Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 19 March 2015 [1]

Case C-398/13 P

Inuit Tapiriit Kanatami and Others
v

European Commission and Others

(Appeal — Regulation (EU) No 737/2010 — Regulation (EC) No 1007/2009 — Trade in seal products — Ban on placing on the market in the European Union — Exception in favour of Inuit communities — Choice of correct legal basis — General power of harmonisation within the internal market (Article 95 EC) — Fundamental rights — International law — United Nations Declaration on the Rights of Indigenous Peoples)

I – Introduction

1. Was the EU legislature entitled to rely, in 2009, on Article 95 EC (now Article 114 TFEU) in order to impose an extensive ban on the placing on the market of seal products in the European internal market? This is in essence the question with which the Court must deal in the present appeal proceedings.

2. There is no need to stress the high sensitivity of legal problems relating to the interpretation and application of Article 95 EC for the division of powers between the European Union and the Member States. [2] Apart from the scope of this general power of harmonisation within the internal market, the present case also raises problems in relation to EU fundamental rights. Furthermore, it is necessary to consider what effects are to be attributed to a declaration by the United Nations General Assembly within the European Union.

1 — Original language: German.

2 — Other legal disputes concerning Article 114 TFEU are pending, namely Cases C-358/14 (*Poland* v *Parliament and Council*), C-477/14 (*Pillbox 38*) and C-547/14 (*Philip Morris and Others*).

3. These questions are being taken to the European Union Courts for a second time by Inuit Tapiriit Kanatami, as the body representing the interests of the Canadian Inuit,[3] and a number of other parties, mainly producers of or traders in seal products. After, in a direct action brought against the basic regulation of the European Parliament and of the Council,[4] it was found that they did not have standing to institute proceedings,[5] they are now challenging the European Commission implementing regulation[6] and making an indirect challenge (pursuant to Article 277 TFEU) alleging that the basic regulation is unlawful.

4. Once again the claim put forward by Inuit Tapiriit Kanatami and its co-appellants was unsuccessful at first instance. By judgment of 25 April 2013.[7] the General Court of the European Union dismissed their action for annulment as unfounded. They are now challenging that judgment by way of the present appeal.

II – The relevant legislation

A – *Rules of EU law*

5. The rules of EU law on the placing on the market of seal products in the European internal market are contained partly in a basic regulation adopted by the European Parliament and the Council of the European Union in 2009 (Regulation No 1007/2009) and partly in a Commission implementing regulation adopted in 2010 (Regulation No 737/2010). The present proceedings are directed, formally speaking, against the implementing regulation, but in substance pleas are raised exclusively against the lawfulness of the basic regulation.

1. The basic regulation (Regulation No 1007/2009)

6. The subject-matter of Regulation No 1007/2009 is defined, in Article 1, as follows:

‘This Regulation establishes harmonised rules concerning the placing on the market of seal products.’

7. Under Article 3 of Regulation No 1007/2009, the following ‘conditions for placing on the market’ of seal products apply:

‘1. 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.

3 — The Inuit are an indigenous ethnic group who live primarily in the arctic and subarctic regions of central and north-eastern Canada, in Alaska, in Greenland and in parts of Russia. The term Eskimo(s), which is sometimes used colloquially, describes other arctic ethnic groups in addition to the Inuit.

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

5 — Order in *Inuit Tapiriit Kanatami and Others* v *Parliament and Council* (T-18/10, EU:T:2011:419), confirmed by the judgment in *Inuit Tapiriit Kanatami and Others* v *Parliament and Council* (C-583/11 P, EU:C:2013:625).

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 (OJ 2010 L 216, p. 1).

7 — *Inuit Tapiriit Kanatami and Others* v *Commission* (T-526/10, EU:T:2013:215), ‘the judgment under appeal’.

2. By way of derogation from paragraph 1:

(a) the import of seal products shall also be allowed where it is of an occasional nature and consists exclusively of goods for the personal use of travellers or their families. The nature and quantity of such goods shall not be such as to indicate that they are being imported for commercial reasons;

(b) the placing on the market of seal products shall also be allowed where the seal products result from by-products of hunting that is regulated by national law and conducted for the sole purpose of the sustainable management of marine resources. Such placing on the market shall be allowed only on a non-profit basis. The nature and quantity of the seal products shall not be such as to indicate that they are being placed on the market for commercial reasons.

The application of this paragraph shall not undermine the achievement of the objective of this Regulation.

3. The Commission shall, in accordance with the management procedure ..., issue technical guidance notes setting out an indicative list of the codes of the Combined Nomenclature which may cover seal products subject to this Article.

4. Without prejudice to paragraph 3, measures for the implementation of this Article, designed to amend non-essential elements of this Regulation by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny …'

8. Furthermore, Article 2(4) of Regulation No 1007/2009 contains the following definition of 'Inuit':

'"Inuit" means indigenous members of the Inuit homeland, namely those arctic and subarctic areas where, presently or traditionally, Inuit have aboriginal rights and interests, recognised by Inuit as being members of their people and includes Inupiat, Yupik (Alaska), Inuit, Inuvialuit (Canada), Kalaallit (Greenland) and Yupik (Russia).'

9. In addition, reference should be made to recital 14 in the preamble to Regulation No 1007/2009:

'The fundamental economic and social interests of Inuit communities engaged in the hunting of seals as a means to ensure their subsistence should not be adversely affected. The hunt is an integral part of the culture and identity of the members of the Inuit society, and as such is recognised by the United Nations Declaration on the Rights of Indigenous Peoples. Therefore, the placing on the market of seal products which result from hunts traditionally conducted by Inuit and other indigenous communities and which contribute to their subsistence should be allowed.'

2. The implementing regulation (Regulation No 737/2010)

10. On the basis of Article 3(4) of Regulation No 1007/2009, on 10 August 2010 the Commission adopted detailed implementing rules for the trade in seal products in the form of Regulation (EU) No 737/2010 (also 'the implementing regulation').

11. Article 1 of Regulation No 737/2010 provides:

'This Regulation lays down detailed rules for the placing on the market of seal products pursuant to Article 3 of Regulation (EC) No 1007/2009.'

12. Article 3 of Regulation No 737/2010 lays down the conditions which must be satisfied in order for seal products resulting from hunts by Inuit or other indigenous communities to be placed on the market.

13. Article 4 of Regulation No 737/2010 defines the requirements under which seal products for the personal use of travellers or their families may be imported.

14. Lastly, Article 5 of Regulation No 737/2010 governs the circumstances under which seal products resulting from marine resources management may be placed on the market.

B – *United Nations resolutions*

15. By Resolution 61/295, adopted at its 107th plenary meeting on 13 September 2007, the United Nations General Assembly solemnly proclaimed the 'United Nations Declaration on the Rights of Indigenous Peoples' (UNDRIP).

16. Article 19 of the UNDRIP reads as follows:

'States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.'

17. According to the last recital in its preamble, the UNDRIP was proclaimed 'as a standard of achievement to be pursued in a spirit of partnership and mutual respect'.[8]

III – Procedure before the Court

18. By written pleading of 8 July 2013, Inuit Tapiriit Kanatami and its co-appellants (also 'the appellants') jointly brought the present appeal. They claim that the Court should:

— set aside the judgment under appeal, declare Regulation No 1007/2009 illegal and inapplicable pursuant to Article 277 TFEU and annul Regulation No 737/2010 pursuant to Article 263 TFEU, should the Court consider that all elements required to decide on the substance of the action for annulment of the contested regulation are present;

— in the alternative, set aside the judgment under appeal and refer the case back to the General Court;

— order the European Commission to pay the appellants' costs.

19. The Commission contends that the Court should:

— dismiss the appeal; and

— order the appellants to pay the costs jointly and severally.

8 — French: 'qui constitue un idéal à atteindre dans un esprit de partenariat et de respect mutuel'; Spanish: 'como ideal común que debe perseguirse en un espíritu de solidaridad y respeto mutuo'.

20. The Parliament, which intervened in the proceedings at first instance in support of the Commission, claims that the Court should:

— dismiss the appeal; and

— order the appellants to pay costs.

21. Lastly, the Council, which also intervened in the proceedings at first instance in support of the Commission, claims that the Court should:

— dismiss the appeal in its entirety; and

— order the appellants to pay the Council's costs.

22. The appeal was examined before the Court of Justice on the basis of the written documents and, on 9 February 2015, at a hearing.

IV – Assessment

23. In their appeal, Inuit Tapiriit Kanatami and its co-appellants do not pursue all the issues which formed the subject-matter of the proceedings at first instance. On appeal, the legal debate is instead confined to only a few selected problems which all relate to the lawfulness of the basic regulation.[9] It revolves around errors in law which the General Court is alleged to have made when it rejected the indirect challenge to contest lawfulness made by Inuit Tapiriit Kanatami and its co-appellants against the basic regulation (Article 277 TFEU). Before I turn to these substantive complaints,[10] it is appropriate to make a brief preliminary remark on the admissibility of the action for annulment at first instance.

A – *Preliminary remark on the admissibility of the action for annulment at first instance*

24. Despite the objections raised by the Council in the proceedings at first instance, the General Court remarkably refrained from examining in detail the standing of Inuit Tapiriit Kanatami and its co-appellants to institute proceedings and turned immediately to the merits of their action.[11]

25. This fact does not, in principle, prevent the Court of Justice from ascertaining of its own motion at the appeal stage that Inuit Tapiriit Kanatami and its co-appellants had the necessary standing to institute proceedings within the meaning of the fourth paragraph of Article 263 TFEU.[12]

26. However, unlike the first proceedings brought by Inuit Tapiriit Kanatami and its co-appellants, which were brought directly against the basic regulation,[13] the present proceedings, which are directed against the implementing regulation, do not raise any fundamental problems of admissibility in respect of standing to institute proceedings. It can be argued that the Commission implementing regulation is of direct concern at least to the appellants which themselves market seal products and sell them in the European internal market and requires no further implementing measures in respect of them. They

9 — The proceedings initiated by Canada and Norway against the European Union before the World Trade Organisation's Dispute Settlement Body ('EC — Seal Products', DS 400 and DS 401), in which the final reports with recommendations were adopted on 18 July 2014, concerned different matters from the present appeal proceedings.

10 — See points 27 to 96 of this Opinion.

11 — In this regard the General Court relied on the case-law occasionally applied by the Court of Justice following from *Council* v *Boehringer* (C-23/00 P, EU:C:2002:118, paragraphs 51 and 52) and *France* v *Commission* (C-233/02, EU:C:2004:173, paragraph 26).

12 — *Stadtwerke Schwäbisch Hall and Others* v *Commission* (C-176/06 P, EU:C:2007:730, paragraph 18).

13 — See footnote 5 above.

can therefore be considered to have standing to institute proceedings under the third variant of the fourth paragraph of Article 263 TFEU.[14] According to case-law, this is sufficient to consider the action for annulment at first instance, which was brought by all the applicants together,[15] to be admissible in its entirety.

B – *The choice of Article 95 EC as the legal basis for the basic regulation (first ground of appeal)*

27. By their first ground of appeal, Inuit Tapiriit Kanatami and its co-appellants allege that the General Court made two errors in law with regard to Article 95 EC. They do not call into question the general suitability of that provision as a legal basis for an extensive ban on placing certain products on the market. Instead, they confine themselves to raising two narrowly defined problems: the first problem concerns the point in time in the legislative procedure at which the conditions for the application of Article 95 EC must be fulfilled and the second the importance of the volume of trade that must be affected in order to justify recourse to Article 95 EC.

1. The relevant point in time for assessing the conditions under Article 95 EC (first part of the first ground of appeal)

28. First of all, the appellants allege, with regard to paragraphs 36 to 64 of the judgment under appeal, that the General Court did not have regard to the correct point in time when it examined whether the conditions under Article 95 EC were fulfilled in respect of the basic regulation. They take the view that it is not the time of the adoption of the basic regulation that is relevant, but an earlier time, namely that at which the Commission submitted its proposal for that regulation.

29. This argument is unfounded.

30. It is settled case-law that the lawfulness of a European Union measure must always be assessed on the basis of the facts and the law as they stood at the time when the measure was adopted.[16] This holds in particular for the point in dispute between the parties to the present case, namely whether the differences existing between national rules were sufficiently large to justify intervention by the EU legislature on the basis of Article 95 EC.[17]

31. Otherwise it would be made considerably more difficult for the Parliament and the Council, during the ordinary legislative procedure (formerly the codecision procedure), to make amendments to the measure proposed by the Commission, either to take account of new facts or law or to give effect to a different political assessment by the co-legislators of the questions to be decided, including the question of the correct legal basis.

32. Neither the principle of conferral invoked by the appellants (first sentence of Article 5(2) TEU, in conjunction with the first sentence of Article 5(1) thereof, formerly Article 5(1) EC) nor the objective of harmonisation pursued by Article 95 EC militate against having regard to the point in time at which the respective measure was adopted in the judicial review.

14 — The third variant of the fourth paragraph of Article 263 TFEU, which was introduced by the Treaty of Lisbon, confers on natural or legal persons standing to institute proceedings against a regulatory act which is of direct concern to them and does not entail implementing measures.

15 — *CIRFS and Others* v *Commission* (C-313/90, EU:C:1993:111, paragraphs 30 and 31).

16 — *France* v *Commission* (15/76 and 16/76, EU:C:1979:29, paragraph 7); *Crispoltoni and Others* (C-133/93, C-300/93 and C-362/93, EU:C:1994:364, paragraph 43); *IECC* v *Commission* (C-449/98 P, EU:C:2001:275, paragraph 87) and *Schaible* (C-101/12, EU:C:2013:661, paragraph 50).

17 — *Arnold André* (C-434/02, EU:C:2004:800, paragraph 38); *Swedish Match* (C-210/03, EU:C:2004:802, paragraph 37); *Germany* v *Parliament and Council* (C-380/03, EU:C:2006:772, paragraphs 46, 51 and 55) and *Vodafone and Others* (C-58/08, EU:C:2010:321, in particular paragraph 39).

33. It is true that the Commission should actually submit proposals for legislative measures to the Parliament and the Council only if it is foreseeable that at the time of their expected adoption by the two co-legislators all the conditions for recourse to Article 95 EC will be fulfilled, including the need for a harmonising measure at EU level. This follows from the Commission's institutional responsibility (Article 17(1) and (2) TEU) and from its duty of sincere cooperation with the other EU institutions (second sentence of Article 13(2) TEU) and with the Member States (first subparagraph of Article 4(3) TEU). However, the object of the judicial review of a legislative measure is not the action of the institution which submitted the proposal, but the action of the institutions which adopted the legislative measure. Consequently, in judicial proceedings regard must be had to the point in time at which the Parliament and the Council took the decision and not that at which the Commission initiated the legislative procedure.

34. The appellants' fear that a Commission proposal made at random, as it were, could — like a self-fulfilling prophesy — only give rise to the adoption of divergent national laws, regulations or administrative provisions, and thus ultimately create the conditions for recourse to Article 95 EC itself, strikes me as unreasonable. It is much more likely that the national legislature will refrain from laying down domestic rules governing a certain matter once the Commission has submitted a proposal for a harmonisation measure at EU level.

35. All in all, the General Court did not therefore err in law when, in examining the conditions under Article 95 EC, it had regard to the time of the adoption of the basic regulation rather than directing its view to the time of the Commission proposal.

2. The conditions for recourse to Article 95 EC

36. Second, the appellants claim that the conditions for the application of Article 95 EC were not fulfilled in the present case irrespective of the time to which reference is made. This criticism is touched upon in the first part of this first ground of appeal in the form of several arguments raised in the alternative and is continued in the second part. In this regard, a distinction can be drawn between two problems: were the differences between the national laws, regulations and administrative provisions sufficiently large to require intervention by the EU legislature (see immediately below, section a)? And was trade in seal products within the European Union important enough to justify a harmonisation measure (see below, section b)?

a) Differences between the national laws, regulations and administrative provisions (submission in the alternative in the first part of the first ground of appeal)

37. In the view of the appellants, at the time of the adoption of the basic regulation — and before that at the time of the Commission proposal — the differences between the national rules on the placing on the market of seal products were far from being sufficiently large to initiate a legislative procedure under Article 95 EC.

38. I am not convinced by this view.

39. It is true that the object of measures adopted on the basis of Article 95(1) EC must genuinely be to improve the conditions for the establishment and functioning of the internal market. [18]

18 — *British American Tobacco (Investments) and Imperial Tobacco* (C-491/01, EU:C:2002:741, paragraph 60); *United Kingdom* v *Parliament and Council* (C-217/04, EU:C:2006:279) and *Vodafone and Others* (C-58/08, EU:C:2010:321, paragraph 32).

40. While a mere finding of disparities between national rules and the abstract risk of infringements of fundamental freedoms or distortion of competition is not sufficient to justify the choice of Article 95 EC as a legal basis, the EU legislature may have recourse to that provision in particular where there are differences between national rules which are such as to obstruct the fundamental freedoms and thus have a direct effect on the functioning of the internal market [19] or to cause significant distortions of competition. [20]

41. The basic regulation unquestionably satisfies these requirements.

42. According to the facts established by the General Court, [21] against which no claims of distortion have been raised before the Court of Justice, several Member States had adopted or were in the process of adopting or examining legislative measures aimed at restricting or banning economic activity linked to the production of seal products. More specifically, on the adoption of the basic regulation, some Member States had already banned the placing on the market of seal products and others intended to adopt such legislation, while no restrictions were placed on trade in these products in other Member States, with the result that different commercial conditions coexisted within the European Union and there were fears of a fragmentation of the internal market.

43. The EU legislature was permitted to take these differences in the applicable national provisions, to which reference is made several times in the recitals in the preamble to the basic regulation, [22] as the reason for a harmonisation measure at EU level. Such differences are likely to impair trade in seal products in the European internal market. [23] In addition, in view of the divergence in the national provisions, there was a danger that European consumers would even be suspicious of products not made from seals, but which may not be easily distinguishable from such products. [24]

44. However, Inuit Tapiriit Kanatami and its co-appellants complain that the General Court relied in this connection only on extremely vague and general allegations in the recitals in the preamble to the basic regulation. Furthermore, they argue, the General Court wrongly incorporated into its considerations the written statements that had been made by the Commission only during the proceedings before it.

45. This claim is also unjustified.

46. It should be noted, first of all, that the statement of reasons for an EU measure of general application is not subject to the same requirements as the statement of reasons for decisions by the EU institutions in individual cases. In the case of measures of general application the statement of reasons may be confined to indicating the general situation which led to the measure's adoption and the general objectives which it is intended to achieve; it needs only to disclose clearly the essential objective pursued by the measure in question. [25]

19 — *Germany* v *Parliament and Council* (C-380/03, EU:C:2006:772, paragraph 37) and *Vodafone and Others* (C-58/08, EU:C:2010:321, paragraph 32).

20 — *Germany* v *Parliament and Council* (C-376/98, EU:C:2000:544, paragraphs 84 and 106) and *Vodafone and Others* (C-58/08, EU:C:2010:321, paragraph 32).

21 — See in particular paragraph 36 of the judgment under appeal.

22 — Recitals 5, 6 and 7 in the preamble to Regulation No 1007/2009.

23 — Recital 6 in the preamble to Regulation No 1007/2009.

24 — Recitals 7 and 10 in the preamble to Regulation No 1007/2009.

25 — *AJD Tuna* (C-221/09, EU:C:2011:153, paragraph 59).

47. Second, it is settled case-law that the EU institutions may, in the proceedings before the General Court, explain in more detail in their defence the reasons for a contested measure.[26] Completely new grounds may not, it is true, be added 'after the event'.[27] However, there is nothing to preclude the EU institutions from providing the General Court with background information on a legislative measure which enables the General Court to review the validity of the grounds for the adoption of that measure mentioned in its preamble and thus ultimately to assess its lawfulness more effectively.

48. That was precisely the situation in the present case. Without relying on new grounds, in its pleading at first instance the Commission merely illustrated which Member States had introduced bans on the placing on the market of seal products in their national law or had considered this course of action, and at what time they had done so.

49. Furthermore, the General Court[28] rightly stated that neither the wording nor the objective of Article 95 EC requires a minimum number of Member States whose national provisions must diverge in order for it to be possible to adopt harmonisation measures at EU level.

50. Contrary to the view apparently taken by Inuit Tapiriit Kanatami and its co-appellants, the mere fact that at the time when the legislative procedure was initiated only two Member States[29] had introduced national bans on seal products does not preclude the application of Article 95 EC.[30]

51. The conditions for intervention by the EU legislature under Article 95 EC are not quantitative, but qualitative. The adoption of a harmonisation measure does not depend so much on whether and in how many Member States a certain product is covered by rules or even by bans. Any existing or specifically anticipated disruption of trade in the internal market can justify a harmonisation measure, on condition that the general principles for the exercise of the powers of harmonisation — in particular the principles of subsidiarity and proportionality (Article 5(3) and (4) TEU) — are respected.

52. I would add that, irrespective of whether or not divergences exist between the national provisions, harmonisation may be necessary at EU level even where there is not yet any market whatsoever for a certain new product and no trade rules exist in Europe because uniform legal conditions must first be created.

53. All in all, I cannot therefore see any indication that the General Court erred in law in its assessment of the circumstances justifying recourse to Article 95 EC in the present case.

b) Importance of the relevant volume of trade for intervention under Article 95 EC (second part of the first ground of appeal)

54. Furthermore, the appellants claim in this first ground of appeal that the General Court applied an incorrect criterion for assessing the existing differences between the national provisions governing trade in seal products when it stated at the end of paragraph 56 of the judgment under appeal that the products at issue were products 'in which trade between the Member States is certainly not negligible'.

26 — *Stora Kopparbergs Bergslags* v *Commission* (C-286/98 P, EU:C:2000:630, paragraph 61); similarly, *Präsident Ruhrkohlen-Verkaufsgesellschaft and Others* v *High Authority* (36/59 to 38/59 and 40/59, EU:C:1960:36, in particular pp. 442 to 444) and *Picciolo* v *Parliament* (111/83, EU:C:1984:200, paragraph 22).

27 — *Michel* v *Parliament* (195/80, EU:C:1981:284, paragraph 22); *Dansk Rørindustri and Others* v *Commission* (C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 463); *Elf Aquitaine* v *Commission* (C-521/09 P, EU:C:2011:620, paragraph 149) and *Alliance One International and Standard Commercial Tobacco* v *Commission* (C-628/10 P and C-14/11 P, EU:C:2012:479, paragraph 74).

28 — Paragraph 51 of the judgment under appeal.

29 — Belgium and the Netherlands.

30 — See, to that effect, *Arnold André* (C-434/02, EU:C:2004:800, paragraph 38) and *Swedish Match* (C-210/03, EU:C:2004:802, paragraph 37).

55. Contrary to the view apparently taken by the Parliament, this complaint is not simply an attempt to question the assessment of the facts and evidence made by the General Court, which would be inadmissible in appeal proceedings. The relevant question is actually whether the General Court applied appropriate legal criteria when examining the legality of the contested decision and whether it drew appropriate legal conclusions from the facts established. It is certainly one of the duties of the Court of Justice, as the appellate body, to review this aspect. [31]

56. In essence, the appellants allege that the General Court applied unduly low requirements to the adoption of harmonisation measures by the EU legislature. With reference to phrases contained in some of the Court's earlier judgments, they take the view that recourse may be had to Article 95 EC as a legal basis only where the relevant market is one in which trade between Member States 'represents a relatively large part' [32] or, to put it another way, in which that trade 'is relatively sizeable'. [33]

57. It seems to me that this complaint is based on a two-fold misunderstanding.

58. First of all, by its contested statements on 'non-negligible trade' the General Court intended, not to define a specific criterion for the application of Article 95 EC, but only to respond specifically to an argument which had been raised by Inuit Tapiriit Kanatami and its co-appellants themselves in the proceedings at first instance. They had claimed that the production of seal products in the European Union was 'negligible'. [34]

59. Second, the allegation made by the appellants is based on an incorrect reading of the Court's case-law on Article 95 EC. It is true that the Court has repeatedly referred to the 'relatively sizeable' character or the 'relatively large part' represented by trade in the relevant products. [35] However, this was merely a particular assessment of the circumstances of the individual case and not a legal requirement for the EU legislature in order to be able to have recourse to Article 95 EC.

60. The general power of harmonisation within the internal market (Article 95 EC, now Article 114 TFEU) is not subject to any *de minimis* threshold such that below a minimum volume of trade the EU legislature would be prevented from adopting harmonisation measures for the product concerned. [36]

61. On the one hand, in view of the diversity of product markets in Europe, such a *de minimis* threshold could not really be universally defined and could therefore lead to considerable legal uncertainty. On the other, there would be a serious danger that a 'two-tier internal market' might be created in which only important products with a sizeable volume of trade benefit from uniform legal conditions applicable throughout the European Union, whilst trade in less important products would lose out. This could be particularly detrimental to certain new products which still have a low volume of trade and which possibly require uniform legal conditions in order to achieve their breakthrough on the internal market.

31 — *Sumitomo Metal Industries and Nippon Steel* v *Commission* (C-403/04 P and C-405/04 P, EU:C:2007:52, paragraph 40); *Bertelsmann and Sony Corporation of America* v *Impala* (C-413/06 P, EU:C:2008:392, paragraph 117); *Solvay* v *Commission* (C-109/10 P, EU:C:2011:686, paragraph 51) and *Commission* v *Stichting Administratiekantoor Portielje* (C-440/11 P, EU:C:2013:514, paragraph 59).

32 — *British American Tobacco (Investments) and Imperial Tobacco* (C-491/01, EU:C:2002:741, paragraph 64); *Arnold André* (C-434/02, EU:C:2004:800, paragraph 39) and *Swedish Match* (C-210/03, EU:C:2004:802, paragraph 38).

33 — *Germany* v *Parliament and Council* (C-380/03, EU:C:2006:772, paragraph 53).

34 — See paragraph 55 of the judgment under appeal.

35 — See again the judgments cited above in footnotes 32 and 33.

36 — Case-law has recognised a kind of *de minimis* threshold in some cases only in respect of the intensity of interference with fundamental freedoms, but not in respect of the significance of the relevant volume of trade; see, for example, *CMC Motorradcenter* (C-93/92, EU:C:1993:838, paragraph 12); *Graf* (C-190/98, EU:C:2000:49, paragraph 25) and *Commission* v *Spain* (C-211/08, EU:C:2010:340, paragraph 72).

62. Article 95 EC certainly does not preclude the approximation of the Member States' laws, regulations and administrative provisions by the EU legislature in respect of products with a negligible volume of trade, on condition that the general principles for the exercise of the powers of harmonisation — in particular the principles of subsidiarity and proportionality (Article 5(3) and (4) TEU) — are respected.

3. Interim conclusion

63. All in all, the first ground of appeal is therefore unfounded in its entirety.

C – *Fundamental rights (second ground of appeal)*

64. By their second ground of appeal, Inuit Tapiriit Kanatami and its co-appellants allege a total of three errors in law which, in their view, were made by the General Court with regard to general fundamental rights principles.

1. Consideration of the ECHR (first part of the second ground of appeal)

65. In the second ground of appeal, the appellants criticise the General Court, first of all, for making reference to the Charter of Fundamental Rights of the European Union only,[37] but not to the ECHR as a source of general fundamental rights principles. They allege that the General Court 'requalified' their submissions made at first instance relating to the ECHR. They consider this to be an error in law.

66. It should be noted in this regard that the ECHR does not, at present, form part of EU law as such, as it is a legal instrument which has not yet been formally incorporated into the legal order of the European Union.[38] Accordingly, that Convention cannot, as things stand at present, itself be applied as a standard for reviewing the lawfulness of acts of the EU institutions.

67. Instead, in this case the General Court was fully entitled to rely on the Charter of Fundamental Rights, which has had constitutional status since the entry into force of the Treaty of Lisbon on 1 December 2009 (first subparagraph of Article 6(1) TEU) and has grown to become the most important source of fundamental rights in EU law.[39]

68. As far as the ECHR is concerned, it admittedly also still fulfils two important functions for the protection of fundamental rights at EU level: first of all, it provides information on the meaning and scope of the fundamental rights enshrined in the Charter in so far as those rights correspond to rights guaranteed by the ECHR (first sentence of Article 52(3) of the Charter). Second, it is and remains the most important source of inspiration for unwritten fundamental rights, which, as general principles, form part of EU law (Article 6(3) TEU). The ECHR thus ultimately defines the minimum standard for the protection of fundamental rights to be guaranteed at EU level[40] (see also Article 53 of the Charter).

37 — See, in particular, paragraph 105 of the judgment under appeal.

38 — *Schindler Holding and Others* v *Commission* (C-501/11 P, EU:C:2013:522, paragraph 32) and *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraph 44) and Opinion 2/13 (EU:C:2014:2454, paragraph 179).

39 — See, to that effect, *Otis and Others* (C-199/11, EU:C:2012:684); *Chalkor* v *Commission* (C-386/10 P, EU:C:2011:815) and *Schindler Holding and Others* v *Commission* (C-501/11 P, EU:C:2013:522); also in *Sky Österreich* (C-283/11, EU:C:2013:28) the Court examined only the provisions of the Charter of Fundamental Rights even though the question referred to it also related to Additional Protocol No 1 to the ECHR.

40 — See also my Opinion in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission* (C-550/07 P, EU:C:2010:229, point 143) and my View in Opinion 2/13 (EU:C:2014:2475, point 203).

69. However, it is not clear in the present case to what extent the ECHR — whether in conjunction with Article 6(3) TEU or with the first sentence of Article 52(3) of the Charter — might thus impose higher requirements on the EU legislature than the Charter cited by the General Court. In their appeal Inuit Tapiriit Kanatami and its co-appellants have not put forward any specific arguments in this regard and they failed to provide an explanation in reply to my express enquiry at the hearing.

70. It is not therefore evident in this case what additional benefit a reference by the General Court to the ECHR, the absence of which is criticised by the appellants, might have had or to what extent that lack of reference could result in the setting-aside of the judgment under appeal. [41]

71. Accordingly, I concur with the Parliament that the assertions by the appellants relating to the ECHR are ineffective (French: 'inopérant'). Consequently, the first part of this second ground of appeal is unfounded.

2. Consideration of commercial interests in connection with the fundamental right to protection of property (second part of the second ground of appeal)

72. In this second ground of appeal, the appellants claim, second, that the General Court erred in law in excluding commercial interests from the scope of the right to property.

73. This argument cannot be accepted either.

74. It is settled case-law that the protection of the right to property guaranteed under EU law, as now established in Article 17 of the Charter of Fundamental Rights, does not apply to mere commercial interests or opportunities, the uncertainties of which are part of the very essence of economic activity. [42] Nor can an economic operator claim an acquired right or even a legitimate expectation that an existing situation which is capable of being altered by measures taken by the EU legislature will be maintained. [43]

75. The situation is the same in respect of Article 1 of Additional Protocol No 1 to the ECHR, which must be taken into consideration pursuant to the first sentence of Article 52(3) of the Charter and Article 6(3) TEU. According to the case-law of the European Court of Human Rights, the guarantee of the right of property enshrined therein also does not encompass the protection of mere earning prospects. [44]

76. It is true that the European Court of Human Rights has ruled that, under certain circumstances, even legitimate expectations in the future realisation of property rights can fall within the scope of the protection offered by Article 1 of Additional Protocol No 1 to the ECHR. [45] However, Inuit Tapiriit Kanatami and its co-appellants cannot rely on such a legitimate expectation in this instance, as their case is based only on the subjective wish to be permitted in future to trade in seal products in the

41 — In so far as the appellants claim that the protection of commercial interests is more strongly expressed in the ECHR than in the Charter of Fundamental Rights, I will examine that contention in the context of the second part of the second ground of appeal (see below, points 72 to 82 of this Opinion).

42 — *Nold* v *Commission* (4/73, EU:C:1974:51, paragraph 14); *FIAMM and Others* v *Council and Commission* (C-120/06 P and C-121/06 P, EU:C:2008:476, paragraph 185) and *Sky Österreich* (C-283/11, EU:C:2013:28, paragraph 34).

43 — *Faust* v *Commission* (52/81, EU:C:1982:369, paragraph 27); *Swedish Match* (C-210/03, EU:C:2004:802, paragraph 73) and *Alliance for Natural Health and Others* (C-154/04 and C-155/04, EU:C:2005:449, paragraph 128).

44 — European Court of Human Rights, judgments *Marckx v. Belgium*, 13 June 1979, § 50, Series A no. 31; *Anheuser-Busch v. Portugal* [GC], no. 73049/01, § 64, ECHR 2007-I and *Malik v. United Kingdom*, no. 23780/08, § 93, 13 March 2012.

45 — See, for example, European Court of Human Rights, judgments *Pressos Compania Naviera v. Belgium*, 20 November 1995, § 31, Series A no. 332 and *Maurice v. France* [GC], no. 11810/03, § 63, ECHR 2005-IX.

European internal market to the same extent as previously. They do not have any authorisation, assurance or any kind of legal position on which they could base their prospect of such future trade. [46] Even in response to an enquiry made at the hearing, they were unable to provide any specific information in this regard.

77. The various judgments of the European Court of Human Rights invoked by the appellants in the appeal proceedings also lead to the same conclusion. Unlike the present case, those judgments concerned much more than mere earning prospects for undertakings. They focused on, among other things, licences and clientele, that is to say, an undertaking's acquired rights and property assets, which represent its goodwill. [47]

78. All in all, it cannot therefore be assumed that the judgment under appeal disregarded the minimum standard for the protection of property stemming from the ECHR. The General Court did not err in law in refusing to consider the mere expectation of Inuit Tapiriit Kanatami and its co-appellants that they would continue to be permitted to place seal products on the European internal market to the same extent as previously to be protected by the guarantees accorded by the right to property. [48]

79. The second part of the second ground of appeal is therefore also unfounded.

a) Additional remarks on the freedom to conduct a business

80. In the event that Inuit Tapiriit Kanatami and its co-appellants now wish, at the appeal stage, additionally to rely on the fundamental right of freedom to conduct a business (Article 16 of the Charter of Fundamental Rights), [49] their submissions are inadmissible on two grounds.

81. First, an examination of that fundamental right would amount to an enlargement of the subject-matter of the dispute heard at first instance. [50]

82. Second, it should be recalled that the freedom to conduct a business is not absolute, but must be viewed in relation to its social function. It may be subject to a broad range of interventions on the part of public authorities which may limit the exercise of economic activity in the public interest. [51] The appeal lodged by Inuit Tapiriit Kanatami and its co-appellants does not even begin to address this aspect. Their submissions on the freedom to conduct a business are therefore too unsubstantiated to be reasonably assessed by the Court. [52]

46 — See also, to this effect, European Court of Human Rights, *Maurice v. France* (cited above in footnote 45, §§ 65 and 66) and *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, §§ 83 to 87, ECHR 2001-VIII.

47 — European Court of Human Rights, judgments *Tre Traktörer v. Sweden*, 7 July 1989, § 53, Series A no. 159; *Van Marle and Others v. Netherlands*, 26 June 1986, Series A no. 101; *Iatridis v. Greece* [GC], no. 31107/96, §§ 54 and 55, ECHR 1999-II; *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, §§ 178 and 179, ECHR 2012 and *Malik v. United Kingdom* (cited above in footnote 44, § 93).

48 — See, in particular, paragraph 109 of the judgment under appeal.

49 — This is suggested by their reference to *Alliance for Natural Health and Others* (C-154/04 and C-155/04, EU:C:2005:449, paragraph 127).

50 — *Groupe Gascogne* v *Commission* (C-58/12 P, EU:C:2013:770, paragraph 35); see also *Dansk Rørindustri and Others* v *Commission* (C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 165), *Alliance One International and Standard Commercial Tobacco* v *Commission* (C-628/10 P and C-14/11 P, EU:C:2012:479, paragraph 111) and *Nexans and Nexans France* v *Commission* (C-37/13 P, EU:C:2014:2030, paragraph 45).

51 — *Sky Österreich* (C-283/11, EU:C:2013:28, paragraphs 45 and 46).

52 — See, to this effect, *Lindorfer* v *Council* (C-227/04 P, EU:C:2007:490, paragraph 83); *Schindler Holding and Others* v *Commission* (C-501/11 P, EU:C:2013:522, paragraphs 45 and 106) and *MasterCard and Others* v *Commission* (C-382/12 P, EU:C:2014:2201, paragraph 151).

3. Consideration of the United Nations Declaration on the Rights of Indigenous Peoples (third part of the second ground of appeal)

83. Lastly, in this second ground of appeal Inuit Tapiriit Kanatami and its co-appellants allege that the General Court erred in law 'by not examining the basic regulation in the light of Article 19 of the UNDRIP'.

a) Admissibility

84. Although the wording of this complaint is not a shining example of clarity, unlike the Parliament I consider it to be sufficiently comprehensible to be able to make a meaningful finding in the appeal proceedings. In essence, it is alleged that the General Court did not take due account of the stipulations of Article 19 of the UNDRIP in examining the lawfulness of the basic regulation.

85. However, this third part of the second ground of appeal is inadmissible in so far as it makes reference to customary international law. This aspect was not part of the subject-matter of the proceedings at first instance before the General Court. As the Parliament has rightly observed, Inuit Tapiriit Kanatami and its co-appellants are not therefore permitted to rely on customary international law in the appeal proceedings.[53] In the event that the Court should nevertheless consider the appellants' arguments on customary international law to be simply a development of their submissions at first instance,[54] I will also examine this aspect below for the sake of completeness.

b) Substance

86. In principle, under Article 3(5) TEU, the European Union is to contribute to the strict observance and the development of international law. Consequently, when it adopts an act, it is bound to observe international law in its entirety, including customary international law, which is binding upon the institutions of the European Union.[55]

87. On a superficial analysis, the impression could actually be created that Article 19 of the UNDRIP, with its reference to 'free, prior and informed consent', confers on indigenous peoples a form of power of veto against legislative and administrative measures that may affect those peoples.

88. On closer inspection, however, the UNDRIP does not contain any internationally binding rules of law which the EU legislature might have infringed in adopting the basic regulation.

89. First of all, 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'.[56] 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.

53 — See again the case-law cited above in footnote 50.

54 — See, inter alia, *Scaramuzza* v *Commission* (C-76/93 P, EU:C:1994:371, paragraph 18); *Akzo Nobel and Others* v *Commission* (C-97/08 P, EU:C:2009:536, paragraphs 38 and 39) and *Commission* v *Poland* (C-504/09 P, EU:C:2012:178, paragraphs 35 and 36).

55 — *Air Transport Association of America and Others* (C-366/10, EU:C:2011:864, paragraph 101).

56 — See the last recital in the preamble to the UNDRIP (emphasis added).

90. Second, contrary to the view taken by the appellants, the UNDRIP cannot be regarded as a codification of customary international law. As 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 iuris sive necessitatis*; subjective element). [57] There can be no question of this in the present case. It is true that the 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. [58] 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.

91. Third, it is also not possible to infer that the UNDRIP has binding legal effects on the European Union from the rulings of the Court, cited by the appellants, in *NTN Toyo Bearing*, *Fediol* and *Nakajima*, as the present case is not comparable to those cases:

— The UNDRIP is not a general, binding legal framework (co-) created by the European Union itself, as was the case in *NTN Toyo Bearing*, [59] with which the EU legislature would have been required to comply strictly when adopting the ban on the placing of seal products on the market.

— Nor is there a situation comparable to *Fediol*. [60] The basic regulation does refer expressly to the UNDRIP at one point in its preamble. [61] However, that reference is certainly not intended to confer on individuals certain legally enforceable rights which can be derived from Article 19 of the UNDRIP.

— Lastly, the basic regulation also does not serve in general for compliance with the international obligations of the European Union, as was the case in *Nakajima*. [62] As already mentioned, the UNDRIP does not at all contain any legally binding provisions governing the actions of the European Union or of its Member States.

92. Of course, the fact that the UNDRIP does not constitute '*hard law*' must not lead to the false conclusion that such a declaration has no importance for the EU institutions. As '*soft law*', [63] it has the status of at least a recommendation and, moreover, carries considerable political weight, especially since the UNDRIP was solemnly proclaimed in the form of a United Nations General Assembly resolution and was supported by a large number of States, including all of the European Union Member States.

57 — See in this connection, in particular, the judgments of the ICJ of 20 February 1969 in the *North Sea Continental Shelf* Cases (Germany v Netherlands and Germany v Denmark), *I.C.J. Reports* 1969, p. 4 (paragraph 77) and of 27 June 1986 in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v United States of America), *I.C.J. Reports* 1986, p. 14 (paragraphs 183 and 184).

58 — Resolution 61/295 was adopted by 143 votes to four, with 11 abstentions (*Official Records of the General Assembly*, Sixty-First Session, Supplement No 53, A/61/53, Part One, Chapter II, Section A). Australia, Canada, New Zealand and the United States of America voted against the resolution; abstentions included Bangladesh, Kenya, Columbia, Nigeria and the Russian Federation.

59 — *NTN Toyo Bearing and Others* v *Council* (113/77, EU:C:1979:91, paragraph 21).

60 — *Fediol* v *Commission* (191/82, EU:C:1983:259, paragraph 22); see, most recently, also *Council and Parliament* v *Commission* and *Commission* v *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht* (C-401/12 P to C-403/12 P, EU:C:2015:4, paragraph 58).

61 — Recital 14 in the preamble to Regulation No 1007/2009.

62 — *Nakajima* v *Council* (C-69/89, EU:C:1991:186, paragraph 31); see, most recently, also *Council and Parliament* v *Commission* and *Commission* v *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht* (C-401/12 P to C-403/12 P, EU:C:2015:4, paragraph 59).

63 — With regard to '*soft law*', see for example, recently, the Opinion of Advocate General Cruz Villalón in *Germany* v *Council* (C-399/12, EU:C:2014:289, point 97, with further references).

93. Respect for the United Nations (second sentence of Article 3(5) TEU) and the European Union's sincere cooperation with its own Member States (first subparagraph of Article 4(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.

94. The General Court certainly did not misunderstand these 'soft-law effects' of the UNDRIP. Rather, it satisfied itself that the EU legislature had addressed the substance of the UNDRIP. According to the findings in the judgment under appeal,[64] the representatives of the Inuit were broadly and repeatedly consulted in preparation for both the basic regulation and its implementing measures and the EU legislature then inserted the 'Inuit exception' into the basic regulation (Article 3(1) of Regulation No 1007/2009), which continues to permit the Inuit and other indigenous communities, to a limited extent, to market seal products resulting from traditional hunting methods in the European internal market in order to ensure their subsistence. Under the prevailing circumstances, more could not have been expected of the EU legislature.

95. All in all, this third and last part of the second ground of appeal — in so far as it is at all admissible — cannot therefore be upheld and must be rejected as unfounded.

D – *Summary*

96. As neither the first nor the second ground of appeal can be upheld, the appeal in its entirety has no prospects of success and should therefore be dismissed as being partially inadmissible and partially unfounded.

V – Costs

97. If, as I propose in this case, the appeal is dismissed, the Court will make a decision as to costs under Article 184(2) of the Rules of Procedure, the details of which are set out in Articles 137 to 146, in conjunction with Article 184(1), of those Rules of Procedure.

98. It follows from Article 138(1) and (2), in conjunction with Article 184(1), of the Rules of Procedure that the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings; where there is more than one unsuccessful party, the Court is to decide how costs are to be shared. Since the Commission has applied for costs and the appellants have been unsuccessful, they must be ordered to pay the costs. They must pay those costs jointly and severally since they brought the appeal jointly.[65]

99. A different decision must be taken on the costs incurred by the Parliament and by the Council. Those institutions, which intervened in the proceedings at first instance in support of the Commission, also participated in the written and oral parts of the appeal proceedings. Under the second sentence of Article 184(4) of the Rules of Procedure, the Court may decide that such parties are to bear their own costs.

64 — Paragraphs 114 and 115 of the judgment under appeal.

65 — *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission* (C-550/07 P, EU:C:2010:512, paragraph 123); to the same effect, see *D and Sweden* v *Council* (C-122/99 P and C-125/99 P, EU:C:2001:304, paragraph 65); in the latter case D and the Kingdom of Sweden had even lodged two separate appeals and were nevertheless ordered jointly and severally to pay the costs.

100. According to its wording ('may'), the latter provision certainly does not prevent the Court, where appropriate, from taking a different decision and ordering the unsuccessful appellant to pay the costs incurred by the opposing intervener at first instance if the latter, like the Parliament and Council in the present case, has been successful in its pleas in the appeal proceedings.[66] In the present case, however, it would seem that the rule laid down in the second sentence of Article 184(4) of the Rules of Procedure should be applied. This is also supported by Article 140(1), in conjunction with Article 184(1), of the Rules of Procedure.[67]

VI – Conclusion

101. In the light of the foregoing, I propose that the Court should:

(1) dismiss the appeal;

(2) order the European Parliament and the Council of the European Union to bear their own costs;

(3) order, for the remainder, the appellants jointly and severally to bear the costs of the proceedings.

66 — See, for example, *Council* v *Zhejiang Xinan Chemical Industrial Group* (C-337/09 P, EU:C:2012:471, paragraph 112); in that case, the Council, as the unsuccessful appellant, was ordered to pay the costs, including those incurred by Audace as the opposing intervener at first instance, which had been successful in its pleas in the appeal proceedings.

67 — See, to this effect, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council* (C-583/11 P, EU:C:2013:625, paragraph116).