in the community, it is not only a logistical center but also a community center where news about weather conditions and the overall state of the fisheries is exchanged. Although sailing routes are not set, prevailing wind patterns and the associated ice conditions are discussed, and estimates on the routes and the likelihood of reaching the seals are exchanged, constituting a conscious deliberation on a successful hunt. This exchange serves two purposes. Firstly, while seals are overabundant all in all in the Front, they may nevertheless be scattered in different patches. In order to avoid hunting in the same patch by two or more boats as much as possible, the exchange of information provides all vessels with a good opportunity to reach different seal patches. Secondly, the exchange of possible sailing routes serves security and safety: If a vessel fails to communicate, potential search areas can be narrowed down. Although each vessel is equipped with radar, GPS, and radio, sharing potential routing information with community members and other sealers is an additional feature for ensuring the safety of the hunters. The planning of the impending hunt is therefore considered under the premise of benefiting the whole community with consideration of difficult economic circumstances and the dangers of the hunt itself.

This resembles nomads in Mauretania where water constitutes the main obstacle to successful pastoralism. Here, water occurrence—both in rain and oases—influences the decisions regarding the routes to be taken (Vium 2014:212). Although geographically apart and diametrically different in environment, a specific shortage (economic stability in Newfoundland and water in Mauretania) and danger (ice conditions and drought) therefore influence the degree to which collective benefit is considered. In this sense, Connie's Store is equivalent to a Mauretanian well where information exchange is exercised and social life is centered (Hastrup and Rubow [ed.] 2014:25) and to the role of a local store in Inuit communities see also Dahl 2000). Also Gudeman (2001:117) refers to information sharing as a benefiter for the whole community: A new innovation in firing clay bricks in a Guatemalan community is not kept private but is passively shared by not preventing copying in order to quicken the pace of the community's local innovations benefitting all. The conscious and nonselective sharing of information is therefore an important element of the moral dimension of economic activity, reflecting the need of fulfilling basic needs of the community (Trawick 2001).

Conscious decision-making and information exchange is also crucial on the boat. The seal hunt at the Front is entirely conducted from the boat. With .222 or .223 caliber rifles, the seals are shot from the upper deck by one marksman. On this

deck, a second wheelhouse is located that eases navigation in ice-obstructed waters and enables smooth communication between the marksman and the skipper. The boat then steers towards the ice patch where the seal was shot and the seal is gaffed aboard by the crew on the open deck. The gaffs used to haul the seal on board are 1.5–6 m long, made of hard wood, and have a metal hook at the end that is driven through the head of the seal. This serves two purposes: It is another means to ensure the death of the animal, and it preserves the condition of the pelt, which loses value with every hole or scratch. The loss of value, in combination with the danger that a wounded seal causes for the crew on the open deck, serves as incentive for the marksman to apply utter precision in his shots to ensure instant death. Precise shooting therefore is a crucial element in making the seal hunt efficient and furthermore corresponds to the overarching attitude on board not to let a seal suffer unnecessarily.

Immediately upon the seal being gaffed on board, the hakapik, a wooden club with a hammer head, is used to crush its skull through several repeated strikes, regardless of the gunshot to the head. The skull is then checked whether both sides are entirely crushed. To ensure certain death, the seal is cut with a single movement from the chin through its belly button to its anus. Both axillary arteries are cut. This first cut constitutes a major element that demarcates the value of the skin. If carried out sloppily (e.g., with several cuts or missing the belly button), a skin loses value because during further processing, large sections of an irregularly shaped skin are discarded during trimming. After the arteries are cut, the seal is turned over for bleeding for around 30 to 40 seconds before it is pelted. The pelting process includes the removal of the blubber and the skin from the carcass (Fig. 5). Due to the lack of a market for seal products other than skins, fat, and flippers, the carcass is thrown overboard unless prior to the hunt agreements with Woodstock residents were made to keep some for personal consumption. Knowledge about and the application of the so-called three-step process—stunning, checking, bleeding—was made compulsory for all sealers in 2009 (DFO 2009).

A second means to hunt seals is from a speedboat. In favorable ice conditions, the speedboat is used to access patches of seals in order to bring in a larger number and to shorten the days at sea. With a maximum capacity of around 45 seals, the speedboat is operated by two sealers. The three-step process is applied on the speedboat, whereas pelting still occurs on the main vessel. The speedboat is used throughout the day and disembarks its catch before heading out again.

The abundance of seals often does not allow for immediate pelting after application of the three-step process so that it can be ensured that every seal is killed following the regulations. Therefore, depending on the daily catch, on several days up to 200 seals were lying on deck and when combined with the rocking of the boat and a slippery floor, movement was difficult. Pelting seals constituted a major part of the work on board and was done when weather and light conditions did not allow for precision shooting. Then the whole crew engages in pelting. Yet, regardless of fatigue, bad weather, or hunger, precision of the cuts is of highest priority. This is firstly to ensure that the sealer does not inflict injury to himself or others, as the pelting knives are kept extremely sharp. Secondly, every cut that is misplaced—cutting through the skin or cutting through organs of the seal—devalues the pelt.

Figure 5. Pelting on the deck of the *Steff&Tahn*. Photograph by Nikolas Sellheim.

Conscious decision-making is ultimately a significant part of affordance response, reflecting into unconscious and moral actions. Given the legal framework and the long-standing economic dimension of the seal hunt, it appears unlikely that hunting and skinning techniques would change with an increase of a subsistence seal hunt, as the safety of the sealers would not entail a conscious change of practices. A change in the legal framework, however, would inevitably lead to sealers having to consciously apply different techniques in order to be able to provide for the community.

Prospective, Unconscious Evaluation, and Response

The seal hunt constitutes an activity that puts the individual under extreme physical and psychological pressure. As I was working as a deck hand, and therefore gaffed and pelted seals, these strains

became very tangible shortly after the beginning of the hunt and mental, as well as physical, fatigue became a challenge to be faced. In combination with the dangers posed by the sea itself, the gory environment on deck, and the distance to family, a sealer easily experiences mental difficulties. However, every nonefficient crew member puts a successful seal hunt into jeopardy and therefore it is necessary to counter these symptoms. This leads to a high degree of crew solidarity, which reflects the interrelationship between the affordances of the seal and the morality of a sealing crew. This does not occur consciously but constitutes an integral element of the dynamics on the boat.

For instance, sharing is a significant moral element onboard a sealing vessel. Although the skipper provides all supplies, prior to sailing each crew member is asked to bring his own personal foodstuffs, cigarettes, or anything that he wishes to consume during the trip except alcohol. Thus a large amount of soda, sweets, chips, and cigarettes can be found on board, each belonging to a particular crew member. Throughout the hunt, personal property is still considered as such but inevitably becomes accessible to all crew leading to a consensual agreement that all goods on board can be used by the whole crew.

Cigarettes, for example, were an important commodity on the *Steff&Tahn* and were consumed frequently. Although I am a nonsmoker, even I was overwhelmed by the urge to smoke but did not take cigarettes. The skipper solved this by providing me with several of his own packs, stating: "Now you have cigarettes. So, there's nothing to worry. And if you need more, you know where they are." As such, personal property and individual usage of this is confined to underwear and socks as well as toiletry items. Clothing, shoes, foodstuffs, and all other commodities are shared among all crew members.

In order to further bolster crew spirit, jokes played an important role in overcoming potential differences or difficult situations. Jokes serve as motivators, while (retaliatory) pranks that have often been ongoing for many years are played on each other for the overall enjoyment of the crew.

Motivation through joking can be best exemplified when looking at a successful hunting day when more than 200 seals needed pelting and storage. The day had been long and tiring, and weather conditions were hostile. Yet, the pelting and storing had to be accomplished before going to sleep. All crew had reached their physical limits and the only way to continue despite pain and hardship was to joke and laugh "and not think about your pain."

Seen from the outside, loudly laughing men among hundreds of dead seals could be considered macabre and barbaric. However, this perception may be hasty. For the crew, seals are charismatic animals and some indicated that killing seals is not nice but necessary. In this situation laughing enables the detachment from a certain difficult surrounding in which strain is put on both the psyche and the body. Also for the crew engaging in pelting of several hundred seals, standing in pools of blood and experiencing utmost exhaustion is challenging. In conversations with the crew, none indicated that they liked the situation and that "you sometimes should not think about what you're doing." This corresponds to some degree to Stammler's (2005:88) observations of killing reindeer by female Yamal Nenets who, in some contexts, strangle reindeer to death, although this breaches the "law of the tundra." Joking, especially when one would least expect it, serves as a motivational tool to overcome hardship. Jokes are therefore not made over a given situation but are caused by a given situation. The absence of hostility on the boat serves as an indicator for joking being a successful and necessary strategy.

Retrospective and Prospective Conflict Resolution

The moral interaction among the crew becomes prominent in the resolution of conflicts and the response to breaches of the performative act of fulfilling the premise of efficiently providing for the community. A vessel-specific system of unspoken rules prevailed, which all aimed at maintaining and resulted in crew solidarity, cooperation, and ultimately efficiency. The more concentrated and concerted the crew acts, the higher the likelihood of an early return to port. This notion of cooperation translates into calm conflict resolution.

One situation of a retrospective as well as proactive character exemplifies this. It was retroactive because it deals with occurrences in the past and proactive because it aims at avoiding future mistakes and maintaining crew integrity. Due to sloppy pelting, several pelts lost value. As I was engaged in the pelting and was not only considered a "greenhorn" but also very inexperienced in working on a constantly moving boat, I was suspected to have made this mistake as both other deckhands were first fishermen and one an older, experienced sealer. Upon discovery of the sloppy work I was calmly observed by one of the foremen while pelting a seal, and he repeatedly hinted to the importance of a sharp knife and a long, single cut. It became quickly clear that given the timely circumstances under which the pelting had been conducted I could not have made the mistake. Therefore, the skipper investigated the incident more closely and put disciplinary measures on both other deckhands without my knowledge. Only later was I informed that they had been

disciplined. The nature of the discipline was not communicated to me, but it was implied that they were related to the work that had to be carried out on the boat.

The situation shows that it is not the finding of the individual culprit but to highlight responsibility for the overall benefit of the crew. This means that since I was an observer without prior knowledge, experience, or economic benefit from the hunt, I did not hold responsibility for the crew while the crew held responsibility for me. This was because through my unpaid participatory work I contributed to the quicker conduct of the hunt and was therefore a contributing member of the crew. Thus, I was spared from disciplinary measures. The other deckhands, as economic benefiters, were responsible for the proper conduct of pelting for the benefit of the whole crew and were therefore both disciplined. This process was carried out without yelling or unfriendliness. Instead, the deckhands accepted their disciplining without argument while the skipper noted: "Yes, a mistake was made. And it simply should not happen again. There is no point in yelling." Brief, heated disagreements erupted only concerning the interpretation of the environmental conditions. These were very short-lived due to the authority of the skipper, reflecting the overall respect towards the hierarchy on board. Open hostility among the crew over a longer period of time was absent.

Interacting Segments of Morality

The applied moral standards on the *Steff&Tahn* are closely linked to the activities that are carried out to respond to the affordances of the seal and to be able to provide for the community. While the affordance–responsive actions feed into the moral behavior of the crew, also external rules influence seal-hunting practices.

According to Canadian legislation, each participant in the seal hunt is required to obtain a license. Licenses were first introduced into the seal hunt in 1964 with the adoption of the Seal Protection Regulations under the Fisheries Act (Barry 2005:19), which have now become the Marine Mammal Regulations. Three different types of licenses exist: a) personal use; b) commercial use; c) license for nuisance seals, meaning for marine-management purposes. Since 1995, the personal-use license is valid for residents of coastal communities in Newfoundland, Labrador, and Quebec under which residents are entitled to hunt six seals per year. Indigenous communities north of 53° latitude are entitled to hunt seals without a permit irrespective of the number of seals that are hunted. Since 2004, in order to further professionalize the hunt, a freeze on the issuance of commercial sealing licenses was implemented. In order to fulfill the need for crew, temporary assistant sealing licenses, which I also held, are issued under which the bearer is not allowed to apply the first blow to a seal (DFO 2011). The regulations pertaining to the seal hunt are by and large under federal control, and implementation is strictly monitored.

While sealers in general do not oppose monitoring of the seal hunt in order to improve its image, the understanding of the seal as an animal that is not to be killed, as put forward by anti-sealing groups, as well as the reflection of moral standards pertaining to the killing and skinning of animals that have originated elsewhere, often lead to a disapproval of the given rules. While they are nevertheless obliged in order to be able to continue sealing, they are perceived as illogical. For instance, the compulsory crushing of both sides of the cranium with a hakapik, responding to moral concerns over the state of the seal's consciousness during skinning, occurs on board irrespective of the state of the seal's head. On several occasions the skull was crushed with the hakapik although it had already been crushed by a bullet—yet only on one side. This seal was undoubtedly irretrievably unconscious. As one sealer noted, "it doesn't make sense, but it's the rules." The "rules" are therefore perceived to be an outside force that shape behavior on board and do not correspond to real-life situations. While the incentive for the introduction of the three-step process into the Canadian legislation inter alia due to protests from the European Union aimed at ensuring an "ethical" hunt on seals by guaranteeing the death of the animal before pelting, many interviewed participants revealed that this morality does not correspond to their own as it is hypocritical. "Why do the Europeans care so much about how we kill our seals when they can't even take care of their pigs in the abbatoirs"? It seems illogical to the sealers to influence hunting methods in a way that makes them more physically daring and more time consuming instead of creating markets for all parts of the animal to make it less wasteful.

Instead, before obtaining the license, every assistant sealer has to attend a compulsory workshop on the "Humane Harvesting of Seals." In 2013, 18 of these workshops were held across Newfoundland (CSA 2013). Due to my arrival in Newfoundland only a few days before the start of the hunt, I was not able to attend a workshop. However, the CSA provided me with learning material on how to strike, cut, bleed, and pelt a seal prior to my arrival. After some time to study these, a phone exam was undertaken in which a workshop presenter tested my knowledge on the humane harvesting of seals, enabling me to obtain a temporary assistant sealing license. Failure to comply with licensing requirements may result in the

permanent loss of sealing licenses by the skipper and the respective sealer in question. Ultimately, sealers feel that they have to adapt to outside standards that disregard the century-old knowledge on how to hunt, kill, and skin seals. This corresponds, for example, to practices in Norwegian reindeer herding in which the acceptance of traditional practice and application of administrative management systems collide (Reinert 2008:70). Moreover, apart from the sealing licenses, the vessel needs to be prepared to accept an observer by the Canadian government—"sea watch"—on short notice prior to sailing in order to provide onsite monitoring of the hunt. It is therefore the responsibility of the skipper to have a spare bunk and provisions available in case a sea watch accompanies the hunt. Failure to do so may result in one crewmember having to stay on land.

The special role seals play in global discourse and the associated morality feed into the behavior of the sealing crew through the stringent application of the three-step process. But even without the rules set forth in the Marine Mammal Regulations, the killing methods in 2013 would not have been significantly different. The one fundamental difference, however, would be that these methods would be related to the safety of the crew, efficiency, and market considerations. This contradicts the moral approach of the laws that place the seal in the center of consideration. With the result in essence being the same, it shows how different moralities on a given context coalesce. Thus, segmented moral relativism is justified when looking at the seal hunt, indeed making the sealing vessel a moral world of its own. In other words, the main focus of the killing practices on board the *Steff&Tahn* is based on its operative and therefore moral environment. A placing of this focus into moral contexts outside of the seal hunt seems therefore difficult.

Dichotomous Values of the Seal Hunt in Woodstock?

Apart from the normative role, the ability to provide and thus the seal hunt, play for generating moral features on a sealing vessel, it also plays a significant role for the community and social cohesion within it. Ultimately, there are certain values attached to the seal hunt that need examining. Borrowing from Graeber (1980), "value" here is referred to in a dual way:

> 1. "value" in the sociological sense: conceptions of what is ultimately good, proper, or desirable in human life; 2. "value" in the economic sense: the degree to which objects are desired, particularly, as measured by how much others are willing to give up to get them (Graeber 2001:1, 2).

In Woodstock, the social and economic values are so closely interlinked that one cannot coexist without the other. Given the long-standing history of the commercial seal hunt (i.e., the hunt on seals for economic benefit which outweighed the dangers at sea), the value system has long been tied to an economic activity.

The Social Value

The dangers at sea and the loss of life over the years have generated a strong sense of belonging and identity in Newfoundland. The latest example for the importance of the seal hunt as a means to signify Newfoundland's identity is the erection of the Home from the Sea sealer's memorial in April 2014 in Elliston, commemorating the 100th anniversary of the great *S. S. Newfoundland* and *S. S. Southern Cross* disasters of 1914 when more than 270 sealers lost their lives.

Also on a community scale, the value of the seal hunt as part of the seafaring activities of the fishermen of Woodstock is significant. Already throughout the preparatory phase of the seal hunt, the logistical center of the community, Connie's Store, becomes the social hub of the community when sealers purchase supplies for their vessels, and the whole community is in uproar. Prior to sailing, the women of Woodstock, approached at Connie's Store during the preparation phase, expressed that they worry for the safety of their husbands, brothers, fathers, and sons. Some women expressed that they would never go out to sea because they would be afraid all the time, yet none expressed that they wished the men would seek another type of employment. To the contrary, happiness upon return and pride for the intrepidness of the men having mastered the dangers of the sea while providing for the community is reflected in the female discourse about the seal hunt and fisheries.

Notwithstanding, outmigration constitutes a problem in Newfoundland's north. To counter uprootedness and community dissolution, within Woodstock, frequent, spontaneous visits to other families and frequent visits from those having moved away occur. While the men are at sea, it is especially the women that maintain the social and communal practices in Woodstock. The dangers that the sea generates for the men can therefore only be countered through strong family and community ties. Assurance of safety of the men is achieved through daily phone calls with the boat, where a cell-phone signal booster and a satellite phone were installed. However, as women indicated, fear of loss stands vis-à-vis the economic and financial need to go out to sea.

The social value of the seal hunt as part of the fisheries in Woodstock therefore influences the

social capital in both a negative and positive way. Bourdieu (1986:248) defines "social capital" as "the aggregate of the actual or potential resources which are linked to possession of a durable network of more or less institutionalized relationships of mutual acquaintance or recognition." On the one hand, the will to pursue other means of livelihoods makes especially young Woodstockers leave the community, rendering fisheries and sealing an adversarial influence on the social capital of Woodstock. On the other hand, the closeness developed by the women and the crew at sea translates into the community in the off-season. For instance, the skipper and the two foremen share a close friendship, go hunting together while their kids are friends, schoolmates, and sport comrades. In the case of the skipper's family, both the father and the skipper himself run the small-scale company under which the *Steff&Tahn* is operated. They also live directly next to one another, share their meals, and spend time with each other. Both the professional and geographical closeness to the sea provides the linkage and sociocultural glue between the individuals engaged in its utilization, positively affecting the social capital through seal hunting and fishing. A merging of the community and market sphere therefore occurs in Woodstock with households being direct actors in both spheres (see also Gudeman 2001:11).

Given the ongoing trend of outmigration from northern Newfoundland, it can be argued that the negative social value of the limited economic possibilities in Woodstock outweighs the positive value sealing and fisheries have on the social cohesion within the community. At the same time, economic hardships aggravate the problem of community dissolution and a dwindling social capital.

Economic Value(s)

Economically, the whole community of Woodstock benefits from the seal hunt. While direct income is created through the sale of pelts and flippers from which the families of the crews benefit, secondary income is generated through the equipping of the vessels, which is mainly done through supplies purchased in the community store. Similar to Iñupiat whaling practices in which whaling captains are responsible for the provision of equipment during the whaling trips (Jensen 2012:147), supplies are provided by the company under which the *Steff&Tahn* is operated.

In 2013, supply costs amounted to approximately $15,000 CAD, enabling the vessel to sail for about three weeks without shore leave. Around $4,000 CAD were spent in Connie's Store while bullets were purchased in the neighboring community, amounting to around $3,000 CAD and fuel for $8,000 CAD was purchased in another community. With Woodstock being only one community in northern Newfoundland where fishing and sealing constitute the mainstays of the local economies, the whole region is positively affected by the preparatory spending of the hunts. While no generalized picture can be drawn for the whole region due to the lack of data, Connie's Store can be considered a spin-off business of the affordances of the sea. Changing economic conditions for seal products on the markets therefore affect secondary businesses due to a reduction of spending.

Enabling the boat and the crew to participate in the seal hunt is dependent on several factors, and the economic situation is carefully assessed as to whether it is economically feasible to engage in the hunt. In 2009, Woodstock's fishermen decided against the hunt as the looming adoption of the seal-products ban in the European Union had contributed to a massive decline in the value of seal pelts (Sellheim 2014), rendering the economic and physical efforts fruitless. Therefore, that year saw only occasional speedboat-based "landsman hunts" for subsistence purposes. Since all of the approximate 20 sealers in Woodstock are first and foremost fishermen, they are dependent on the developments in the fisheries sector and the feasibility of fishing for other species. This provides the opportunity to diversify and shift focus on other species should one fail. Therefore, the skipper and the crew evaluate carefully whether it is economically feasible to equip the boat for the seal hunt or whether it is more feasible to wait for the opening of other fisheries. This generalized niche approach increases the resilience of a community and has in numerous cases been documented as a successful management scheme (see for example Colding et al. 2003; Forbes 2013; Kalland 2000).

In 2013, the decision to prepare the boat for the seal hunt was motivated through the developments in the crab fisheries, as the crab season opened on April 8 and the sealing season opened on April 9. Since that year crab processors allocated the price per pound at $1.83 CAD, which was considered very low by the fishermen, the crab fishery was struck against (FFAW 2013). Ultimately, the seal hunt gained more importance and although the economic outcome was not certain, it was considered more viable than not earning money at all. It is the degree of exchange on the domestic and international markets—both for fisheries and seal products—that steer the fishermen's ambitions to conduct sealing or fishing. Consequently, attempts are being made by the skipper prior to preparing the vessel for the hunt to determine which products are in demand. Based on these factors, the appraisal of the number of seals being hunted is made. This corresponds to other (semi)commercial hunts (e.g., conducted in Greenland) where, albeit on a local scale, different

marine-mammal products are offered on the local markets at different times, preventing an oversaturation of the local markets (Kalland and Sejersen 2005:74).

The economic value of the seal hunt can therefore not be underestimated, while it is highly dependent on the world's markets. In combination with the short duration of the seal hunt and the community's dependence on other fisheries, the hunt's economic contribution and overall economic value varies greatly from year to year. It is estimated that the seal hunt constitutes between 5–35% of the annual income of coastal communities (COWI 2008:24). Crew members on the *Steff&Tahn* stated that in good sealing and bad fishery years even 50% of the annual income can derive from sealing.

The Common or Shared Values

In Woodstock the social and economic spheres cannot be separated, contrary to the clear distinction that Stammler (2005:173) draws for Nenet reindeer herders. While the market sphere dictates the degree to which economic income is yielded from the seal hunt and from fisheries, "'the economy' is . . . not only a frame of reference for understanding the world and acting on it, it is also a set of social practices and cognitive tools that constitute a 'social world' " (de L'Estoile 2014:S65). One of these social practices is bartering when the vessel returns to port, which benefits the whole community through the exchange of services for seal meat. This bartering system resembles Sahlins' system of generalized reciprocity (Sahlins 1972:193, 194) and contradicts Humphrey's assessment of post-Soviet bartering where it "involves perceiving other people's lack of resources, ignorance or inefficiency in order to make a profit, and it evokes constant fears of default or cheating or theft" (Humphrey 2000:79). In many instances, bartering was replaced by the free provision of seal meat to the community.

Moreover, a subsistence element can be found in the commercial seal hunt in Woodstock, although a traditional division between immediate-return (subsistence) and delayed-return (market) economies (Barnard 2002:7; Ingold 2011:66) cannot be made. Although the hunt itself is driven by a delayed-return economy, the sealers on board the *Steff&Tahn* considered their hunt a subsistence seal hunt as it directly generates food as well as monetary income later on. This was particularly true in 2009 the landsman hunt generated direct supplies for the community, while the pelts—as a byproduct—were sold to the market.

Therefore, it is the economic circumstances on the market for seal products that drive the degree of subsistence activities in Woodstock: with a declining market for commercial seal products, the landsman hunts gain importance and the consumption of seal products stemming from hunts conducted primarily for community consumption increases with fewer products being sold commercially. In other words, good markets increase the impersonal exchange value for seal products, while declining markets increase their personal use value. Consequently, a clear-cut line between commercial and subsistence features of the seal hunt for Woodstock cannot be drawn. The economic characteristics pertaining to the seal hunt are mixed and stand in a dialectical relationship to each other. But while there are commercial considerations that drive the hunt, the degree of subsistence activities relating to and depending on the changing commercial markets generates a type of economy that I term "relay economy": a decrease in commercialization of a given resource leads to the increase of subsistence use of the same resource by the resource users. Thus, the incentive to use a resource shifts with varying market conditions, but it is nevertheless used. The capability of self-sufficiency in light of changing economic conditions was underlined by a Woodstocker who stated that "as long as we in Woodstock know how to hunt and fish, we won't have any problems." In other words, even in light of the fluctuating markets for seal products, the affordance of the seal does not change. Also Gudeman (2001) notes, in the context of securing the base of social cohesion, drawing from an example of economic downturn and a household's ability to purchase frozen beans, that "the shift form frozen to fresh to home beans, participation in market exchange declines as time devoted to the communal production of goods increases" (Gudeman 2001:44). Further research is needed to assess the self-sufficiency vis-à-vis profit-making aspect of this principle.

It is thus that the market and community spheres of exchange in Woodstock experience a one-dimensional interaction in unison with the principle of "relay economy": With a dwindling market sphere of exchange, the community sphere of exchange undergoes changes. This occurs in a twofold manner. First, the monetary exchange decreases when skippers no longer equip their vessels to go out sealing, impacting small businesses such as Connie's Store. This, in turn, impacts the social interaction within the community and may accelerate ongoing processes of uprooting. Second, subsistence hunting, as well as possibly bartering practices, increases. While the latter cannot be proved due to data deficiency, the former is best exemplified by the increase in landsman hunts in 2009 when the markets for seal products were virtually nonexistent.

Actions and practices as impacted by a changing market spheres also influence the

transmission of knowledge about the sea, its resources, and affordances. Competences in sealing and associated knowledge(s) that often have been acquired through social practices consequently decline. The ability of "reading the ice," which especially the skipper and the two foremen showed, inevitably is affected when fewer and fewer trips to the ice are undertaken (see Krupnik et al. 2010). While in ongoing sealing and fishing trips "nature is a kind of book that can be read," and it will therefore "always provide new, unread pages" (Kalland and Sejersen 2005:139), this characteristic is only provided for when the sea is interacted with and its affordances are of a utilitarian nature. Currently, knowledge transmission in Woodstock occurs for instance as a direct social practice in Connie's Store where information on interpretation of ice conditions are exchanged. Furthermore, knowledge on sealing and fishing practices, as well as on the marine environment, occurs on the boat during the different phases of the seal hunt. Transmission of unwritten knowledge, commonly referred to as "folk" knowledge, therefore requires that there are people that use it (Ingold 2011:368, 369). Reyes-García et al. (2005) show that one way to counter the loss of folk knowledge is through schooling. This, of course, implies that the folk knowledge is brought into a curriculum or a compendium, to be taught to students remaining in the area. The constant trend of outmigration and the long distances, as well as an aging population, make this approach unfeasible for Woodstock. Transmission of knowledge and skill surrounding the marine environment inevitably weakens, altering the moral environment and the set of values prevalent in the community.

Conclusion

Affordances, morality, and values are closely intertwined. Due to the proximity to the sea and responses to its affordances, certain elements of human interaction in the community can only be understood when considering geography and affordances, and they are only conclusive within this particular environment. This is what I have labeled "segmented moral relativism." This encompasses different sets of moral decisions and actions that are characteristic for specific situations and contexts. As the example from Woodstock has shown, the ability to provide by responding to the affordances of the sea is the overarching moral determinant of the actions carried out on a commercial sealing vessel. These actions furthermore reflect back into the community where the seal as part of the sea's affordances shape social interaction. It therefore seems impossible to transport those moral features prevalent in Woodstock that are linked to the response to affordances of the sea into other areas where these affordances are not recognized.

Throughout the centuries, the perception of the seal as an exploitable resource has not changed in Newfoundland albeit there have been changes in laws and the introduction of moral considerations from outside sources. While Woodstockers consider primarily the usability of the seal, Canadian laws link the usability with the sensitiveness of the animal, and opponents link sensitiveness with nonusability. For Woodstockers and other sealers to be able to further exploit the seal, adaptation to outer moral values—in this case "humane harvesting"—is necessary, although danger of injury (and thus possible impediment of ability to exploit and to provide), the danger of reducing the economic value of pelts, and ultimately the inability to provide create similar killing and skinning techniques.

The affordances of the seal are not changed through the market sphere, which, however, does change community behavior and may reflect into changes of the moral and therefore socioeconomic structure of Woodstock. This is best exemplified by the increase of subsistence activities in light of dwindling economic feasibility, which I have termed "relay economy." Although the market for seal products, and thus the large-scale hunt for seals in Newfoundland, has undergone significant decline with the rise of the protest movement, the communities' exposure to an increasingly globalized and connected world must also be taken into consideration when finding a cause for community dissolution. Therefore, although the knowledge on seal hunting and fishing may provide food for the community of Woodstock in times of economic hardship, it is the lack of economic diversity, the physical and mental strains, as well as uncertain economic yields, which are cause for young Woodstockers to leave the community. In this sense, sealing and fishing as the main economies have an adverse effect on the social capital of Woodstock.

With a changing demographic structure in northern Newfoundland and an increasingly globalized world, the affordances of the sea may change in the future. It is possible that the seal will be perceived as a remnant of the past that does have the potential to be exploited but whose affordances are confined to nonutility. In Woodstock, moral and economic values guide the decision-making on how to exploit the seal, linking a potential affordance with empirical considerations and social actions, thus contradicting the "mirage of relativism" (Laidlaw 2014:23). Gibson's (1979) affordance theory must therefore be extended by a significant practical dimension that impacts the social fabric in a small community like Woodstock. As shown, the interdependency among affordance, value, and morality therefore goes

beyond the notion of affordances being a "relation between the perceiver and the environment" (Chemero 2003:186), but affordances should also be considered as affecting the relations among the perceivers.

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