



INSIGHT

## THE *INUIT TAPIIRIT KANATAMI II* CASE AND THE PROTECTION OF INDIGENOUS PEOPLES' RIGHTS: A MISSED OPPORTUNITY?

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ABSTRACT: On 3 September 2015 the EU Court of Justice dismissed the appeal against the judgment of 25 April 2013, case T-526/10, *Inuit Tapiriit Kanatami et al. II*, in which the General Court had refused to declare the invalidity of the basic Regulation (EC) No 1007/2009 on trade in seal products pursuant to Art. 277 TFEU. Among the issues involved in the case were the legal value under EU law of the UN Declaration on the Rights of Indigenous Peoples and the protection of the appellant indigenous communities' economic interests by the guarantee accorded to the right to property. Overall, the case reveals a lack of sensitivity of the EU judiciary towards advancing the rights of indigenous peoples and favouring the progressive development of international law in this field.

KEYWORDS: UN Declaration on the Rights of Indigenous Peoples – customary international law – trade in seals products – right to property – legitimate expectations.

### I. THE *INUIT TAPIIRIT KANATAMI* SAGA: IN A NUTSHELL

The Canadian non-profit organization *Inuit Tapiriit Kanatami* made the headlines in European legal chronicles for bringing an action for the annulment of Regulation (EC) No 1007/2009 of the European Parliament and of the Council on trade in seal products. As is widely known, both the General Court and the Court of Justice found that the Regulation did not fall within the scope of the notion of “regulatory act” under Art. 263, para. 4, of the Treaty on the Functioning of the European Union (TFEU) and rejected the claim.<sup>1</sup> Some months after, the same plaintiffs brought an action for annulment against the Commission Regulation (EU) No 737/2010 laying down detailed rules for the implementation of Regulation No 1007/2009. The claim was rejected by the General Court on 25

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<sup>1</sup> General Court, order of 6 September 2011, case T-18/10, *Inuit Tapiriit Kanatami et al.*; Court of Justice, judgment of 3 October 2013, case C-583/11 P, *Inuit Tapiriit Kanatami et al.*

April 2013<sup>2</sup> and this decision was definitively upheld by the Court of Justice on 3 September 2015.<sup>3</sup>

The Court of Justice's decision closed thus a controversial case involving sensitive issues of moral and commercial nature, as also revealed by WTO challenges against the European Union's (EU) ban by Canada and Norway.<sup>4</sup> This issue appears to be even more sensitive in the context of European law, where two competing arrays of legal interests are at stake: on the one hand, the protection of welfare of animals (seals indeed are killed and skinned in a way that causes them distress and atrocious sufferings); on the other hand, the socio-economic and cultural identity of the Inuit people, based for centuries on seal hunting, which still represents a means to ensure their subsistence.<sup>5</sup>

Moreover, the case also involved controversial issues related to the right to property (as protected by the Charter of Fundamental Rights of the European Union (Charter) and the European Convention on Human Rights), notably the existence of a multicultural-oriented dimension of that right aimed to protect the identity of indigenous peoples.

In the light of the preceding considerations, one would have expected the EU courts to engage in a close analysis of these issues, with a view to assessing whether the EU legislator, by establishing a limited exception to the ban on indigenous seal hunting, had struck a fair balance among the various interests at stake: the protection of cultural diversity *versus* animal health and welfare. This was not the line of reasoning followed

<sup>2</sup> General Court, judgment of 25 April 2013, case T-526/10, *Inuit Tapiriit Kanatami et al. II*.

<sup>3</sup> Court of Justice, judgment of 3 September 2015, case C-398/13 P, *Inuit Tapiriit Kanatami et al. II*.

<sup>4</sup> The case was decided by a WTO panel report of 25 November 2013, *European Communities – Measure Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R, which was then appealed. The Appellate Body (AB) ultimately found the EU seal regime is inconsistent with Art. I, para.1, of the GATT 1994, since it does not “immediately and unconditionally” extend the same market access advantage to Canadian and Norwegian seal products that it accords to seal products from Greenland (report of the Appellate Body, 22 May 2014, WT/DS/400/AB/R). While recognizing that the EU Seal Regime could be characterized as a necessary measure to protect public morals within the meaning of Art. XX(a) of the GATT 1994, the AB found that the EU had failed to demonstrate, in accordance with the chapeau of Art. XX, “how the discrimination resulting from the manner in which the EU Seal Regime treats IC hunts as compared to ‘commercial’ hunts can be reconciled with, or is related to, the policy objective of addressing EU public moral concerns regarding seal welfare” (*ibidem*). Furthermore, as far as the Inuit exception is concerned, the AB found that the “subsistence” and “partial use” criteria to identify indigenous hunts were too ambiguous and that the EU had not made the necessary efforts to cooperate with third State and facilitate the establishment of certification systems to the benefit of indigenous peoples in countries like Canada. On this dispute see T. PERIŠIN, *Is the EU Seal Products Regulation a Sealed Deal? EU and WTO Challenges*, in *International and Comparative Law Quarterly*, 2013, p. 373 *et seq.*; G. MARCEAU, *A Comment of the Appellate Body Report in “EC-Seal Products” in the Context of the Trade and Environment Debate*, in *Review of European, Comparative and International Environmental Law*, 2014, p. 318 *et seq.*; R. HOWSE, J. LANGILLE, K. SYKES, *Pluralism in Practice: Moral Legislation and the Law of the WTO after “Seal Products”*, in *George Washington International Law Review*, 2015, p. 81 *et seq.*

<sup>5</sup> Regulation (EC) No 1007/2009 of the European Parliament and of the Council on trade in seal products, preamble, recital no. 14.

in the two decisions. Quite the contrary, the EU courts rejected all claims pertaining to alleged breach of fundamental rights, simply relying on a formalistic reading of Art. 17 of the Charter and refusing, for procedural reasons, to assess the conformity of the contested regulation with customary international law.

In the present contribution we propose to follow the line of reasoning of the decision with a view to noticing its shortcomings and its incoherence with regard to the two main aspects referred to above: the relevance of international law in shaping the indigenous cultural and socio-economic rights under EU law (section II) and the special contents that the right to property may have acquired with regard to this particular class of people (section III). The last paragraph will formulate some final remarks on the failure of the EU judiciary to contribute the evolutionary trends in international and in national law on the special status to be recognized to indigenous peoples and on the way to protect it.

## II. THE LEGAL EFFECTS OF THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES IN THE EU LEGAL ORDER

The first remark concerns the relevance of international law in the reasoning of the EU judiciary. The plaintiffs had claimed before the General Court that the basic regulation should be declared invalid because it did not comply with the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration).<sup>6</sup> They notably alleged the infringement of their right to be heard under its Art. 19. Quite surprisingly, indeed, the plaintiffs had made no express reference to indigenous peoples' rights under international customary law.

In its judgment of 25 April 2013, the General Court limited itself to affirming that the UN Declaration "does not have the binding force of a treaty. It cannot be considered that that declaration can grant the Inuit autonomous and additional rights over and above those provided for by Union law".<sup>7</sup> The judgment also notes that "in the context of a procedure for the adoption of a Union act based on an article of the Treaty, the only obligations of consultation incumbent on the Community legislature are those laid down in the article in question [...]. Article 95 EC did not impose on the legislature a particular obligation to consult the applicants".<sup>8</sup> The categorical exclusion of consultation obligations different from those expressly provided for in the TFEU is criticisable, if one just considers that the EU is a contracting party to the Aarhus Convention, which establishes various obligations of consultation of the public in both decision- and law-making

<sup>6</sup> General Assembly of the United Nations, United Nations Declaration on the Rights of Indigenous Peoples, Annexed to the resolution No 61/295 of 13 September 2007.

<sup>7</sup> General Court, *Inuit Tapiriit Kanatami et al. II*, cit., para. 112.

<sup>8</sup> *Ivi*, para. 113.

processes.<sup>9</sup> Beyond the Aarhus Convention, the right of affected communities to be consulted by governmental authorities on environmental policies or actions has gained increasing recognition in bilateral and multilateral environmental treaties, playing a prominent role among those, which may be qualified as “biocultural community rights”.<sup>10</sup> Moreover, as far as indigenous peoples are concerned, the duty to consult them (even beyond environmental matters) is also established under customary international law:<sup>11</sup> as even an ICSID arbitral tribunal has recently argued, “there does exist a principle of customary international law requiring governmental authorities to consult indigenous peoples on governmental policies or actions significantly affecting them”.<sup>12</sup> Therefore, the failure to consult affected indigenous peoples before the adoption of certain EU acts may result in a breach of international obligations incumbent upon the EU, despite the respect of the procedure for their adoption laid down in the relevant articles of the Treaty.

<sup>9</sup> In this regard it should be noted that, in an equally questionable ruling, the Court of Justice has stated that the Aarhus Convention cannot be used as a parameter to value the legality of EU acts (Court of Justice, judgment of 13 January 2015, jointed cases C-404/12 and C-405/12, *Stichting Natuur en Milieu*, paras 46-53).

<sup>10</sup> See on this notion K.R. SRINIVAS, *Protecting Traditional Knowledge Holders’ Interests and Preventing Misappropriation – Traditional Knowledge Commons and Biocultural Protocols: Necessary but not Sufficient?*, in *International Journal of Cultural Property*, 2012, p. 401 *et seq.*; S.K. BAVIKATTE, *Stewarding the Earth: Rethinking Property and the Emergence of Biocultural Rights*, Oxford: Oxford University Press, 2014, *passim*; G. SAJEVA, *Rights with Limits: Biocultural Rights – between Self-determination and Conservation of the Environment*, in *Journal of Human Rights and the Environment*, 2015, p. 30 *et seq.*

<sup>11</sup> For an analysis of the international practice relating to the participatory rights of indigenous peoples, see H. QUANE, *The UN Declaration on the Rights of Indigenous Peoples: New Directions for Self-Determination and Participatory Rights?*, in S. ALLEN, A. XANTHAKI (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford and Portland, Oregon: Hart Publishing, 2011, p. 259 *et seq.*; M. BARELLI, *Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges Ahead*, in *International Journal of Human Rights*, 2012, p. 1 *et seq.*; S. J. ROMBOUTS, *Having a Say: Indigenous Peoples, International Law and Free, Prior and Informed Consent*, Oisterwijk: Wolf Legal Publishers, 2014; C.M. DOYLE, *Indigenous Peoples, Title to Territory, Rights and Resources: the Transformative Role of Free Prior and Informed Consent*, Oxon and New York: Routledge, 2015. It should be emphasized that, to a certain extent, the duty to engage in consultation also applies extraterritorially, in relation to those decisions by States which are capable of affecting the enjoyment of economic, social and cultural rights of persons outside national borders (on the extraterritorial dimensions of human rights see *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, published with a commentary in *Human Rights Quarterly*, 2012, p. 1084 *et seq.*; C.M. DOYLE, *Indigenous Peoples, Title to Territory, Rights and Resources: the Transformative Role of Free Prior and Informed Consent*, *cit.*, p. 210 *et seq.*). An example in this is provided exactly by the case here under examination, regarding the duty to consult the affected indigenous peoples before the adoption of a ban affecting the importation of traditional products from third countries.

<sup>12</sup> *Grand River Enterprises Six Nations, Ltd. Et al. v. United States of America*, ICSID/UNCITRAL, ICSID Case No ARB/10/5, award of 12 January 2011, para. 210.

Before the Court of Justice, the appellants alleged, *inter alia*, that the General Court was wrong in not declaring the basic Regulation in breach of customary international law concerning indigenous peoples. However, according to the Court, this plea was inadmissible, because the argument of customary international law was not part of the subject matter of the proceeding at first instance.<sup>13</sup> This is a very formalistic stance. Significantly enough, in her Opinion of 19 March 2015,<sup>14</sup> Kokott did not exclude the possibility that the Court could deem admissible this ground of appeal and examined at length the issue. It seems, indeed, that the appellants' arguments based on general international law were simply a development of those appellants' allegations before the General Court based on the UN Declaration. In other words, the line of argument followed at first instance suggests that, even if without making it explicit, the applicants had made reference to the UN Declaration for the sake of simplicity, in the belief that its provisions embodied the current state of customary international law.

In legal literature, it is a widely debated issue to what extent the UN Declaration can be regarded as a codification instrument.<sup>15</sup> In this regard, in the above mentioned Opinion the Advocate General took a very prudent and conservative position: the UN Declaration "cannot be regarded as a codification of customary international law".<sup>16</sup> In her words, "a United Nations General Assembly resolution such as that by which the UNDRIP was solemnly proclaimed does not, as such, have any binding legal effects. This is underscored if we look at the preamble to the UNDRIP. According to that preamble, the UNDRIP should be understood less as a binding legal text than as 'a *standard of achievement* to be pursued in a spirit of partnership and mutual respect'. Accordingly, that declaration is not a legal document but a political one, and therefore cannot in itself serve as a benchmark for assessing the lawfulness of acts of the EU institutions".<sup>17</sup> Secondly, the Advocate General excluded the existence of customary international norms reflecting the content of the UN Declaration's provisions, by arguing as follows: "[a]s is well known, for customary international law to exist there must be a settled practice on the part of the particular subjects of international law (*consuetudo*; objective element), which is recognised as a rule of law (*opinio juris sive necessitatis*; subjective element). There can be no question of this in the present case. It is true that the

<sup>13</sup> Court of Justice, *Inuit Tapiriit Kanatami et al. II*, cit., paras 56-58.

<sup>14</sup> Opinion of Advocate General Kokott delivered on 19 March 2015, case C-398/13 P, *Inuit Tapiriit Kanatami et al. II*, paras 87-95.

<sup>15</sup> Compare M. DAVIS, *To Bind or Not to Bind. The United Nations Declaration on the Rights of Indigenous Peoples Five Years On*, in *Australian International Law Journal*, 2012, p. 17 *et seq.* S. ALLEN, *The UN Declaration on the Rights of Indigenous Peoples and the Limits of the International Legal Process*, in S. ALLEN, A. XANTHAKI (eds), *Reflections on the UN Declaration*, cit., p. 225 *et seq.*; E. VOYIAKIS, *Voting in the General Assembly as Evidence of Customary International Law?*, in S. ALLEN, A. XANTHAKI (eds), *Reflections on the UN Declaration*, cit., p. 209 *et seq.*

<sup>16</sup> Opinion of Advocate General Kokott, cit., para. 90.

<sup>17</sup> *Ivi*, para. 89.

General Assembly resolution by which the UNDRIP was solemnly proclaimed was adopted by a broad majority of United Nations Member States. It is noticeable, however, that some significant States in which indigenous communities live either expressly voted against the resolution or at least abstained from the vote. Against this background, no settled practice or legal conviction on the part of the particular subjects of international law could be assumed to exist in respect of the rights of indigenous peoples, at least at the time of the adoption of the basic Regulation, only some two years after the UNDRIP had been solemnly proclaimed".<sup>18</sup> According to the present writer, the categorical character of these statements is quite regrettable, although partly nuanced by the fact that the lack of "settled practice" and "legal conviction" refers to 2009.

Many scholars with expertise in this field have argued that some provisions of the UN Declaration embody customary international law.<sup>19</sup> Indeed, the largely prevailing view in the *doctrine* has been well summarized by the International Law Association in its resolution No. 5/2012, dealing with "Rights of Indigenous Peoples", where it is asserted that the UN Declaration "as a whole cannot yet be considered as a statement of existing customary international law. However it includes several key provisions which correspond to existing State obligations under customary international law".<sup>20</sup> Domestic courts in various Countries have issued a number of judgments endorsing this view.<sup>21</sup> Apparently, this was not taken into account in the reasoning of the Advocate General, who is, indeed, very elusive and patchy in the examination of relevant State practice.

The Opinion exactly highlights that "[r]espect for the United Nations (second sentence of Art. 3, para. 5 TEU) and the European Union's sincere cooperation with its own Member States (first subparagraph of Art. 4, para. 3 TEU) require the EU institutions to consider the substance of the UNDRIP and to take it into account as far as possible in the exercise of their powers, even though that declaration does not contain any legally binding provisions governing the actions of the European Union".<sup>22</sup> However, if taken seriously, the duty of sincere cooperation with member States – all of which have voted in favour to the UN Declaration – should have suggested greater shrewdness in the Advocate General: she should have refrained from excluding that some of the rights and principles proclaimed by the UN Declaration have been incorporated into general inter-

<sup>18</sup> *Ivi*, para. 90.

<sup>19</sup> See, for all, S.J. ANAYA, S. WIESSNER, *The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment*, in *Jurist Forum*, 3 October 2007.

<sup>20</sup> International Law Association, resolution No 5/2012, conclusion no. 2.

<sup>21</sup> A domestic judgment pre-dating the issuance of the basic Regulation No 1007/2009 was issued in 2007 by the Supreme Court of Belize, *Aurelio Cal and the Maya Village of Santa Cruz v. Attorney General of Belize*; and *Manuel Coy and Maya Village of Conejo v. Attorney General of Belize*, (Consolidated) Claims Nos 171 and 172. Some other examples can be found in C. BALDWIN, C. MOREL, *Using the United Nations Declaration on the Rights of Indigenous Peoples in Litigation*, in S. ALLEN, A. XANTHAKI (eds), *Reflections on the UN Declaration*, cit., p. 121 *et seq.*

<sup>22</sup> Opinion of Advocate General Kokott, cit., para. 93.

national law. This *dictum* constitutes an obstacle to the consolidation of customary law in the direction desired by EU Member States. It is worth emphasizing that the Advocate General, as a highly qualified organ contributing to the adjudicatory function in the EU legal order, also contributes towards the *opinio juris* of the EU, by either reinforcing the position of the Court or providing internally conflicting evidence of *opinio juris*.<sup>23</sup> In this perspective, the ruling of the Court of Justice is less detrimental than the Opinion of the Advocate General to the emergence and crystallization of general international law on indigenous peoples' rights. In fact, after declaring the plea inadmissible, the Court has not tried to ascertain the content of customary international law or establish to what extent the UN Declaration may be considered a codification instrument.

### III. INDIGENOUS COMMUNITIES' RIGHT TO PROPERTY AND ITS PROTECTION UNDER EU LAW

Another argument relied upon by the Inuit associations was that the basic Regulation and the Commission Implementing Regulation No 737/2010 had deprived them of the economic benefits arising from the exploitation of seal products, which constitute a significant portion of their income.

It is important to emphasize that Regulation No 1007/2009 does not prohibit the placing on the market of seal products derived from traditionally practiced forms of hunting for subsistence purpose. This has been further specified by the Implementing Regulation No 737/2010, whereby the only products that can be placed on the market are those derived from seal hunts that contribute to the subsistence of indigenous communities and "are at least partially used, consumed or processed within the communities according to their traditions".<sup>24</sup> The plaintiffs/appellants alleged that this restrictive interpretation of the "Inuit exception" represented an illegitimate interference in the peaceful enjoyment of their possessions, due to the impossibility to place on the market products originating from seals traditionally hunted, but subsequently processed and sold by non-Inuit persons.<sup>25</sup> The *Inuit Tapiriit Kanatami II* case afforded the Court of Justice of the European Union the unique opportunity to express its view con-

<sup>23</sup> The contribution of domestic courts decisions to State practice and *opinio juris* is widely recognized in international law literature (see *inter multos* M. AKEHURST, *Custom as a Source of International Law*, in *British Yearbook of International Law*, 1974-1975, p. 8 *et seq.*). The same considerations can be extended, *mutatis mutandis*, to international organizations. On internally conflicting practice and *opinio juris* see B.D. LEPARD, *Customary International Law. A New Thesis with Practical Applications*, Cambridge: Cambridge University Press, 2010, p. 172 *et seq.*

<sup>24</sup> Art. 3 of Regulation No 737/2010. This Regulation also provides that indigenous seal products must be accompanied by an attesting documentation issued by an entity included in a list of "recognized body" (Art. 3, para. 2, Art. 5, para. 2 and Art. 7, para. 1).

<sup>25</sup> General Court, *Inuit Tapiriit Kanatami et al. II*, cit., para. 127; Court of Justice, *Inuit Tapiriit Kanatami et al. II*, cit., para. 49.

cerning whether Art. 17 of the Charter must be interpreted as also encompassing collective property rights claimed by indigenous peoples.

It is commonly acknowledged that one of the most important developments in the field of indigenous peoples' rights consists of a multicultural-oriented interpretation of the right to property, which has allowed to cover those rights established by indigenous customary law, *in primis* indigenous rights over ancestral lands and natural resources.<sup>26</sup> In the case at issue, the plaintiffs/appellants claimed that the restriction of the opportunity to trade in seal products as previously done had breached a legitimate expectation in the future realization of property rights, falling within the scope of the protection of Art. 1 of Protocol No 1 to the European Convention on Human Rights (and therefore of Art. 17 of the Charter). The Advocate General and then the Court of Justice, did not accept this argument, deeming that the appellants' "case is based only on the subjective wish to be permitted in future to trade in seal products in the European internal market to the same extent as previously. They do not have any authorization, assurance or any kind of legal position on which they could base their prospect of such future trade".<sup>27</sup>

Again, the Court has missed the opportunity to clarify the state of EU and international law as far as the rights of indigenous peoples are concerned. It is true that the appellants had not produced substantial evidence of contracts for the sale of seal products in Europe, whose execution had been made impossible because of the entry into force of Regulations No 1007/2009 and No 737/2010. Had this happened, there would have been an interference in the enjoyment of clearly identifiable rights with an asset value. However, the Court of Justice has too hastily dismissed the claim that the indigenous communities could assert a legitimate expectation. The UN Declaration proclaims, *inter alia*, the right of indigenous peoples "to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities",<sup>28</sup> and "the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human

<sup>26</sup> See, e.g., E. TRAMONTANA, *La dimensione collettiva dei diritti dei popoli indigeni nella giurisprudenza della Corte interamericana dei diritti umani: il caso Comunidad Indígena Sawhoyamaka c. Paraguay*, in *Diritti umani e diritto internazionale*, 2007, p. 617 *et seq.* It is also arguable that the right to property guaranteed under international human rights treaties also protects indigenous peoples' traditional knowledge as a form of intellectual property (S. VEZZANI, *Il Primo Protocollo alla Convenzione europea dei diritti umani e la tutela della proprietà intellettuale di popoli indigeni e comunità locali*, in *Diritti umani e diritto internazionale*, 2007, p. 305 *et seq.*; ID., *La tutela delle conoscenze tradizionali di interesse agricolo nel diritto internazionale*, in G. STRAMBI, A. GERMANÒ (eds), *La valorizzazione del patrimonio culturale immateriale di interesse agricolo*, Milano: Giuffrè, 2015, p. 50 *et seq.*)

<sup>27</sup> Opinion of Advocate General Kokott, cit., para. 76. The Opinion also emphasizes that "[e]ven in response to an enquiry made at the hearing, [the appellants] were unable to provide any specific information in this regard".

<sup>28</sup> Art. 20 of the UN Declaration.



and genetic resources, seeds, medicines”.<sup>29</sup> It is argued here that these provisions of the Declaration codify existing customary international law as concerns the right of indigenous peoples to trade in natural resources and traditional by-products. It is worth noting in this respect that a wide number of treaties concerning the conservation of protected species, while prohibiting the trade in products thereof, establish specific exceptions in favour of indigenous peoples.<sup>30</sup> Indeed, the aim of the whole body of international law on indigenous peoples’ rights (in contrast with biocultural rights drawn from international environmental agreements) is to protect certain social, cultural and economic interests of the communities purely because of their indigenous status, not only conditional upon sustainability and stewardship towards ecosystems and biodiversity.<sup>31</sup> Like the other rights proclaimed in the Declaration, the right to place traditional indigenous products on the market should be “subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society”.<sup>32</sup>

If the preceding considerations are correct, the Inuit communities could claim *on the basis of customary international law* what the Advocate General had defined a “legal position on which they could base their prospect of such future trade”.<sup>33</sup> Therefore, using an evolutionary interpretation of Art. 17 of the Charter, the Court ought to have accepted the argument that, as a matter of principle, a restriction on the possibility of exporting traditional seal products to the EU internal market could amount to interference with the Inuit communities’ right to property. While extremely important from a legal policy point of view, this interpretation of the right to property would have not implied the acceptance of the applicants’/appellants’ allegations in the specific case here under consideration. As stated above, the EU legislation allows the placing on the internal market of indigenous products, though limited to those derived from seals hunted by indigenous communities which contribute to their subsistence and “are at least partially used, consumed or processed within the communities according to their traditions”.<sup>34</sup> The limited scope of the “Inuit exception” is perfectly in line with the UN Declaration and with corresponding customary international norms, which cannot be invoked to afford

<sup>29</sup> Art. 31 of the UN Declaration.

<sup>30</sup> R. VIRZO, *Diritti dei popoli indigeni e conservazione, gestione e commercializzazione di risorse naturali nel diritto internazionale*, in M.B. DELI, M.R. MAURO, F. PERNAZZA, F.P. TRAISCI (eds), *Impresa e diritti fondamentali nella prospettiva transnazionale*, Napoli: Editoriale Scientifica, 2012, p. 345 *et seq.*

<sup>31</sup> G. SAJEVA, *Rights with Limits: Biocultural Rights – between Self-determination and Conservation of the Environment*, cit., p. 49 *et seq.*

<sup>32</sup> Art. 46, para. 2, of the UN Declaration.

<sup>33</sup> Opinion of Advocate General Kokott, cit., para. 76.

<sup>34</sup> Art. 3 of Regulation No 737/2010.

protection for trade in products, which are not at least partially used, consumed or processed within the communities according to their traditions. To recognize an unconditioned privilege for indigenous communities to trade in products derived from seals hunted and processed by non-indigenous hunters and corporations, primarily for commercial reasons, would run contrary to the *bona fide* principle and result in an abusive circumvention of any measure prohibiting the commercialization of seal products. It is no mere chance that similar criteria, relating to the identity of the hunter, the purpose of the hunt and the use of by-products are always found in all the above-mentioned treaties on the conservation of protected species, which establish specific exceptions in favour of indigenous peoples, but limited to hunting, fishing or whaling traditionally conducted and for subsistence purposes.<sup>35</sup>

#### IV. CONCLUSION

A few weeks after the judgment of the Court of Justice commented upon above, the EU Seal Regime was modified by Regulation (EU) No 2015/1775 of the European Parliament and of the Council of 6 October 2015 amending Regulation (No) 1007/2009 on trade in seal products and repealing Commission Regulation (EU) No 737/2010. This Regulation, further implemented by the Commission,<sup>36</sup> contains some amendments aimed at bringing the EU ban in compliance with WTO law.<sup>37</sup> It confirms the ban on products obtained from hunts either not conducted by indigenous peoples or primarily for commercial reasons. At the same time, it sets out clearer criteria for the application of the “Inuit exception” and adds a new condition to be fulfilled, i.e. that “the hunt is conducted in a manner which has due regards to animal welfare, taking into consideration the way of life of the community and the subsistence purpose of the hunt”.<sup>38</sup> It is not possible to predict how the new EU Seal Regime will be applied and whether the *Inuit Tapiriit Kanatami* saga will continue before the Court of Justice or the European Court of Human Rights. However, it seems doubtful that claims may be brought successfully in Luxembourg or in Strasbourg (against EU member States), unless the application of Regulation No 1007/2009 resulted in a concrete case in the exclusion from the EU market of seal products properly characterized as obtained from indigenous subsistence hunting.

<sup>35</sup> R. VIRZO, *Diritti dei popoli indigeni e conservazione, gestione e commercializzazione di risorse naturali nel diritto internazionale*, cit.

<sup>36</sup> Commission Implementing Regulation (EU) No 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.

<sup>37</sup> Notably, Regulation No 2015/1775 eliminates the exception for products derived from hunts conducted for the sole purpose of the sustainable management of marine resources.

<sup>38</sup> Art. 3, lett. c), of Regulation (EC) No 1007/2009, as amended by Art. 1, para. 2, of Regulation No 2015/1775.

The Court of Justice cannot be blamed for ruling in favour of the lawfulness of the EU ban on the marketing of seal products. The EU Seal Regime has been established in response to public moral concerns about the inhumane killing of seals and pursues a legitimate public interest under Art. 13 TFUE, i.e. the protection of animals as sentient beings. Both the contested regulations sufficiently guarantee the rights of indigenous peoples to engage in traditional hunting and to maintain and control their traditional knowledge and cultural expressions. Furthermore, according to the available information, the EU legislature had consulted several representatives of indigenous communities before adopting Regulation No 1007/2009.<sup>39</sup> It is regrettable, however, that the Court has not seized the opportunity to express the EU's *opinio juris* concerning some customary international norms on the rights of indigenous peoples. The judgment should have emphasized the importance of the informed consultation principle and clarified, in an *obiter dictum*, that Art. 17 of the Charter also affords protection to the collective property rights of indigenous peoples over natural resources and associated traditional knowledge. This re-conceptualization in a multicultural perspective of the Charter would have aligned Luxembourg case law with the jurisprudence of the Inter-American Court of Human Rights and offered an important contribution to the consolidation at the international level of the rights of indigenous peoples.

Overall, the *Inuit Tapiriit Kanatami II* case reveals under many respects a lack of sensitivity of the EU judiciary towards advancing the rights of indigenous peoples and favouring the observance and progressive development of international law in this field. As said above, particularly regrettable is the statement, in the Advocate General's Opinion, that the UN Declaration does not codify general international law. This stance is not in line neither with the duty of sincere cooperation of member States, nor with the principle requiring the EU to bolster its founding values as stated in Art. 2 of the Treaty on European Union (TEU) on the international scene: "democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law".<sup>40</sup> Of course, currently EU values also include the protection of animal health and welfare under Art. 13 TFEU, which would have justified a balancing of the various interests at stake. Yet the EU Courts simply refused to examine whether the EU Seal Regime was in conformity with international law on indigenous peoples' rights, based on the formalistic argument that the applicants had invoked at first instance the UN Declaration, without specifying they were referring to it as providing evidence of the content of international customary law. This approach

<sup>39</sup> Opinion of Advocate General Kokott, cit., para. 114.

<sup>40</sup> Art. 21, para. 1, TEU.

casts some shadow on the credibility of the Union's ambition to promote "the strict observance and development of international law".<sup>41</sup>

<sup>41</sup> Art. 3, para. 5, TEU.