

Markets, Sovereignty, and Racialization

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ABSTRACT

The 2009 European Union (EU) Seal Regime banning the importation of seal products on moral grounds and the series of cases before the EU courts and World Trade Organization provide an opportunity to understand how capitalism relies on racial categories. The EU Seal Regime is racist since it constructs an Indigenous identity based on abstract European definitions of subsistence hunting. It also has a unique racializing dynamic that purports to protect Indigenous identity from afar but in effect decimates Indigenous communities in their homeland. In this struggle over seals and the trade laws that constitute the global seal market, the concept of sovereignty in this instance helps clarify what is at stake. What is at stake is a contest over who has jurisdiction over seal bodies: whoever has the power to create the market rules that determine the taking and selling of seals in effect determines the sovereign power in the Arctic. Ultimately, what is problematic with the Seal Regime is that the definition of European morals used to justify the ban of seal products relied on a relationship that simultaneously ignored and threatened Indigenous existence.

I. INTRODUCTION

The 2009 European Union (EU) Seal Regime banning the importation of seal products into its market on moral grounds devastated the lives of Inuit and other Indigenous peoples in the Arctic and generated a series of cases before the EU courts and World Trade Organization (WTO) dispute settlement body.¹

The EU Seal Regime allowed for seal products that resulted from Inuit or other Indigenous communities if they met certain criteria (among several other exceptions). Inuit Tapiriit Kanatami (representing Inuit interests in Canada) led advocacy groups and hunters' associations from Canada and Greenland, individual Inuit hunters, and other representatives from the seal hunting industry from Canada, Greece, and Norway in a series of suits in EU courts and lost on procedural points.² While the EU court cases proceeded, Canada and Norway challenged the

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¹ European Parliament and Council Regulation (EC) 1007/2009 on trade in seal products, OJ 2009 L286/36 [Basic Regulation]. The exceptions are contained in European Commission Regulation (EU) No. 737/2010 laying down detailed rules for implementation of Regulation (EC) No. 1007/2009 of the European Parliament and of the Council on trade in seal products, OJ 2010 L216/1 [Implementing Regulation].

² European General Court, Case T-18/10 *Inuit Tapiriit Kanatami and Others v Commission* (2011) ECR 11–5599 (ITK v Commission 2011); European General Court, Case T-526/10 *Inuit Tapiriit Kanatami and Others v Commission* (2013) (ITK v Commission 2013); ECJ, Case C-583/11 P *Inuit Tapiriit Kanatami and Others v Commission* (2013) (ITK v Commission 2013); ECJ, Case C-398/13 P *Inuit Tapiriit Kanatami and Others v Commission* (2015) (ITK v Commission 2015).

EU Seal Regime at the WTO.³ In sum, the Appellate Body (AB) held that EU Seal Regime contravened General Agreement on Tariffs and Trade (GATT) Article I:1 (Most-Favored Nation) because it unjustifiably discriminated against all seal products from Canada and Norway in favor of seal products from Greenland. It followed, however, with the conclusion that the EU could provisionally justify its ban as a general exception under GATT Article XX(a) as a measure necessary to protect public morals.

International animal rights organizations, sympathetic trade scholars, and proponents for the emerging field of global animal law considered the WTO AB decision a victory.⁴ To them, the case highlighted how the WTO is not necessarily a doctrinaire free trade institution and can be made more flexible to make room for other values. Others, mostly from Arctic communities and the Polar Law Academy, determined the EU Seal Regime and the WTO decision to be a violation of Indigenous peoples' human rights.⁵ Their concerns added to long-standing arguments that the international economic system harms Indigenous peoples.⁶ What both perspectives share is the assumption that international trade law is a space for competing values and interests, with different opinions over how those values should be arranged or balanced.⁷

Indeed, since the EU Seal Regime was promulgated, the trade landscape in relation to Indigenous peoples has changed. Regional trade agreement reference Indigenous peoples, granting them different degrees of power. The United States–Mexico–Canada Agreement references Indigenous peoples,⁸ but notably not to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).⁹ The New Zealand–United Kingdom Free Trade Agreement includes a Māori Trade and Economic Cooperation chapter addressing Māori interests and treaty rights. The Indigenous Peoples Economic and Trade Cooperation Arrangement is a plurilateral agreement among states intended to support and promote Indigenous political and commercial participation in international trade and investment; it can be understood as one way to put UNDRIP into economic practice.¹⁰ There are also new Indigenous-to-Indigenous trade treaties

³ WTO Panel Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R and WT/DS401/R, adopted 25 November 2013; WTO Appellate Body Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products (EC-Seals)*, AB-2014-1 and AB-2014-2, adopted 22 May 2014.

⁴ Robert Howse, Joanna Langille, and Katie Sykes, 'Sealing the Deal: The WTO's Appellate Body Report in EC—Seal Product', *ASIL Insights*, 184 June 2014, <https://www.asil.org/insights/volume/18/issue/2/animal-welfare-public-morals-and-trade-wto-panel-report-ec—seal> (visited on 29 June 2020); Katie Sykes, 'Globalization and the Animal Turn: How International Trade Law Contributes to Global Norms of Animal Protection', 1 *Transnational Environmental Law* 55 (2016); Anne Peters, 'Animals in International Law (Volume 410)', in *Collected Courses of the Hague Academy of International Law* (Leiden: Brill, 2019) 95–544 at 310–331.

⁵ Dorotheé Cambou, 'The Impact of the Ban on Seal Products on the Rights of Indigenous Peoples: A European Issue', 5 (1) *Yearbook of Polar Law* 389 (2013); Kamrul Hossain, 'The EU Ban on the Import of Seal Products and the WTO Regulations: Neglected Human Rights of the Arctic Indigenous Peoples?', 49 (2) *Polar Record* 154 (2013).

⁶ Victor Menotti, 'How the World Trade Organization Diminishes Native Sovereignty', in Jerry Mander and Victoria Tauli-Corpuz (eds), *Paradigm Wars: Indigenous Peoples' Resistance to Globalization* (San Francisco: Sierra Club Books; Distributed by University of California Press, 2006) 59; Valentina Vadi, 'Global v. Local: The Protection of Indigenous Heritage in International Economic Law', in Sarah Sargent and Jo Samanta (eds), *Indigenous Rights: Changes and Challenges for the twenty-first Century* (Buckingham: The University of Buckingham Press, 2016) 7.

⁷ See for e.g. Alexia Herwig, 'Regulation of Seal Animal Welfare Risk, Public Morals and Inuit Culture under WTO Law: Between *Techne*, *Oikos* and *Praxis*', 6 *European Journal of Risk Regulation* 382 (2015); Ben Czapnik, "'Moral" Determinations in WTO Law: Lessons from the Seals Dispute', 25 *Journal of International Economic Law* 1 (2022).

⁸ Agreement between the USA, the United Mexican States, and Canada, 1 July 2020. Risa Schwartz, 'Developing a Trade and Indigenous Peoples Chapter for International Trade Agreements', in John Borrows and Risa Schwartz (eds), *Indigenous Peoples and International Trade: Building Equitable and Inclusive International Trade and Investment* (Cambridge: Cambridge University Press 2020) 248.

⁹ United Nations Declaration on the Rights of Indigenous Peoples, United Nations General Assembly, 2 October 2007, A/RES/61/295.

¹⁰ Indigenous Peoples Economic and Trade Cooperation Arrangement, 10 December 2021. See also Amokura Kawharu, 'The Treaty of Waitangi Exception in New Zealand's Free Trade Agreements', in John Borrows and Risa Schwartz (eds), *Indigenous Peoples and International Trade: Building Equitable and Inclusive International Trade and Investment* (Cambridge: Cambridge University Press 2020) 274.

in the western hemisphere which are contemporary versions of historical practices¹¹ and operate ‘with, within, and across the borders of individual states.’¹² Meanwhile, a groundbreaking scholarship has been examining Indigenous people’s role and interests in international economic law.¹³

Considering these developments, the debate among and within Indigenous communities is whether and on what terms people should engage with trade regimes, but also with capitalism more broadly. Indigenous perspectives span the same range of positions being put forward all over the world: to some, capitalism creates markets which operate as spaces of individual freedom, and the problem with trade is that the rules are applied with racist bias;¹⁴ others argue that ‘for our nations to live, capitalism must die’;¹⁵ and to others still, capitalism is not inherently problematic and they see substantive expressions of self-determination as an opportunity to fundamentally transform current forms of capitalism.¹⁶

To help people judge the opportunities for Indigenous self-determination in or against trade agreements and to help sharpen the terms of the ongoing debates, I focus on the set of laws and cases around the EU Seal Regime as an example of how working through concepts of racial capitalism may clarify the stakes. To all people committed to liberation politics, my suggestion is that we can have better strategic and tactical discussions among different peoples and movements when we understand how race is legally constructed through capitalism and not just colonialism and imperialism.¹⁷ My methodological challenge to international economic law scholars and practitioners is to present this case as an example of how being silent about trade law’s role in constructing racial categories is to be complicit with racist laws.

Different racial regimes operate differently. Some racial regimes devalue people’s humanity in a way that enables others to exploit their labor often through immigration or criminal law.¹⁸ Whereas settler colonialism is defined by a ‘logic of elimination’ of native societies accompanied by the erection of a new colonial society in order to obtain and maintain territory.¹⁹ The EU Seal Regime has a unique racializing dynamic that purports to regulate the seal market and protect Indigenous identity from afar, but in effect decimates Indigenous communities in their homeland. The EU created the category of ‘Indigenous’ in racial terms by drawing a line between who is in and who is out—not according to Inuit sovereignty claims or on actual relationships among people and seals, but on an abstract notion of ‘Indigenous subsistence hunting.’ The EU

¹¹ Angelique EagleWoman and Wambdi A. Was’tewinyan, ‘Indigenous Historic Trade in the Western Hemisphere’, in John Borrows and Risa Schwartz (eds), *Indigenous Peoples and International Trade: Building Equitable and Inclusive International Trade and Investment Agreements* (Cambridge: Cambridge University Press, 2020) 43.

¹² Sheryl R. Lightfoot and David MacDonald, ‘Treaty Relations between Indigenous Peoples: Advancing Global Understandings of Self-Determination’, 2 *New Diversities* 25 (2017), at 26.

¹³ John Borrows and Risa Schwartz (eds), *Indigenous Peoples and International Trade: Building Equitable and Inclusive International Trade and Investment* (Cambridge: Cambridge University Press, 2020); Sergio Puig, *At the Margins of Globalization: Indigenous Peoples and International Economic Law* (Cambridge: Cambridge University Press, 2021).

¹⁴ This was Madeline Redfern’s position in Michael Fakhri and Madeline Redfern, ‘How the WTO Constructed Inuit and Indigenous Identity in EC-Seal Products’, in John Borrows and Risa Schwartz (eds), *Indigenous Peoples and International Trade: Building Equitable and Inclusive International Trade and Investment* (Cambridge: Cambridge University Press, 2020) 109, at 114, 122.

¹⁵ Glen Coulthard, ‘For Our Nations to Live, Capitalism Must Die’ (5 November 2013), *Unsettling America*, <https://unsettlingamerica.wordpress.com/2013/11/05/for-our-nations-to-live-capitalism-must-die/>.

¹⁶ John Borrows, ‘Indigenous Diversities in International Investment and Trade’, in John Borrows and Risa Schwartz (eds), *Indigenous Peoples and International Trade: Building Equitable and Inclusive International Trade and Investment Agreements* (Cambridge: Cambridge University Press, 2020) 11.

¹⁷ B S Chimni, ‘Capitalism, Imperialism, and International Law in the Twenty-First Century’, 14 *Oregon Review of International Law* 17 (2012); Nick Estes, *Our History Is the Future: Standing Rock versus the Dakota Access Pipeline, and the Long Tradition of Indigenous Resistance* (New York: Verso, 2019).

¹⁸ Carolina S Ruiz-Austria, ‘Profiteers of the Bump and Grind Contests in Commodification’, 14 *Oregon Review of International Law* 203 (2012); Adelle Blackett and Alice Duquesnoy, ‘Slavery Is Not a Metaphor: U.S. Prison Labor and Racial Subordination through the Lens of the ILO’s Abolition of Forced Labor Convention’, 6 *UCLA Law Review* 1504 (2021).

¹⁹ Patrick Wolfe, ‘Settler Colonialism and the Elimination of the Native’, 4 *Journal of Genocide Research* 387 (2006).

Seal Regime continues the long tradition of white-supremacist conservatism by relying on an unsubstantiated racial panic about non-white people cruelly harming animals.²⁰

In this struggle over seals, I focus on sovereignty because in this instance it helps clarify what is at stake. There is no contest over who owns seal products as such. What is at stake is a contest over who has jurisdiction over seal bodies:²¹ whoever has the power to create the rules that determine the taking and selling of seals in effect determines the sovereign power in the Arctic. In this case, the sovereign power is expressed through trade laws that constitute the global seal market. The EU is not making direct claims to any land or seaways in the Arctic. But regulating animals extends to regulating the land and water those animals live on and in turn regulates people by restricting their access and activities.²²

Before delving into the specifics of the cases and broader debates around seal hunting, I first explain what I mean by racial capitalism and why sovereignty is a useful concept to understand markets in general in Part II.²³ I then focus in Part III on how the EU Seal Regime and court cases racialized Inuit people by forcing Indigenous communities into an intimate relationship with the EU on terms that treat Indigenous people as objects and not legal subjects.²⁴ In Part IV, I highlight how the WTO AB legitimized and reconfigured the EU Seal Regime in continued racist terms by consolidating the definition of 'Indigenous'. I conclude with a summary and brief reflection on how this case raises concerns for the field of international economic law.

II. RACIAL CAPITALISM, SOVEREIGNTY, AND MARKETS

The notion of racial capitalism has been a way for people to 'grapple with the role of violence in the production of capital' and resist that violence.²⁵ I use the term racial capitalism to think in a way that starts with interrogating how capitalism always relies on the construction and deployment of racial categories to extract and accumulate wealth.²⁶

By capitalism I mean a way of organizing life around production for exchange and profit. It is a social system constituted by relationships defined in commercial terms of buying and selling, where increasing aspects of life are reliant on markets in order to access all the elements necessary to reproduce life. Capitalism is always accompanied by a legal regime that constitutes and enables one group—capitalists—to control and restrict access to instruments of production necessary for sustaining life.²⁷ Feminist scholars have framed capitalism as a system in which the few have control over the means of social reproduction and the work necessary for life to flourish, where the work is usually devalued through the construction of categories of gender and

²⁰ I am grateful to one of the reviewers for clarifying this point. See John Bellamy Foster and Brett Clark, 'The Sociology of Ecology Ecological Organicism Versus Ecosystem Ecology in the Social Construction of Ecological Science, 1926–1935', 3 *Organization Environment* 311 (2008); Miles A. Powell, *Vanishing America: Species Extinction, Racial Peril, and the Origins of Conservation* (Cambridge, Massachusetts: Harvard University Press, 2016).

²¹ Shaun McVeigh and Sundhya Pahuja, 'Rival Jurisdictions: The Promise and Loss of Sovereignty', in George Pavlich and Charles Barbour (eds), *After Sovereignty: On the Question of Political Beginnings* (New York: Routledge, 2010) 97; Sundhya Pahuja, 'Laws of Encounter: A Jurisdictional Account of International Law', 1 *London Review of International Law* 63 (2013).

²² Glenn W. Sheehan and Anne M. Jensen, 'Emergent Cooperation, or, Checkmate by Overwhelming Collaboration: Linear Feet of Reports, Endless Meetings', in Rebecca Pincus and Saleem H. Ali (eds), *Diplomacy on Ice* (New Haven: Yale University Press, 2015) 213, at 215.

²³ In general, self-determination and sovereignty are sometimes used interchangeably or are used with a considerable overlap. Each term has its own histories. In this paper, I use the concept of sovereignty since that is how Inuit frame their general political position in the Arctic and because UNDRIP was raised in the formal disputes. Self-determination is a larger category than sovereignty, but UNDRIP only focuses on internal self-determination with no reference to Indigenous sovereignty.

²⁴ My thanks to Cheryl Harris to pointing out that forced inclusion is a technology of racialization (along with absorption and exclusion/expulsion).

²⁵ Michael Ralph and Maya Singhal, 'Racial Capitalism', 6 *Theory and Society* 851 (2019), at 854.

²⁶ See for e.g. Gargi Bhattacharyya, *Rethinking Racial Capitalism: Questions of Reproduction and Survival* (Lanham: Rowman and Littlefield Publishers, 2018).

²⁷ Karl Marx, *Capital: A Critique of Political Economy* (London; New York, N.Y.: Penguin Books in association with New Left Review, 1976), at 493.

race.²⁸ Capitalism is defined by a rationality whose principal goal is to indefinitely accumulate and employ labor, land, money, and technology—capital—in order to accumulate and generate more capital. As such, extraction and accumulation are driving forces in capitalism.²⁹

My understanding of racism starts with Ruth Wilson Gilmore's description of racism as a 'practice of abstraction, a death-dealing displacement of difference into hierarchies that organize relations within and between the planet's sovereign political territories.'³⁰ Along with TWAIL scholars, this understanding places the issue of race at the center of international law.³¹ I understand Ruth Wilson Gilmore's notion of abstraction to mean a way to erase individual characteristics and communal relationships and reconstitute them through concepts such as 'black', 'white', or 'Indigenous'. This abstraction is then deployed in an attempt to weaken or erase people's power by denying them access to levers of power while also turning their bodies into something to be measured and devalued—the turning of people from legal subjects to objects.

A focus on race provides a clearer picture of how under capitalism, accumulation does not generate wealth in and of itself; instead, accumulation of capital is the result of redistributing power and resources in a way that reconfigures social and ecological relationships.³² Marx focused on the so-called primitive or original accumulation in order to understand what processes first generated capitalism—this was the process in which common property was enclosed and converted into private property and the peasantry was pushed off the land forced into becoming wage laborers. David Harvey, drawing from the work of Rosa Luxemburg, noted the continuing and complex dispossession that occurred in the more recent life of capitalism since the 1970s, the increasing privatization, the decreasing entitlements, and the reduction of wealth held in common—what he called accumulation by dispossession.³³ Glen Coulthard, however, has highlighted that what is at stake is not just the privatization of common property or elimination of public entitlements, but a transformation of socio-ecological relations that threaten an entire way of life, a people's very understanding of themselves and their relationship to land.³⁴

Even though I frame the stakes, like feminist and Indigenous scholars, as a matter of life and death, in this study I address categories of race and not gender. Trade law undoubtedly has also reconstructed how gender is understood in seal hunting communities and changed how work is allocated through gender. However, to understand gender requires a complementary analysis on a different scale, focusing on how seal meat, pelts, and products are taken, shared, and used through gender categories in seal hunting communities and how the racialization of Indigenous peoples generated resistance and unequal burdens across categories of gender. This article is written to complement such accounts.³⁵

Marx was concerned that commodification was a process that obscured the social conditions that created the final good, assumed people are legal formal equals, and redirected our attention

²⁸ Tithi Bhattacharya and Liselotte Vogel (eds), *Social Reproduction Theory: Remapping Class, Recentering Oppression* (London: Pluto Press, 2017).

²⁹ Eric R. Wolf, *Europe and the People Without History* (Berkeley, CA: University of California Press, 1982 [1997]), at 73–100; Ellen Miksins Wood, *The Origin of Capitalism: A Longer View* (London: Verso, 1999 [2002]), at 2.

³⁰ Ruth Wilson Gilmore, 'Fatal Couplings of Power and Difference: Notes on Racism and Geography', 1 *The Professional Geographer* 15 (2002), at 16.

³¹ Chantal Thomas, 'Critical Race Theory and Postcolonial Development Theory: Observations on Methodology', 45 *Villanova Law Review* 1195 (2000); Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005); John Reynolds, *Empire, Emergency, and International Law* (Cambridge: Cambridge University Press, 2017); E. Tendayi Achiume and Ashl Bāli, 'Race and Empire: Legal Theory Within, Through, and Across National Borders', 67 *UCLA Law Review* 1386 (2021).

³² Robert Knox, 'Valuing Race? Stretched Marxism and the Logic of Imperialism', 1 *London Review of International Law* 81 (2016), at 108.

³³ David Harvey, *A Brief History of Neoliberalism* (Oxford: Oxford University Press, 2005); David Harvey, *The New Imperialism* (Oxford: Oxford University Press, 2005).

³⁴ Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014).

³⁵ Alethea Arnaquq-Baril, *Angry Inuk* (Ottawa: National Film Board, 2016).

away from our relationship to each other toward our relationship to things. But what Bhandar adds, through her reading of Fanon, is that this equality and misguided focus is a fantasy only experienced by colonizers. To the colonized subject, there is no fantasy or misdirection since capitalism is experienced as a violent racializing force—a social relationship in which the colonizer is a legal subject with individualized will and the colonized subjects are subordinated as something less than human, a legal object, as something premodern or part of nature.³⁶

Discussions around racial capitalism and law over the past decades have focused on how property rights are central to capitalist systems.³⁷ Most recently, Bhandar has detailed how racial regimes of ownership have been a core aspect of capitalist modes of accumulation articulated through colonial regimes.³⁸ These studies of property and racial capitalism examine the different types of property rights such as use, disposition, and status. At the core of these studies, is a focus on property law as creating a regime of individual ownership—ultimate control—even if that notion of ownership is problematized.

Much of Marxist scholarship has focused on property relations based on ownership. But what matters is not the abstract bundle of property rights or the specific power of exclusion. What matters is how law converts all relationships into a market relationship between subjects that can buy and sell commodities. Marx emphasized that property relations are the basis of any capitalist legal system, and what matters is that property can be freely bought and sold in the market. To Bhandar, reading Marx and Pashukanis, legal subjectivity under capitalism comes from the ability to buy and sell in the market.³⁹

I am inspired by Bhandar's work on how private property ownership constructs racial subjects and has been central to the continued development of capitalism. I want to focus instead on two different but related aspects of property.

First, I focus more on how markets construct racial subjects. The sale of goods and commercial law more broadly can be understood as the transfer of property rights. It is too narrow, however, to imagine that people first hold property rights and then enter market transactions to transfer those property rights. Often, property rights are generated from the conditions of the transaction itself. Thus, markets are not just mechanisms that bring together buyers and sellers to transfer property rights, they are also spaces in which property rights are generated in effect creating the terms of legal subjectivity. A market transaction assumes that subjects are self-actualized individuals expressing their free will. But at the same time, 'their self-possession and autonomy was thoroughly racialized and emplaced within a colonial logic.'⁴⁰

Second, I focus on sovereignty. If property rights emerged in England as a mechanism to contest the Crown's sovereignty and royal prerogative, throughout the seventeenth and eighteenth centuries in Europe, property was increasingly used to justify expanding the geographical scope of the Crown's sovereignty.⁴¹ Throughout the last two centuries up until today, property rights still play a central claim in assertions of sovereignty.⁴² In turn, private property always relies on a particular institutional system of regulation and enforcement that have profound effects on how goods and entitlements are distributed, locally and globally.⁴³ I, therefore, focus on sovereignty

³⁶ Brenna Bhandar, 'Disassembling Legal Form: Ownership and the Racial Body', in Matthew Stone, Illan Wall and Costas Douzinas (eds), *New Critical Legal Thinking* (London: Birkbeck Law Press, 2012) 112, at 119, 121.

³⁷ Cheryl I Harris, 'Whiteness as Property', 8 *Harvard Law Review* 1707 (1993).

³⁸ Brenna Bhandar, *Colonial Lives of Property: Law, Land, and Racial Regimes of Ownership* (Durham: Duke University Press, 2018).

³⁹ See Bhandar, above n 36, at 117.

⁴⁰ *Ibid.*, at 115.

⁴¹ Martti Koskenniemi, 'Sovereignty, Property and Empire: Early Modern English Contexts', 2 *Theoretical Inquiries in Law* 255 (2017).

⁴² Kate Miles, *The Origins of International Investment Law: Empire, Environment, and the Safeguarding of Capital* (Cambridge: Cambridge University Press, 2013); Nicolás M. Perrone, *Investment Treaties and the Legal Imagination: How Foreign Investors Play by Their Own Rules* (Oxford: Oxford University Press, 2021).

⁴³ Joseph William Singer, 'Sovereignty and Property', 86 *Northwestern University Law Review* 1 (1991); Sylvia Wairmu Kang'ara, 'Rethinking Property: Language, Meaning and Institutions', in A-Ch Kiss and Johan G. Lammers (eds), *Hague Yearbook of*

not as an ultimate power over a particular territory but as concomitant to property and as a relationship between people through a particular space.⁴⁴ Sovereignty then, like property, is the power to control people's access to land, water, and knowledge through a system of rights and duties. In this study I also track how sovereignty, like property, is created through market-based relationships.

I also focus on sovereignty since Inuit people regularly claim their authority in the Arctic through complex and dynamic notions of sovereignty, as a way of constituting themselves as singular people across state borders, as a way of determining their relationship to states, and as a mode of resistance to different forms of oppressive power.⁴⁵

Countries have also used sovereignty to justify and define the meaning of imperial expansion. Colonizing powers would first legally define Indigenous as different or exceptional; they would then affirm their authority over this exception thereby asserting jurisdiction over Indigenous land; and finally they would enact laws that tried to bridge, redefine, or contain that difference almost always with a discriminatory purpose and harmful effect. Such a 'dynamic of difference' would justify the enactment of laws and the presence of the colonizing power.⁴⁶

In this dynamic there is always the twin logic of improvement and biology.⁴⁷ Difference is created by measuring against some standard of civilization but then making that standard always unattainable because of some immutable trait. Often this immutable trait is always related to some notion of 'nature'—the closer you are thought to be to nature or the less control of nature you exercise over nature through agriculture, commerce, or industry, the lower you are in the hierarchy of civilizations.⁴⁸ In turn, the closer you are to Europe or some assumed notion of whiteness and commerce, the more civilized you are.

In this case, the standard of 'civilization', the moral position, is not hunting seals. The EU Seal Regime then makes a distinction between traditional hunters whose purpose is subsistence (more directly related to nature and serving immediate biological needs) and commercial seal hunters whose purpose is profit (more technologically advanced and operating at a greater scale). The normative thrust of the EU Seal Regime is then that commercial hunters are banned from hunting, forced to change their ways, and brought into the moral European fold. In turn, Indigenous hunters are left to their traditional methods within boundaries created in Brussels but also granting the EU jurisdiction over seals, expanding EU sovereign power in the Arctic.

III. THE EU'S RACIALIZATION OF INUIT PEOPLE

A. What is at stake for the Inuit people

After decades of hardship, coastal communities in Atlantic Canada and the Arctic thought things were looking better in 2004. This was because the price of seal pelts had doubled over the past several years due to a thriving seal population and growing markets in Russia, Ukraine, Poland, and China. Inuit in the Arctic and fishing communities in Newfoundland and Labrador were excited about the prospect of a revived market.⁴⁹ Meanwhile, with the new booming market,

International Law (2000) (Leiden: Brill Nijhoff, 2000) 37; Kerry Rittich, 'The Properties of Gender Equality', in Philip Alston and Mary Robinson (eds), *Human Rights and Development: Towards Mutual Reinforcement* (Oxford: Oxford University Press, 2005) 87.

⁴⁴ Morris R. Cohen, 'Property and Sovereignty', 13 *Cornell Law Quarterly* 8 (1927).

⁴⁵ ICC Canada Staff, 'Arctic Sovereignty Begins with Inuit' (2008) 1:4 *DRUM* 1, <http://iccalaska.org/wp-icc/wp-content/uploads/2016/01/December-2008-Drum.pdf>; Mary Simon, 'Inuit and the Canadian Arctic: Sovereignty Begins at Home', 43 (2) *Journal of Canadian Studies/Revue d'études canadiennes* 250 (2009); *Ilulissat Declaration adopted at the Arctic Ocean Conference* (28 May 2008), <https://arcticportal.org/images/stories/pdf/Ilulissat-declaration.pdf>.

⁴⁶ See Anghe, above n 31; Karin Mickelson, 'The Maps of International Law: Perceptions of Nature in the Classification of Territory', 27 *Leiden Journal of International Law* 621 (2014).

⁴⁷ Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge: Cambridge University Press, 2020).

⁴⁸ See Miles, above n 42; Mickelson, above n 46; Usha Natarajan and Julia Dehm (eds), *Locating Nature: Making and Unmaking International Law* (Cambridge: Cambridge University Press, 2022).

⁴⁹ Clifford Kraus, 'New Demand Drives Canada's Baby Seal Hunt', *New York Times* (5 April 2004), <https://www.nytimes.com/2004/04/05/world/new-demand-drives-canada-s-baby-seal-hunt.html>.

animal rights activists mobilized and reinvigorated their international campaign against seal hunting.

Sealing is central to almost every aspect of Inuit life in the Arctic. In Newfoundland and Labrador, hundreds of villages depended on seal hunting for their livelihood, and the Canadian seal hunt is the largest in the world.⁵⁰ So, when the animal rights activists successfully lobbied the EU to ban the importation of seal products through its Seal Regime,⁵¹ they delivered a socio-economic blow against these communities. Right before the ban, by the European Commission's estimate, 30% of global trade in seals was within the EU market.⁵² Many people from the sealing communities correctly predicted that the EU's ban would cause a surplus of seal products to flood other markets, thereby depressing the global price. Even though the EU Seal Regime made an 'exception' for seal products from Indigenous communities, Inuit knew this would be economically meaningless for them. Based on their experience from earlier anti-seal hunt campaigns in the 1970s and 1980s, Inuit correctly predicted that the ban would create a moral tarnish against all seal products, reducing the demand to a negligible amount.⁵³

Animal rights groups have been fighting since the 1960s to shut down the sealskin trade. In the 1970s and 1980s, the International Federation for Animal Welfare (IFAW), Greenpeace, Brigitte Bardot, and others mobilized public opinion against the annual hunt of baby harp seals (known as 'whitecoats') off Canada's east coast.⁵⁴ The organizations used photographs of helpless baby seals being clubbed to death by fishermen to create protest campaigns. As a result, the USA banned the importation of all seal products in 1972 and the EU banned the importation of sealskin products made from white coat harp seal pups in 1983.⁵⁵

Much like today, animal rights organizations celebrated the bans and the Inuit—who do not hunt seal pups, only adult harp seals—suffered from the collapse of the market for seal pelts. Public opinion against the seal hunt was so strong that the demand for seal pelts and furs dropped dramatically all over the world. Despite an exemption for Indigenous hunters, seal hunting markets around the world crashed. In 1983–85, when the European ban went into effect, the average income of an Inuit seal hunter in Resolute Bay fell from C\$54,000 to C\$1,000. The government of the Northwest Territories estimated that nearly 18 out of 20 Inuit villages lost almost 60% of their communities' income. This time is often referred to as the Great Depression by the Inuit people, highlighting not only the economic collapse but the spike in suicide.⁵⁶

Since the early seal campaigns, Greenpeace has apologized for the damage they had done to Inuit communities through their anti-seal hunting campaigns.⁵⁷ IFAW doubled-down and commenced the current anti-seal hunting campaign that led to the EU Seal Regime. Inuit communities are still plagued by the highest suicide rates in the world for long-standing reasons caused by Canadian colonialism, and the current ban only made

⁵⁰ Nikolas Sellheim, *The Seal Hunt: Cultures, Economies and Legal Regimes* (Leiden: Brill Nijhoff, 2018).

⁵¹ Basic Regulation, above n 1. The exceptions are contained in Implementing Regulation, above n 1.

⁵² European Commission, 'Proposal for a Regulation of the European Parliament and of the Council concerning Trade in Seal Products', COM (2008) 469 final.

⁵³ Peter L Fitzgerald, "'Morality' May Not Be Enough to Justify the EU Seal Products Ban: Animal Welfare Meets International Trade Law", 14 (2) *Journal of International Wildlife Law & Policy* 85 (2011).

⁵⁴ Donald Barry, *Icy Battleground: Canada, the International Fund for Animal Welfare and the Seal Hunt* (St. John's, Newfoundland: Breakwater Books, 2005).

⁵⁵ See Fitzgerald, above n 53.

⁵⁶ See Arnaquq-Baril, above n 35.

⁵⁷ Joanna Kerr, 'Greenpeace Apology to Inuit For Impacts of Seal Campaign', Greenpeace (24 June 2014), <https://www.greenpeace.org/canada/en/story/5473/greenpeace-apology-to-inuit-for-impacts-of-seal-campaign/>.

the situation worse.⁵⁸ Anti-sealing/anti-Indigenous sentiment continues today in popular culture.⁵⁹

B. Animal rights organizations fund-raising needs/EU Arctic policy

Large multimillion-dollar animal rights groups like IFAW significantly rely on the revenue from anti-seal hunting campaigns to run their operations.⁶⁰ So while the non-profit sector is not a business, it is built on a model where there is a constant need for more donations and an endless drive for accumulating capital. What matters are not the seals themselves but cute images of charismatic megafauna and dehumanized images of hunters that trigger moral outrage and solicit support and monetary donations.

The EU Seal Regime is best understood as the merger of the IFAW's endless fund-raising needs and the EU's increasing geopolitical interest in the Arctic. What conjoins those interests is a shared commitment to Arctic politics and effacing Inuit political demands.

To understand what is at stake for the EU, it helps to turn to Arctic geopolitics more generally. Over the past decade, the EU has been trying to position itself as an Arctic player.⁶¹ However, the EU must make an argument as to why it should play a role in Arctic politics because it does not clearly lie geographically in the Arctic Circle and as such is treated as a peripheral Arctic power by Arctic countries. The EU has, therefore, been trying to gain membership in the Arctic Council to secure its geopolitical position in the north.

The Arctic Council, since its inception in 1996, has become a principal intergovernmental forum that addresses issues faced by the Arctic governments and Indigenous peoples.⁶² The European Commission has been able to send observers to Arctic Council meetings on an ad hoc basis, which means it is treated like other observers in practice but has to apply every time it wants to attend. Since 2008, it has set its sights on trying to receive accreditation as a more permanent Observer to the Arctic Council. This can be understood as the EU's attempt to increase its prominence in Arctic geopolitics.⁶³ But Arctic Council members have pointed to the EU Seal Regime and its insensitivity to Indigenous hunters as a principal reason to block EU's membership bid. Until recently, the EU's Observer status has been vetoed by Canada as an explicit response to the seal hunt dispute.⁶⁴

In 2014, Canada dropped its opposition to the EU's application to the Arctic Council after striking a deal on implementing exemptions for Indigenous peoples from the EU seal regime⁶⁵ and as part of its bilateral trade negotiation (Comprehensive and Economic Trade Agreement).⁶⁶ Some have pointed out that the EU does not meet the Arctic Council's stated criteria for general suitability, specifically failing to recognize the Arctic States' sovereignty and

⁵⁸ Helen Epstein, 'The Highest Suicide Rate in the World', *New York Review of Books* (19 October 2019), <https://www.nybooks.com/articles/2019/10/10/inuit-highest-suicide-rate/>.

⁵⁹ Anya Zoledziowski, "'Seaspiracy' Criticized For Anti-Inuit Racism After Targeting Seal Hunt', *Vice News* (13 April 2021), <https://www.vice.com/en/article/akgw84/seaspiracy-criticized-for-anti-inuit-racism-after-targeting-seal-hunt>.

⁶⁰ See Arnaquq-Baril, above n 35.

⁶¹ Nengye Liu, Elizabeth A Kirk and Tore Henriksen (eds), *The European Union and the Arctic* (Leiden; Boston: Brill Nijhoff, 2017).

⁶² Nikolas Sellheim, 'The Arctic Council and the Advancement of Indigenous Rights', in Nikolas Sellheim, Yulia V. Zaika and Ilan Kelman (eds), *Arctic Triumph: Northern Innovation and Persistence* (Cham: Springer International Publishing, 2019) 105; Margrét Cela and Pia Hansson, 'A Challenging Chairmanship in Turbulent Times', 11 (1) *The Polar Journal* 43 (2021).

⁶³ Andreas Østhagen, 'In or Out? The Symbolism of the EU's Arctic Council Bid', *Arctic Institute* (18 June 2013), <http://www.thearcticinstitute.org/in-or-out-symbolism-of-eus-arctic/>.

⁶⁴ 'Canada against EU entry to Arctic Council because of seal trade ban', *Canadian Broadcasting Corporation News* (29 April 2009), <http://www.cbc.ca/news/canada/north/canada-against-eu-entry-to-arctic-council-because-of-seal-trade-ban-1.806188>.

⁶⁵ Duncan Depledge, 'The European Union in the Arctic', *Arctic in Context* (25 June 2015), <https://jsis.washington.edu/aic/2015/06/25/the-european-union-in-the-arctic/> (visited on 28 June 2020).

⁶⁶ European Commission Press Release, 'Canada-EU Summit - A new era in Canada-EU relations: Declaration by the Prime Minister of Canada and the Presidents of the European Council and the European Commission' (26 September 2014), http://europa.eu/rapid/press-release_STATEMENT-14-288_en.htm.

sovereign rights; failing to respect the values, interests, culture, and traditions of Arctic Indigenous peoples; and failing to demonstrably support the work of its member states and Permanent Participants (i.e. Indigenous peoples) to bringing Arctic concerns to decision-making bodies, such as the AB.⁶⁷ Nevertheless, the EU remains a regular ad hoc attendee of the Arctic Council despite the harm it caused to Indigenous peoples in the Arctic, with no public discussion of excluding it all together.

C. Constructing Europe and indigeneity through the Seal Regime

The 2009 EU Seal Regime Indigenous community exception copied much of the language of the US 1972 Marine Mammal Protection Act (MMPA). Although the texts of the two seal regimes are nearly identical, the imperial relationship is different and thus the racial relationship is different. The fundamental difference between the US and EU seal bans and Indigenous community exceptions arises from the fact that seal hunting in the USA primarily takes place in Alaska, within the conditions of an Arctic settler colony, whereas the EU has a more peripheral and at times ambiguous political presence in the Arctic. The US MMPA arose out of a settler colonial context and is one way through which Indigenous people are forced to negotiate their sovereignty with the US federal government. It is a significant legal component of government-to-government relations among the US government, Alaska state government, and sovereign Indigenous peoples that is accompanied by a complex system of implementation and enforcement. This is not to say that this relationship is not fundamentally problematic, but the MMPA is part of a long-standing relationship in which Indigenous sovereignty is actively deployed and redefined by both parties. Whereas the EU Seal Regime forced a new intimate relationship between the EU and Inuit people. The EU Seal Regime was designed and enacted without any regard for Inuit's concerns as expressed by the Inuit people. Nor did it set up any administrative regime as in the case of the MMPA. The MMPA can be understood as the result of Indigenous resistance to the logic of elimination of settler colonialism. Whereas the EU Seal Regime is a direct blow against Inuit communities.⁶⁸

The EU banned the importation of all seal products and granted an exception to seal products from Inuit or other Indigenous communities if they met the following criteria:

- (a) seal hunts conducted by Inuit or other indigenous communities which have a tradition of seal hunting in the community and in the geographical region;
- (b) seal hunts the products of which are at least partly used, consumed or processed within the communities according to their traditions;
- (c) seal hunts which contribute to the subsistence of the community.⁶⁹

This legislation granted the EU significant control over global seal markets and the power to determine the legitimacy of Inuit identity and hunting practices.

Inuit hunters and their communities' livelihoods were affected since not all seal products they produced satisfied the specific, exceptional conditions laid out in the EU regulation. Even if the products did meet the regulatory exception, Inuit traders would have to bear the administrative and financial burden of proving that the hunt and product meet EU criteria, thereby raising the cost of production. Moreover, Inuit access to the international seal product markets depends

⁶⁷ See Fakhri and Redfern, above n 14.

⁶⁸ Michael Fakhri, 'Gauging US and EU Seal Regimes in the Arctic Against Inuit Sovereignty', in Nengye Liu, Elizabeth A. Kirk and Tore Henriksen (eds), *The European Union and the Arctic* (Leiden: Brill Nijhoff, 2017) 200.

⁶⁹ Implementation Regulation, above n 1, at Article 3.

upon the marketing channels created and maintained by the much-larger Atlantic seal hunt. The ban did away with these channels, which in effect denied Inuit hunters market access.⁷⁰

Inuit communities were also angry that animal rights activists, celebrities, and the political rhetoric around regime characterized seal hunting as a cruel and barbaric practice. They were frustrated that animal rights activists and EU officials did not understand the reality of the seal hunts, conditions in the Arctic, or the centrality of seal hunting in almost all aspects of Inuit life. This had economic implications: even if the Inuit seal products made it to the European market, they would be tainted by demonizing moralistic language. Moreover, Inuit heard this complaint as patronizing especially since their identity was at stake.⁷¹

The first thing this exception did was divide up the seal hunting communities by making a distinction between (banned) commercial hunts for profit and (permitted) traditional hunts for subsistence. This was a theoretical simplification that ignored how the seal market and economies actually operated. For Indigenous people the seal market was actually three inter-linked economies: subsistence (or sustenance), government sales, and the free market economy. Seal hunters shared their meat with their communities based on traditional practices but also sold the pelts to government agents. The sales to government agents provided a stable and remunerative system to hunters, who in turn used the revenue to support the cost of their hunts. The government agents acted as wholesalers to the international seal pelt market. Also, Inuit tailors (mostly women) used seal fur to sell (and gift) clothes locally and internationally. If you altered any one aspect of the triumvirate, you disrupted the entire seal market.⁷²

The corollary was that coastal communities in Atlantic Canada and Norway were automatically categorized as commercial hunters even though, much like the Inuit, they built their culture and identity around seal hunting and historically depended on seal hunting for their livelihood.⁷³ Now, seal hunters were forced to give up their way of life and lose an aspect of their livelihood to become more European or morally upstanding. On the discursive level, whiteness was equated with commerce, modernity, and technology. But the price that seal hunters and their communities had to pay for being culturally white was the deterioration of their socio-economic conditions on terms they never asked for—they became the ‘rural poor’.

The Indigenous community exception almost caused a divide among Inuit people. The closer Inuit communities were to Europe, the more they could work through this exception. The EU put into place a mechanism that allowed (the mostly Inuit) Greenlandic hunters to benefit from the exception. This likely resulted from the fact that Greenland was a colony in the (EU-member) Kingdom of Denmark. Inuit groups in Canada were frustrated that they had no practical way to take advantage of the Indigenous community exception. This was because the EU did not create any administrative structure to clarify and enforce the measure in a way that applied to them. Regardless of whether Inuit people’s relationship to seals was determined by their colonial relationship to Denmark or Canada, Inuit groups across the different states came together in their broader concern that even with an Indigenous exception, such legislation would cause the entire seal market to collapse. In alliance with all seal hunters they called for an end to the whole Seal Regime.⁷⁴

⁷⁰ Tamara Perišin, ‘Is the EU Seal Products Regulation a Sealed Deal? EU and WTO Challenges’, 62 *International and Comparative Law Quarterly* 373 (2013); Elizabeth Whitsitt and Nigel Banks, ‘The WTO Panel Decision on the EU’s Rules on the Marketing of Seal Products: Who Won and Who Lost?’, *ABlawg* (10 January 2014), <http://ablawg.ca/2014/01/10/the-wto-panel-decision-on-the-eus-rules-on-the-marketing-of-seal-products-who-won-and-who-lost/>.

⁷¹ See Fakhri and Redfern, above n 14.

⁷² Lee Huskey, ‘Alaska’s Village Economies’, 3 *Journal of Land Resources & Environmental Law* 435 (2004); Arnaquq-Baril, above n 35.

⁷³ Gry Elisabeth Mortensen and Trude Berge Ottersen, *Sealers: One Last Hunt* (Tromsø: Koko Film, 2017); See Sellheim, above n 50.

⁷⁴ See Fakhri, above n 68.

IV. INTERNATIONAL LAW LEGITIMIZES THE RACIALIZATION OF INUIT PEOPLE

A. EU—the erasure of Indigenous subjects

When the 2009 EU Seal Regime was set to be put forward before the European Parliament, Inuit Tapiriit Kanatami (representing Inuit interests in Canada) led advocacy groups from Canada and Greenland, associations of hunters from Canada and Greenland, individual Inuit hunters, and other representatives from the seal hunting industry from Canada, Greece, and Norway in a series of suits in EU courts. The General Court found the challenge inadmissible primarily on the grounds that the measure in question was a legislative and not regulatory measure.⁷⁵ The European Court of Justice (ECJ) upheld this finding on appeal.⁷⁶

Inuit Tapiriit Kanatami then led the group to challenge the Seal Regime implementing measure before the European Courts. The General Court dismissed the applicants' claims on procedural grounds.⁷⁷ The applicants lost their appeal before the ECJ.⁷⁸ Part of the applicants' argument was that because the legislation's Recital referenced UNDRIP, the General Court erred in not applying Article 19 of UNDRIP; this would have required the EU to seek 'free, prior and informed consent' from Indigenous communities before implementing their legislation. The ECJ held that UNDRIP was not binding and the reference to it in the Recital only provided the reasoning for the Indigenous exception but did not acknowledge a legal obligation.

The European General Court upheld the Regulations on the basis of Article 95 of the EC Treaty and determined that the principal objective of the EU's Sealing Regulations was not to safeguard the welfare of animals but to harmonize the seal ban across the EU and 'improve the functioning of the internal market.'⁷⁹ This in effect denied Inuit rights to self-determination within the EU. So while the EU had a tenuous political position in the Arctic, Inuit people were denied a political position within the EU.⁸⁰

B. WTO legitimizes and shapes EU's racist laws

The WTO AB ultimately agreed with the EU's argument that the Seal Regime's Indigenous communities exception deals with the 'identity of the hunters, the traditions of their communities and the purpose of the hunt.'⁸¹ The AB had to in effect choose between Canada's or the EU's understanding of what Indigenous meant—both definitions, however, racialized Inuit people.

Canada wanted to do away with any reference to Indigenous peoples. It claimed that the distinction between commercial and subsistence hunting was arbitrary and 'illusory in practice' since hunts in mostly Indigenous Greenland were just as profit-motivated as commercial hunts in Canada. It also argued that the EU mischaracterized commercial hunts in Newfoundland and Labrador; Canada put forward the point that these hunts are actually akin to subsistence hunts since the hunters were from small communities that had depended on seal hunting for generations and had developed their own traditions around the practice.⁸²

⁷⁵ EGC, above n 2; *Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union* [2016] OJ C202/1, at Article 263: '[a]ny natural or legal person may... institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory of direct concern to them and does not entail implementing measures'.

⁷⁶ ECJ, above n 2.

⁷⁷ EGC, above n 2.

⁷⁸ ECJ, above n 2.

⁷⁹ EGC, above n 2, paras 35, 83.

⁸⁰ For a broader examination of European jurisprudence see Sara Iglesias Sánchez, 'Arctic Indigenous Peoples at European Courts: Issues Concerning Their Effective Judicial Protection at the CJEU and the ECtHR', in Elena Conde and Sara Iglesias Sánchez (eds), *Global Challenges in the Arctic Region: Sovereignty, Environment and Geopolitical Balance* (London: Routledge, 2016) 217.

⁸¹ AB Report, above n 3, at para. 2.154, quoting EU Appellant Submission para. 72.

⁸² AB Report, above n 3, at paras. 2.7–2.9. See also Nikolas Sellheim, 'The Right Not to Be Indigenous: Seal Utilization in Newfoundland', *Arctic Yearbook* 2014, <https://arcticyearbook.com/arctic-yearbook/2014/2014-briefing-notes/117-the-right-not-to-be-indigenous-seal-utilization-in-newfoundland>.

Taken alone, this argument benefited the Inuit community. It was in their economic interest to be treated no differently than non-Indigenous seal hunters and for the entire seal ban to be found illegitimate. The Government of Canada, was not, however, looking out solely or primarily for the interest of the Inuit people. This was also an effort to protect the economic interests of the non-Indigenous rural communities in Newfoundland and Labrador that make up 95% of Canadian seal hunts.

Canada's argument about Indigenous identity ran against Inuit political and legal interests. Canada framed the EU Seal Regime as granting Indigenous people preferential treatment when compared to Canadian hunters. Canada could only argue that the EU Seal Regime granted Indigenous people preferential treatment, if it only considered Inuit in Greenland and not the Inuit living within its own borders. Thus, Canada's argument erased Inuit identity within Canada.

This approach was a continuance of the Government of Canada's long-standing position to resist recognizing explicit Indigenous rights in international law.⁸³ In this case, Canada argued that the EU could not justify the Indigenous preference by relying on 'international agreements that recognize, in general terms, the interests of Indigenous peoples' since this is extraneous to the case.⁸⁴ This was an obtuse way of arguing that the EU could not justify its Indigenous communities' exception in reference to the international instruments that protected Indigenous rights such as the UNDRIP. At the time, this was consistent with Canada's position to vote against the UNDRIP and the assumption that it contravened Canadian law.⁸⁵ In fact, Canada had regularly blocked Indigenous peoples' attempts to directly engage with WTO and NAFTA disputes in the past.⁸⁶

To the EU, the nature of the hunt in and of itself did not matter and the exception hinged on Indigenous identity as defined by the EU Seal Regime. The EU conceded that the distinction between commercial and subsistence hunting was not binary but rather one of degree. It argued, however, that it does not matter how commercial a hunt is, what mattered is that the Seal Regime established clear criteria as to what constituted Indigenous subsistence hunting. According to the EU, only Indigenous communities could claim an exception based on subsistence, and it was 'irrelevant' whether Canada's east coast hunts were similar to Indigenous subsistence hunts.⁸⁷ The EU Seal Regime did not define subsistence hunting as a universal category, but as something essential to the Indigenous identity based on undefined concepts of 'tradition.'⁸⁸

In sum, the AB held that the EU Seal Regime contravened the GATT Article I:1 (Most-Favored Nation) because it unjustifiably discriminated against all seal products from Canada and Norway in favor of seal products from Greenland. It followed, however, with the conclusion that the EU could provisionally justify its ban as a general exception under GATT Article XX(a) as a measure necessary to protect public morals. The EU did not argue that the Seal Regime was about animal welfare and met the Article XX(b) exception in the GATT that allowed states to restrict trade if it was necessary to protect animal life and health. This was because the EU could not marshal science-based evidence that indicated that seal hunting practices caused undue suffering before death.⁸⁹

⁸³ This position has changed since 2016 after Canada endorsed UNDRIP without qualification. Canada is currently seeking to negotiate trade and Indigenous peoples chapter in international trade agreements—part of its so-called progressive trade agenda.

⁸⁴ AB Report, above n 3, at para. 2.4.

⁸⁵ This has since changed with Canadian Parliament enacting UNRIP into domestic law in June 2021. See *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021 c. 14.

⁸⁶ Arthur Manuel and Nicole Schabus, 'Indigenous Peoples at the Margin of the Global Economy: A Violation of International Human Rights and International Trade Law', 1 *Chapman Law Review* 222 (2005).

⁸⁷ AB Report, above n 3, at para. 2.106.

⁸⁸ Implementation Regulation, above n 1, at Article 3.

⁸⁹ Nikolas Sellheim, "Direct and Individual Concern" for Newfoundland's Sealing Industry?—When a Legal Concept and Empirical Data Collide, 6 (1) *Yearbook of Polar Law* 466 (2015); Martin Hennig, 'The EU Seal Products Ban – Why Ineffective Animal Welfare Protection Cannot Justify Trade Restrictions under European and International Trade Law', 6 *Arctic Review on*

In the end, the AB legitimized the EU's racist legislation, reproducing a dynamic of difference.⁹⁰ The WTO AB recognized Indigenous hunters as different from commercial hunters. It also legitimized the EU's jurisdiction over seals and authority to define the meaning of Indigenous in the Arctic. It then forced the EU to redefine a particular way—albeit still in a way that treated Indigenous people as something to be governed by the EU instead of as a people with sovereignty who can articulate and negotiate their own position.

The AB held that the EU had discriminated arbitrarily and unjustifiably against seal products from Canada and Norway, including seal products hunted by traditional Indigenous hunters in Canada (under the GATT Article XX chapeau analysis). This pushed both Canada and EU into legal interpretations they did not anticipate. Canada, as mentioned above, never presented the Inuit within its borders as a particular class or interest. The EU also never addressed the Inuit in Canada and focused on justifying its favoring Inuit hunts in Greenland over what it called commercial hunts in Canada.⁹¹

Whereas the AB took the category Indigenous as a single category and asked: does the EU, by allowing marketing of seal products by the Greenlandic Inuit community while in effect disallowing the sale of similar goods by the Canadian Inuit community, act consistently with the chapeau of GATT Article XX?⁹² By framing their analysis in those terms, the AB in effect ruled that for the EU's Seal Regime to be fair, it had to provide the same conditions of competition for Inuit in Canada and Greenland.

The result was that the AB gave a clearer and more singular meaning to Indigenous—but it was not on Indigenous peoples' own terms. It allowed instead for the EU to structure its seal market through definitions of Indigenous. The AB provided a framework that still allowed the EU to define Indigenous in a way that best served European interests—all trade law did was to ensure that the meaning of 'Indigenous' was uniform and that the EU applied their rules equally toward all Indigenous hunters. Meanwhile, all sealers including Inuit were hit hard by the resulting EU seal ban and from the subsequent depressed seal market and added restrictions from the Indigenous exemption.

Several months after the WTO AB report was released, all the relevant authorities and groups adjusted to the new legal landscape, politically regrouped, and mobilized. Canada and the EU ironed out their economic differences and negotiated a framework to try to ensure that the Indigenous exception would allow actual access for Inuit seal products into the product, while also finalizing the text of the Canada–EU trade agreement.⁹³ In return, as mentioned above, Canada agreed to support the EU bid for Observer Status at the Arctic Council, despite Indigenous peoples' protests. Thus, the EU was able to preserve its ability to enact its new Seal Regime and in effect govern seal hunts in the Arctic while also garnering more support for its position in the Arctic Council.

Law and Politics 74 (2015); Nikolas Sellheim, 'The Narrated "Other" – Challenging Inuit Sustainability Through the European Discourse on the Seal Hunt', in Kamrul Hossain and Anna Petr etei (eds), *Understanding the Many Faces of Human Security* (Leiden: Boston: Brill, 2016) 56.

⁹⁰ See Anghie, above n 31.

⁹¹ AB Report, above n 3, at 2.104.

⁹² AB Report, above n 3, at 5.336–339. See also Petros C. Mavroidis, 'Sealed with a Doubt', 3 *European Journal of Risk Regulation* 288 (2015).

⁹³ European Commission, 'On the Joint Statement by Canada and the European Union on

Access to the European Union of Seal Products From Indigenous Communities of Canada' C(2014) 5881 final; 'Canada, EU strike deal on Indigenous-hunted seal products: Joint statement gives Inuit seal products access to EU market; non-aboriginal sealers left on the floe edge', *Nunatsiaq News* (13 October 2014), http://www.nunatsiaqonline.ca/stories/article/65674canada_eu_strike_deal_on_Indigenous-hunted_seal_products/; Jim Bell, 'EU Trade Deal Good for Nunavut Fish Harvesters, Tootoo says', *Nunatsiaq News* (29 April 2016), http://www.nunatsiaqonline.ca/stories/article/65674eu_trade_deal_good_for_nunavut_fish_harvesters_tootoo_says/.

The EU promulgated a new Seal Regime in October 2015 with slightly modified terms in order to become WTO compliant.⁹⁴ Afterward, the Governments of Greenland and Nunavut engaged in the process and released a joint statement, emphasizing the role that seal hunting played in their way of life, sense of self, and human rights. They concluded by encouraging 'the EU to work with us in a manner that respects for our way of life and the United Nations Declaration on the Rights of Indigenous Peoples, to ensure all Indigenous peoples have equal access to, and benefits from, the implementation of the Indigenous Communities Exemption.'⁹⁵ This communicated that the respective Inuit governments' tactic was to accept that the new EU Seal Regime was going forward and work to ensure that the Inuit rights of self-determination were as protected as much as possible within this new law.

To date, the EU has authorized the Governments of Greenland,⁹⁶ Nunavut,⁹⁷ and the Northwest Territories⁹⁸ to implement the Indigenous exception. Nevertheless, the EU Commission is the final arbiter of interpreting what is meant by 'subsistence' and what is 'commercial', what is 'traditional', and what constitutes appropriate consideration for 'animal welfare'. In the end, this interpretive authority is a key power in governing seal hunts and by extension Indigenous peoples' identity and culture. Based on recent public consultations, the EU is likely to have Indigenous issues and marine mammal protection on its agenda for its next Arctic strategy.⁹⁹ Regardless, from a European perspective, Indigenous peoples are likely to remain an issue and not a people with a sovereign claim in the Arctic.

Under the new regime, by meeting the WTO demands for consistency, the EU has granted itself more power to create a seal market for Indigenous communities. The regime is in effect a co-management system in which the EU shares power with the authorities that govern export markets. A recent study commissioned by the European Council has concluded that the 2015 EU Seal Regime is 'having adverse effects on Inuit or other Indigenous communities, and certification requirements have imposed an undue burden and disincentive on Inuit producers and EU purchasers.'¹⁰⁰ In sum, the WTO consummated a relationship between the EU and Indigenous peoples in the Arctic on terms entirely favorable to EU Arctic geopolitics and animal rights organizations' financial interests.

⁹⁴ European Parliament and Council Regulation (EU) 2015/1775 amending Regulation (EC) No 1007/2009 on trade in seal products and repealing Commission Regulation (EU) No. 737/2010, OJ 2015 L262/1 (New Basic Regulation); European Commission Regulation (EU) No. 2015/1880 laying down detailed rules for implementation of Regulation (EC) No. 1007/2009 of the European Parliament and of the Council on trade in seal products, OJ 2010 L271/1 (New Implementing Regulation).

⁹⁵ Government of Greenland Nunavut, 'Joint Statement of the Governments of Greenland and Nunavut regarding the Revision of the EU Seal Ban Regulation' (24 April 2015), https://gov.nu.ca/sites/default/files/2015-04_st_gn_gr_revision_of_the_eu_seal_ban_regulation-eng.pdf.

⁹⁶ European Commission, 'Decision Recognising the Greenland Department of Fisheries, Hunting and Agriculture (APNN) in accordance with Article 3 of Implementing Regulation (EU) 2015/1850 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' C (2015) 7274 final, http://ec.europa.eu/environment/biodiversity/animal_welfare/seals/pdf/C_2015_7274_en.pdf.

⁹⁷ European Commission, 'Decision recognising the Department of Environment, Government of Nunavut in accordance with Article 3 of Implementing Regulation (EU) 2015/1850 laying down detailed rules for the implementation of Regulation (EC) No1007/2009 of the European Parliament and of the Council on trade in seal products' C (2015) 7273, http://ec.europa.eu/environment/biodiversity/animal_welfare/seals/pdf/C_2015_7273_en.pdf.

⁹⁸ European Commission Decision (EU) 2017/265 of 14 February 2017 including the Government of Northwest Territories of Canada as a recognized body in the list referred to in Article 3 of Implementing Regulation (EU) 2015/1850 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 (notified under document C(2017) 757) C/2017/0757, <http://data.europa.eu/eli/dec/2017/265/oj>.

⁹⁹ European Commission Directorate General for Maritime Affairs and Fisheries and European Commission European External Action Service, *Summary of the Results of the Public Consultation on the EU Arctic Policy*. (LU: Publications Office, 2021).

¹⁰⁰ European Commission, *On the implementation of Regulation (EC) No 1007/2009, as amended by Regulation (EU) 2015/1775, on the Trade in Seal Products*, 10 January 2021 at 17, <https://ec.europa.eu/transparency/expert-groups-register/core/api/front/document/38257/download>.

V. CONCLUSION

Ultimately, what is problematic with the Seal Regime is that the definition of European morals used to justify the ban of seal products relied on a relationship that simultaneously ignored and threatened Indigenous existence. The EU Seal Regime made a distinction between commercial and traditional/subsistence hunters, disrupting the relationship people made with each other through seal hunting and seal markets. EU and WTO laws instead created categories of class and race based on their proximity to and within the EU:¹⁰¹ seal hunters were disaggregated into categories of white rural poor, legitimate Indigenous hunters, and illegitimate Indigenous hunters.

It is worth returning to Gilmore's definition of racism as 'a practice of abstraction, a death-dealing displacement of difference into hierarchies that organize relations within and between the planet's sovereign political territories.'¹⁰² The first step of abstraction came from animal rights organizations that did not rely on seals or concern themselves with people's relationship to seals; they instead used the image of seals as a fund-raising vehicle, in effect turning seals into a financial instrument. The EU Seal Regime repurposed the Seal Regime from the settler colonial context in Alaska and continued racist assumptions. The European laws constructed racial categories by actively ignoring and denigrating Indigenous attempts to maintain their relationship with seals and their way of life, granting the EU the authority to determine the very definition of Indigenous and on terms favorable to animal rights groups, and profoundly harming all seal communities by decimating the global seal market. In turn, the WTO AB legitimized EU's relationship with Indigenous peoples albeit on slightly modified—but still racialized—terms.

Nevertheless, in its report, the AB noted that it was 'troubled' by the EU's argument that once a seal hunt is deemed to be an Indigenous hunt, 'the degree of commercialization is "irrelevant"'.¹⁰³ This highlights that the original impetus behind the EU's legislation, despite the alliance with animal rights groups, was as much about doing away with commercial seal hunts as it was about creating a special category of Indigenous and projecting their sovereign power into the Arctic—that is to say, it reflected an imperial impulse.

The EU in controlling the rules of the seal market has reconfigured Indigenous relationships to seals, land, and water. The 2105 Seal Regime defines Indigenous communities as people sharing a history of conquest or colonization.¹⁰⁴ But one could also read it as a definition that brings with it the echoes of conquest and colonialism into the present since the EU is also claiming that it has the authority to define who is or is not Indigenous. Instead of just taking land through conquest or land enclosure, colonizing powers sometimes transformed the territory and local communities' international relations and then controlled the territory through difference mechanisms of governance. In order to make those transformations permanent, racial distinctions were used to transform local communities and then justified and solidified through legal techniques.¹⁰⁵

What makes the EU Seal Regime different is that it is removing seals from the international commercial intercourse by destabilizing the market and fundamentally disrupting the lives of all seal hunting communities. The seal is de-commodified as a good and re-commodified as a financial instrument to be leveraged by animal rights organizations' fund-raising needs. Moreover, Inuit people were asking to engage in commerce through WTO rules, whereas the EU relied on a moral exception within those rules. What makes this process violent is that it is an act that has forced Inuit and other seal hunting communities into an intimate relationship with the EU. What makes it racialized violence is that the European Courts effaced the Indigenous

¹⁰¹ See Natsu Taylor Saito, *Settler Colonialism, Race, and the Law: Why Structural Racism Persists* (New York: New York University Press, 2020).

¹⁰² See Gilmore, above n 30.

¹⁰³ AB Report, above n 3, at para. 5.326.

¹⁰⁴ New Basic Regulation, above n 94, at Article 1.

¹⁰⁵ Knox, above n 33, at 106–109.

political presence in the EU by ignoring UNDRIP, and the WTO legitimized the EU's power in the Arctic through seal markets—Indigenous seal hunting communities were brought into the EU market without any legal power.

The legal techniques the EU and WTO AB used were hardly opaque or novel. The potential and actual violence the EU Seal Regime generated was well known to Arctic communities and their allies who continuously raised the issue in political, legal, and cultural forums. What is surprising, however, is how a large number of international economic law scholars ignored the issue. Regardless of international economic lawyers' and scholars' personal views, their silence in effect legitimizes and reproduces the EU's existential violence against Inuit people. With such high stakes, the widespread ignoring of the violence wrought by the EU and its Seal Regime calls to question the legitimacy of international economic scholarship writ large.