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## The EU as an Arctic Power: Analysis of the Competence of the EU in the Arctic by Policy Areas

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*The European Union is not generally perceived as an Arctic power. However, the ever-expanding list of EU competences implies that it will have both an interest in participating in the governance of the Arctic and the authority to do so, should the seven Arctic states agree to make room. This development holds both challenges and opportunities for Canada and other Arctic states. The challenges stem from the fact that the EU will seek to promote the economic interests of its Member States in resource extraction and freedom of navigation where Canada and Russia, in particular, have asserted strong national policies. The opportunities lie in the fact that the EU is likely to support strong environmental protection and to be ready to finance enhanced scientific research. Having incurred the wrath of indigenous peoples of the Arctic with its seal products ban, the EU faces particular difficulties in trying to participate in the Circumpolar Conference.*

*L'Union européenne n'est généralement pas considérée comme une puissance arctique. Cependant, la liste toujours en croissance des compétences de l'UE signifie qu'elle aura à la fois intérêt à participer à la gouvernance de l'Arctique et l'autorité pour le faire si les sept États arctiques l'acceptent. Cette situation présente tant des défis que des possibilités pour le Canada et les autres pays arctiques. Les défis découlent du fait que l'UE cherchera à promouvoir les intérêts économiques de ses États membres pour ce qui est de l'extraction des ressources et de la liberté de navigation alors que le Canada et Russie en particulier ont fait valoir de fortes politiques nationales. Les possibilités viennent de ce qu'il est probable que l'UE appuie des mesures fortes de protection de l'environnement et qu'elle soit disposée à financer une recherche scientifique accrue. Après avoir provoqué la colère des peuples indigènes de l'Arctique avec son interdiction des produits du phoque, l'UE fait face à des difficultés particulières alors qu'elle tente de participer à la Conférence circumpolaire.*

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*Introduction*

- I. *Elaboration of an EU Arctic policy*
- II. *The external competence of the EU on the Arctic*
  1. *The UN Convention on the Law of the Sea and related regional fishery management organizations*
  2. *The International Maritime Organization*
  3. *International instruments concerning environmental protection*
- III. *The integrated maritime policy (IMP)*
- IV. *Maritime shipping*
- V. *Fisheries*
- VI. *Resource exploitation on the continental shelf and in the international seabed area*
- VII. *Environmental protection*
  1. *Marine pollution*
  2. *Climate change*
  3. *Security and civil protection*
- VIII. *Scientific research programmes related to the Arctic*
  1. *SIOS—Towards an integrated Arctic earth observation system (SIOS)*
  2. *ArcRisk*
  3. *EU Arctic footprint*
  4. *Ice2sea*
  5. *EUROPOLAR*
  6. *The Arctic tipping points*

*Conclusion*

*Introduction*

The involvement of the European Union (EU) in the Arctic has increased considerably over the last years. There has been the discovery of new opportunities to exploit the resources of the region due to the reduction of the volume of ice as a consequence of climate change, and the region has thus acquired a strategic importance for the EU as well as for the other Arctic stakeholders. Few think of the EU as an Arctic power today, nevertheless this may change in the future. As the EU defines its international personality and expands its fields of action, it is gradually being drawn into debates concerning the governance of the Arctic region. Two EU member states, Sweden and Finland, have territory in the Arctic Circle. A third, Denmark, is the sovereign over Greenland although, by

agreement, Greenland is not included within the ambit of EU law and competence. Through its association with Norway and Iceland in the European Economic Area (EEA), much EU law extends to their Arctic regions. Thus, by virtue of territory alone, the EU is becoming an Arctic power. Beyond this, the EU has various competences which may ultimately be exercised in the Arctic and it unquestionably has significant long-term economic and political interests that will move it in the same direction.

The Arctic Council<sup>1</sup> was established in 1996 within the context of the *Arctic Environmental Protection Strategy*,<sup>2</sup> and has served as a primary forum for cooperation among the seven Arctic States.<sup>3</sup> The increase in the importance of the Arctic region has induced these and other countries and political entities to strengthen their Arctic policies. The EU has made a first, unsuccessful, attempt to be granted observer status in the Arctic Council.<sup>4</sup> China and Japan are said to be contemplating requests for observer status as well. In May 2008 the five Arctic coastal countries (U.S.A., Russia, Canada, Denmark, and Norway) signed the Ilulissat Declaration<sup>5</sup> in which they rejected the need to create a broader international legal framework to govern the Arctic Ocean, claiming that its governance would be best carried out by them in a mutual cooperative manner, in accordance with international law. The EU has moved to expand its power in the Arctic, through a twofold strategy: on one hand, it has attempted to make diplomatic steps to be included in Arctic governance; on the other hand, it has developed new policies designed to allow it to exercise various competences in the Arctic region.

Currently, there are three different ways in which EU policies can affect the Arctic region. The first is through the direct application of EU policies within the Arctic region: the North of Sweden and Finland are within the Arctic Circle and therefore, in principle, EU policies apply without distinction there, as they do elsewhere within the EU legal space.<sup>6</sup> Another example of direct application of EU policies can be found in the EU's research programs devoted to the Arctic: these programs, which may

1. *The Declaration on the Establishment of the Arctic Council*, 19 September 1996, 35 ILM 1387.

2. *Arctic Environmental Protection Strategy*, 14 June 1991, 30 ILM 1624.

3. This includes: USA, Canada, Denmark, Norway, Sweden, Finland, Russia.

4. Arctic Council, "Tromsø Declaration," 6th Ministerial Meeting (29 April 2009), online: Arctic Council <<http://www.arctic-council.org/index.php/en/>>.

5. *The Ilulissat Declaration*, 28 May 2008, 48 ILM 382 [*Ilulissat*].

6. EU policies would normally apply to the Arctic Circle because of Denmark as well: Greenland which is under Danish sovereignty is also an Arctic coastal country. However, Greenland is not subject to EU law even if it is subject to Danish sovereignty because it has been excluded by agreement from the EU. See EC, *Council Decision 2001/822/EC of 27 November 2001 on the association of the overseas countries and territories with the European Community*, [2001] OJ, L 314/1.

be carried out in the Arctic or in EU member states, are typically aimed at scientific research on the consequences of human activities within the EU on the environment of the Arctic region. EU policies can also affect the Arctic region through the *Agreement on the European Economic Area* (EEA Agreement). The EEA Agreement extends the EU internal market to three of the four European Free Trade Association (EFTA) States, two of which, Norway and Iceland, lie in the Arctic.<sup>7</sup> This has the consequential effect of extending EU law and policy to a broader area of the Arctic. Finally, many EU policies apply in the Arctic as a result of the external projection of all domestic policies. As a result, the EU is party to numerous multilateral instruments concerning, inter alia, the fisheries, environmental protection and maritime transportation.

### I. *Elaboration of an EU Arctic policy*

The EU has in recent years increasingly adopted measures regarding the Arctic. This is demonstrated in the papers and communications adopted by the European Commission (Commission) and the Council of the European Union (Council). These documents constitute the beginning of what is destined to be a comprehensive EU policy for the Arctic. In March 2008 the Commission delivered a paper on *Climate Change and International Security*.<sup>8</sup> This document identifies the Arctic as one of the regions where climate change is posing a threat to international security, in particular potential conflicts over resources. One of the recommendations is to “develop an EU Arctic policy based on the evolving geo-strategy of the Arctic region, taking into account i.e. access to resources and the opening of new trade routes.”<sup>9</sup> Afterwards, the European Parliament adopted a resolution on Arctic governance,<sup>10</sup> in which it expresses its concerns about the environmental, geo-strategical and social consequences of climate change in the Arctic. The resolution also provided the elements for the foundation of a meaningful EU Arctic policy.

7. The EEA is principally concerned with the four fundamental pillars of the internal market (freedom of movement of goods, persons, services and capitals), but also side policies, such as social policy, consumer protection and environment policy. Agriculture and fishery policies are excluded due to the reluctance of Iceland and Norway to accept them. See *Agreement on the European Economic Area*, 2 May 1992, 1801 UNTS 3, [1994] OJ L1/3, (entered into force 1 January 1994) [EEA Agreement].

8. EC, High Representative & European Commission, S113/08, *Climate Change and International Security: Paper from the High Representative and the European Commission to the European Council*, (14 March 2008), online: Council of the European Union <[http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/reports/99387.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/reports/99387.pdf)>.

9. *Ibid* at 11.

10. EC, *European Parliament resolution of 9 October 2008 on Arctic governance*, (2008) Eur Parl Doc P6\_TA(2008)0474, online: The European Parliament <<http://www.europarl.europa.eu/>>.

In November 2008, the Commission adopted a Communication on “The European Union and the Arctic Region.”<sup>11</sup> The purpose of this policy document is to achieve a “structured and coordinated approach” regarding “Arctic matters,” “as a first step” towards defining a complete EU Arctic policy. The policy objectives referred to in the Communication are contained in three macro-objectives: “protecting and preserving the Arctic in unison with its population, promoting the sustainable use of resources, and contributing to enhanced Arctic multilateral governance.”<sup>12</sup> In December 2009, the Council adopted “conclusions” on Arctic issues in which it “welcomes the gradual formulation of a policy on Arctic issues to address EU interests and responsibilities, while recognising Member States’ legitimate interests and rights in the Arctic.”<sup>13</sup> Finally, in January 2011 the European Parliament adopted a *Resolution on a sustainable EU policy for the High North*.<sup>14</sup> The Resolution affirms the EU’s position as an Arctic power and calls for a united and coordinated EU policy on the Arctic region in order to meet the challenges posed by the Arctic. These measures adopted by the Commission and the Council demonstrate the EU’s interest in establishing a policy on the Arctic region.

## II. *The external competence of the EU on the Arctic*

As briefly discussed above, the EU can potentially act in the Arctic through its external competence. To understand how and why the EU can act in this manner in the Arctic one must first understand how the EU is legally entitled to act beyond the national borders of its Members States. In this section, the evolution of the EU external competence, and its limitations, will be illustrated.

The external competence of the EU has developed gradually over a number of years and it is still a work in progress. The broad outlines of the external competence have been developed by the Court of Justice of the European Union (CJEU), formerly the European Court of Justice (ECJ), throughout its case law and opinions as well as by the Council’s and Commission’s practice. The latter two institutions have been joined

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11. EC, *Communication from the Commission to the European Parliament and the Council—The European Union and the Arctic Region*, COM(2008) 763 final [Commission Communication on the Arctic].

12. The Commission’s Communication was approved by the Council in December 2008. At time of writing, a second policy document is expected from the Commission.

13. EC, Council of the European Union, Press Release, *Council Conclusions on Arctic Issues: 2985th Foreign Affairs Council meeting* (8 December 2009), online: Council of the European Union, <[http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/EN/foraff/111814.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/111814.pdf)>.

14. EC, *European Parliament resolution of 20 January 2011 on a sustainable EU policy for the High North*, (2011) EU Parl Doc TA(2011)0024, online: The European Parliament <<http://www.europarl.europa.eu/>>.

by the European Parliament in defining the EU external action and foreign policy as a result of changes made by the Treaty of Lisbon in 2009.

The CJEU has contributed significantly to the development of the concept of the EU's external competence through the principles of parallelism and complementarity. In the absence of a closed list of external competences in the treaties, CJEU has over the years elaborated the principle of parallelism: the external competence of the EU reflects the projection of its internal competences. In addition, the CJEU introduced the principle of complementarity, according to which the EU has external competence when the exercise is necessary for the effective implementation of its internal policies.<sup>15</sup> In the *ERTA* case the ECJ consolidated the concept of the external projection of exclusive external competences by stating that when the "[c]ommunity, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules... the Member States no longer have the right...to undertake obligations with third countries which affect those rules."<sup>16</sup> In the *Inland Waterways Vessel*<sup>17</sup> opinion, the ECJ further extended the exclusive external competence by stating that the EU also has exclusive external competence in the absence of an internal power, as long as the international agreement is necessary for the attainment of the common policy.<sup>18</sup>

Conversely, in *Opinion 1/94* the Court adopted a very significant limitation to EU's external competence by holding that if an international agreement to which the EU becomes party covers policies falling outside of the scope of EU's competence, then this does not give rise to an exclusive external competence.<sup>19</sup> In these circumstances, the external competence is shared between the EU and its Member States. The Marrakech Agreement, establishing the WTO is an example of shared competence: it falls within the category of "mixed agreements" due to the fact that both the European Community (EC) and its Member States signed it and are members of the WTO.

The Treaty of Lisbon has codified the list of EU external competences. The *Treaty on the Functioning of the European Union* (TFEU), in fact, states in Article 3.2 that:

The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in

15. *Kramer*, C-3/76, [1976] ECR I-1279.

16. *Commission v Council*, C-22/70, [1971] ECR I- 263 at para 17.

17. *European Laying-Up Fund for Inland Waterways Vessel*, *Opinion 1/76*, [1977] ECR I-741, at paras 4-5.

18. *Ibid.*

19. *Opinion 1/94 WTO*, [1994] ECR I-5267.

a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.<sup>20</sup>

Furthermore, TFEU art 216.1 provides that:

[t]he Union may conclude an agreement with one or more third countries or international organizations where the Treaties so provide, or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.

The legislative and policy-making processes applicable to EU's external competences vary considerably depending on the treaty basis of the power being exercised. In some policy areas the EU has exclusive internal/external competence (such as in the case of the conservation of marine biological resources), whereas in other policy areas the competence is shared between Member States and the Union (such as in the case of maritime shipping and navigation). In other limited circumstances, as in the policy area of tourism, the competence of the EU is limited to support or coordinate the actions of Member States.

In addition, the Parliament's role in the conclusion of international agreements is established in Art. 218.6(a) TFEU and the Parliament's consent is required in case of:

- (i) association agreements;
- (ii) agreement on Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms;
- (iii) agreements establishing a specific institutional framework by organizing cooperation procedures;
- (iv) agreements with important budgetary implications for the Union;
- (v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required.<sup>21</sup>

Thus, for policies falling outside of the list above, the Parliament has only consultative powers.<sup>22</sup>

In the *Titanium Dioxide* case the ECJ ruled that, in determining the legal basis for the exercise of the EU external relations power, the potential

20. EC, *Consolidated versions of the Treaty on the Functioning of the European Union*, [2010] OJ, L 83/02 at art 3.2 [TFEU].

21. *Ibid*, art 218.6(a).

22. *Ibid*, art 218.6(b).



consequences for the Parliament should be taken into consideration.<sup>23</sup> This ruling is relevant for cases in which a specific act of the Union may fall under two legal bases, one falling within the scope of Art. 218.6(a) and the other within the scope of Art. 218.6(b). In these cases, preponderance should be given to the legal basis that guarantees a law-making process in which the Parliament has a greater role, notably *sub* 218.6(a).

In conclusion, it has become clear that the EU foreign affairs power involves both exclusive and shared competences, as well as an expanding procedural dimension involving the role of an increasingly active European Parliament in the conclusion of international agreements.

1. *The UN Convention on the Law of the Sea and related regional fishery management organizations*

The EU is a party to various international instruments covering different policy sectors, which are relevant for the EU's competence over the Arctic. The *Third United Nations Convention on the Law of the Sea* (UNCLOS) is the most relevant international instrument for maritime matters. UNCLOS provides for the participation of international organizations in the Convention in circumstances where member states have transferred competence over those matters covered by the Convention<sup>24</sup> and in cases where the "majority of its relevant member states are signatories of this Convention."<sup>25</sup> All 27 EU member states are party to the Convention and the EC (now the EU) has been member since 1984.<sup>26</sup>

Under EU law the UNCLOS is a "mixed treaty," because it covers matters falling both under national exclusive competence (the determination of territorial sea) and community matters (Exclusive Economic Zone (EEZ) and fisheries). In 1998, the EU (through a Council decision) issued a declaration confirming the EU's adhesion to the Convention.<sup>27</sup> The declaration addresses issues of competence between EU and Member States by stating that "Member States have transferred competence to it with regard to the conservation and management of sea

23. *Commission v Council*, Case C-300/89, [1991] ECR I-2867.

24. *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 3 art 305(1) (f) and Annex IX (entered into force 16 November 1994) [UNCLOS].

25. *Ibid.*, at art 2 Annex IX.

26. "[...] The EC deposited its instrument of formal confirmation only in April 1998, becoming then a full member." See Robin Churchill & Daniel Owen, *The EC Common Fisheries Policy* (Oxford: Oxford University Press, 2010) at 317.

27. EC, *Council Decision 98/392/EC of 23 March 1998 concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof*, [1998] OJ L 179/1, Annex 2 [Declaration].

fishing resources.”<sup>28</sup> Thus the EU can adopt relevant legislation which must be enforced by its Member States. This competence also enables the EU to “enter into external undertakings with third states or competent international organizations.”<sup>29</sup>

The Declaration further indicates that the EU’s competence “applies to waters under national fisheries jurisdiction and to the high seas.”<sup>30</sup> This section of the Declaration thus addresses EU’s competence regarding the geographical scope of the management of sea fishing resources. The declaration continues (in point 1) by stating that:

in respect of measures relating to the exercise of jurisdiction over vessels, flagging and registration of vessels and the enforcement of penal and administrative sanctions, competence rests with the Member States whilst respecting Community law. Community law also provides for administrative sanctions.

Finally, as for matters concerning maritime transport, the declaration states:

With regard to the provisions on maritime transport, safety of shipping and the prevention of marine pollution contained inter alia in Parts II, III, V, VII and XII of the Convention, the Community has exclusive competence only to the extent that such provisions of the Convention or legal instruments adopted in implementation thereof affect common rules established by the Community. When Community rules exist but are not affected, in particular in cases of Community provisions establishing only minimum standards, the Member States have competence, without prejudice to the competence of the Community to act in this field. Otherwise competence rests with the Members States.<sup>31</sup>

According to Churchill and Owen, this declaration designates EU competence over fishing vessels in a manner that may not be in conformity with the EU’s practice, because measures relating to the exercise of jurisdiction by the flag State over its vessels on the high sea fall within the competence of Member States. They argue that “[a] number of the RFMOs (Regional Fishery Management Organizations) that the EC joined to the exclusion of its Member States before the mid-1990s have provisions on the exercise of flag State jurisdiction on the high seas and

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28. “The Community points out that its Member States have transferred competence to it with regard to the conservation and management of sea fishing resources,” *ibid*, point 1.

29. *Ibid*, point 1.

30. *Ibid*.

31. *Ibid*, point 2.

have developed schemes of international inspection.”<sup>32</sup> Here, the authors make reference to the Scheme of Control and Enforcement of the North-East Atlantic Fisheries Commission (NEAFC), which includes provisions on inspection and port state control of foreign fishing vessels.<sup>33</sup> The EU is a contracting party of the NEAFC, but its Member States are not (with the exception of Denmark, in respect of the territories of Greenland and Faroe Islands). NEAFC provisions on inspection and exercise of the flag State jurisdiction have been implemented by the EU with Regulation 2791/1999, whose legal basis is Art. 43 TFEU (former Art. 37 EC Treaty), agricultural policy, which is a shared competence between EU and Member States. The Council sought to narrow the scope of the EU’s exclusive treaty-making powers in order to safeguard the residual competences of Member States. According to the Commission, the exclusive competence of the EC on the conservation of fishing resources had to be interpreted so broadly as to cover the conditions for the granting of nationality to fishing vessels, vessels inspection and responsibility of the flag States. The Commission took the matter to the ECJ.

In *Commission v Ireland* (C-459/03) the ECJ held that in areas where EU rules existed, a transfer of competence took place when the EU became party to UNCLOS merely by virtue of its membership.<sup>34</sup> Where there were no EU rules, competence remained with the Member States. While the marine environment falls within the EU’s competence,<sup>35</sup> the Court recognized that competences in this field are “in principle, shared between the Community and Member States.”<sup>36</sup> According to the Court, however,

...the question as to whether a provision of a mixed agreement comes within the competence of the Community is one which relates to the attribution and, thus, the very existence of that competence, and not to its exclusive or shared nature.<sup>37</sup>

This case lays down the principle that “as soon as the EC starts acting on the subject matter of a ‘mixed agreement,’ [...] everything provided for in the agreement becomes ipso facto an integral part of the community

32. Robin Churchill & Daniel Owen, *The EC Common Fisheries Policy* (Oxford: Oxford University Press, 2010) at 311 (footnote omitted).

33. See NEAFC, *NEAFC Scheme of Control and Enforcement*, online: NEAFC <<http://www.neafc.org/scheme>>.

34. *Commission v Ireland*, C-459/03, [2006] ECR I-4635 at para 105-108 [*Commission v Ireland* (C-459/03)].

35. TFEU, *supra* note 20, art 191. This article is former art 174 EC Treaty.

36. *Commission v Ireland* (C-459/03), *supra* note 34, at para 92.

37. *Ibid* at para. 93.

legal order.”<sup>38</sup> This decision extends the external powers of the EU at the expense of Member States and it has clear effects on the fishery policy sector which, in turn, may be relevant for the Arctic. To conclude, the decision of the ECJ and the practice of the EU suggest that the Union can expand its external competence in the field of fisheries, including powers of inspection and control of vessels flying the flag of an EU member state. This expansion of the EU’s external competence may likely have an impact on its competence in the Arctic because fisheries could become an important economic activity in the region. Thus, in 2008 the Commission, in its Communication on the Arctic,<sup>39</sup> contemplated the possibility of the NEAFC extending its mandate into the Arctic Ocean, in the absence of a RFMO for the Arctic Ocean.

## 2. *The International Maritime Organization*

The International Maritime Organization (IMO) is the main specialized UN agency dealing with maritime transport and it is also the agency entrusted with maritime standard-setting functions (conventions, codes, etc). The IMO deals with subject areas such as, inter alia, pollution from ships, ballast water management, safety of life at sea, and collision prevention, over which competence is shared between the EU and the Member States.<sup>40</sup> The “IMO is currently developing a draft International code of safety for ships operating in polar waters (Polar Code), which would cover the full range of design, construction, equipment, operational, training, search and rescue and environmental protection matters relevant to ships operating” in the Arctic and Antarctic.<sup>41</sup> The EU has no direct representation at the IMO, and it has not acceded to any of its Conventions, although most EU Member States have done so. This is because the IMO Convention does not have a Regional Economic Integration Organization (REIO) clause that would permit the Union’s accession as member. Even though the Commission has held an observer status since 1974, the voice of the EU within the IMO can only be mediated by its Member States.

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38. On this specific point see Cesare Romano, “Case C-459/03 Commission v Ireland” (2007) 101 Am J Int’l L 171 at 176.

39. *Commission Communication on the Arctic*, *supra* note 11 at para 3.2.

40. EC, European Parliament, *Directorate-General for External Policies: EU Competencies Affecting the Arctic* (28 October 2010) at 23, online: European Parliament <<http://www.europarl.europa.eu/committees/en/afet/studiesdownload.html?languageDocument=EN&file=33381>>.

41. International Maritime Organization, *Development of a Mandatory Polar Code—Update on Progress* (IMO, 2011), online: International Maritime Organization <<http://www.imo.org/mediacentre/hottopics/polar/>>.

### 3. *International instruments concerning environmental protection*

The EU is party to numerous multilateral instruments for the protection of the environment.<sup>42</sup> As discussed above, both the Member States and the EU are parties to international instruments falling within the shared competence of environmental protection. The EU exercises exclusive competence over matters falling within internal market and international trade policies, for example the prohibitions and restrictions of production and trade of persistent organic pollutants.<sup>43</sup> In other circumstances the EU has to work jointly with Member States to promote international environmental protection policies.

### III. *The integrated maritime policy (IMP)*

The Commission's 2007 Communication *An Integrated Maritime Policy for the European Union* (IMP), explicitly endorsed by the European Council,<sup>44</sup> aims at creating an overarching framework to promote a coherent and coordinated development of different sectoral policies related to maritime affairs, including environmental protection, fisheries, maritime transport, tourism and marine scientific research. Many aspects of the IMP have potential relevance for the Arctic, such as development of tools for surveillance and data collection, action to reduce pollution from ships and action for sustainable maritime tourism.<sup>45</sup> Airoldi discusses the inevitable external dimension of the IMP: "[w]hile the IMP has a predominantly internal EU dimension, marine ecosystems and economics transcend boundaries, adding an obvious external dimension."<sup>46</sup> The Commission, in its 2009 communication on the external dimension of the

42. The most relevant are: the United Nations Environmental Programme; the United Nations Framework Convention on Climate Change; the Kyoto Protocol; the LOS Convention, including the provisions on the International Seabed Authority; the Convention for the Protection of the Marine Environment of the North Atlantic and the Stockholm Convention on Persistent Organic Pollutants and the Convention on Biological Diversity.

43. EC, *Council Decision 2006/507/EC of 14 October 2004 concerning the conclusion, on behalf of the European Community, of the Stockholm Convention on Persistent Organic Pollutants*, [2006] OJ L 209/1.

44. Council of the European Union, *Brussels European Council 14 December 2007: Presidency Conclusions* (14 February 2008) 16616//1/07 rev 1, at para 58, online: <[http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/ec/97669.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/97669.pdf)>.

45. Adele Airoldi, *European Union and the Arctic. Policies and Actions* (Copenhagen: Nordic Council of Ministers, 2010) at 72.

46. *Ibid* at 39.

IMP, stressed that the external dimension cannot be ignored.<sup>47</sup> The 2010 *Report on Integrated Maritime Policy* of the European Parliament endorses the “Commission’s October 2009 package on the IMP.”<sup>48</sup> Furthermore, the Parliament “calls...on the European Commission and the Member States to further develop the potential offered by the different maritime sectors by drawing up an ambitious ‘blue growth’ strategy”<sup>49</sup> and asks the Commission to elaborate an “overarching, cross-sectoral strategy for sustainable growth in coastal regions and maritime sectors by 2013.”<sup>50</sup> In November 2011, the European Parliament and the Council of the European Union passed Regulation 1255/2011, establishing a Programme to further support the development of an Integrated Maritime Policy.<sup>51</sup> Under this Integrated Maritime Policy, third countries are requested to ratify and implement UNCLOS. The Commission is also encouraged to work in close cooperation with Member States on an integrated approach with third countries (and non-state actors in third countries) sharing a sea basin with the Member States of the Union. Due to the proximity of the EU waters to the Arctic, it is clear that the expansion of the EU’s external competence in the field of maritime policy represents an opportunity for the EU to affect the Arctic region. In fact, many aspects of the IMP have

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47. See EC, Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions—Developing the international dimension of the Integrated Maritime Policy of the European Union*, COM(2009) 536 final (15 September 2009) at 3. In this communication, the Commission indicates that issues such as “climate change, biodiversity loss, sustainable use of marine resources, [and] fair competition in shipping and shipbuilding” need to be “addressed [with] robust international cooperation,” which can have either a global or a regional scope depending on the specific issue.

48. EC, European Parliament, *Report on Integrated Maritime Policy (IMP)—Evaluation of Progress made and New Challenges* (5 October 2010) at 6/24, para 1.

49. *Ibid* at 6/24.

50. *Ibid* at 6/24, para 3. The Report also calls for an “integrated approach to strengthening Europe’s world leadership in marine and maritime research, technology development and maritime engineering across sectors such as shipbuilding, the sustainable development of marine resources, clean shipping and off-shore energy development and technologies,” and expresses the need to find “solutions... at the international level to eradicate unfair competition practices within the shipbuilding industry.” It also urges the Commission to “extend the mandate of the European Maritime Safety Agency (EMSA) on safety inspections of off-shore installations and the cleaning up of oil spills” in the EU EEZ. It also calls for “review of the EMSA Regulation” and asks the Commission to investigate whether EMSA’s mandate should be extended to environmental liability and “whether it should be assigned responsibility for monitoring compliance with safety standards in off-shore oil extraction and reviewing contingency plans in that regard.” *Ibid* at 6/24.

51. Among its objectives are, inter alia, “foster[ing] the development and implementation of integrated governance of maritime and coastal affairs;” “promoting the protection of the marine environment;” “improve[ing] and enhance[ing] external cooperation and coordination in relation to the objectives of the IMP, on the basis of advancing debate within international forums.” See EC, *Regulation (EU) No 1255/2011 of the European Parliament and of the Council of 30 November 2011 establishing a Programme to support the further development of an Integrated Maritime Policy Text with EEA relevance*, [2011] OJ L321/1 at art 2(e).

potential relevance for the Arctic, such as, inter alia, development of tools for surveillance and data collection, action to reduce pollution from ships, action for sustainable maritime tourism.<sup>52</sup>

#### IV. *Maritime shipping*

TFEU establishes that transport policy is shared between Member States and the EU.<sup>53</sup> This policy includes also freedom to provide services in the field of transport.<sup>54</sup> The EU may establish “common rules applicable to, [among others], international transport to or from the territory of a Member state” as well as “conditions [under which] non-resident carriers serv[e] the EU” and “measures to improve transport safety.”<sup>55</sup>

Since transport is a shared competence, the EU is entitled to regulate policy areas that are already “covered” by EU legislation. Thus, the EU acquires external competence in matters regulated internally within the Union. Nevertheless, as pointed out in the 2010 study by the Directorate-General for External Policies of the Union, *EU Competences Affecting the Arctic*,

...in the case of the Union abstaining from exercising its competence within the field of transport, Member States can act individually respecting the principle of cooperation and refraining from taking any measures which could jeopardise the attainment of the objectives of the EU legislation. Most probably, the limits for States’ flexibility to act in this context will be drawn from practice and/or newly developed case law.<sup>56</sup>

In addition, EU legislation covers maritime safety and the prevention of pollution from ships,<sup>57</sup> rules for ship inspection,<sup>58</sup> port state control,<sup>59</sup>

52. This aspect has been underlined in Adele Airoidi’s text: while the IMP has a predominantly internal EU dimension, marine ecosystems and economics transcend boundaries, adding an obvious external dimension. See Adele Airoidi, *European Union and the Arctic. Main developments July 2008–July 2010* (Copenhagen: Nordic Council of Ministers, 2010) at 39.

53. TFEU, *supra* note 20, art 4, Title VI.

54. *Ibid*, art 58, Chapter 3.

55. *Ibid*, art 91(a), (b), (c).

56. EC, European Parliament, Directorate-General for External Policies: *EU Competencies affecting the Arctic*, (28 October 2010), online: European Parliament <<http://www.europarl.europa.eu/committees/sv/studiesdownload.html?languageDocument=SV&file=33381>> at 22.

57. EC, *Directive 2002/84/EC of the European Parliament and of the Council of 5 November 2002 amending the Directives on maritime safety and the prevention of pollution from ships*, [2002] OJ L 324/53.

58. EC, *Council Directive 94/57/EC of November 1994 on common rules and standards for ship inspection and survey organizations and for the relevant activities of maritime administrators*, [1994] OJ L319/20.

59. EC, *Directive 2009/16/EC of the European Parliament and the Council of 23 April 2009 on port State control*, [2009] OJ L 131/57.

improvement of performance of Member States as flag states<sup>60</sup> and liability of carriers<sup>61</sup> and vessel traffic monitoring and information system.<sup>62</sup> The Vessel Traffic Monitoring & Information Systems (VTMIS) Directive also includes risk management measures in the event of sea-ice: the directive identifies the Member States that are responsible for providing proper information on ice conditions. According to Dir. 59/2002 (as amended by Dir. 17/2009), Member States' authorities recommend routes and ice-breaking services, and are empowered to request certifications for the strength and other requirements commensurate to the ice conditions in areas in which ships operate.<sup>63</sup> These powers apply to any operator, agent or master of a ship bound to a port of a Member State (Art. 4) and in the area of competence of each Member State (Art. 18(a)).

The EU competence in the field of transport is of particular significance due to the importance of commercial shipping for the economy and the environment of the region: this potentially involves greater pressure to open maritime corridors and straits in the Arctic in future years. Through the Commission's Communication,<sup>64</sup> the EU expresses the will to contribute to the development of the Arctic's commercial shipping and the improvement of maritime surveillance capabilities in the North.<sup>65</sup> The competence of the EU over maritime transport may also have a partial legal grounding in other areas, such as environmental protection (shared) and competition (exclusive). According to the jurisprudence of the ECJ on the choice of legal basis, cited above, the choice must be made considering the role of the European Parliament in the decision-making process. Given the Parliament's strong interest in environmental issues, this suggests that the environmental challenges posed by maritime transportation may well be at the top of EU's Arctic agenda.

60. EC, *Directive 2009/21/EC of the European Parliament and the Council of 23 April 2009 on compliance with flag State requirements*, [2009] OJ L 131/132.

61. EC, *Regulation No 392/2009 of the European Parliament and of the Council of 23 April 2009 on the liability of carrier of passengers by sea in the event of accidents*, [2009] OJ L 131/24.

62. EC, *Directive 2002/59/EC of the European Parliament and of the Council of 27 June 2002 establishing a Community vessel traffic monitoring and information system and repealing Council Directive 93/75/EEC*, [2002] OJ L 208/10; amended by *Directive 2009/17/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2002/59/EC establishing a Community vessel traffic monitoring and information system*, [2009] OJ L 131/101.

63. *Ibid* at 24. Art 18(1)(a) from amended 2009/17/EC, section (10).

64. See *Commission Communication on the Arctic*, *supra* note 11.

65. The Communication also mentions the possibility of developing a polar-orbiting satellite system and the option of using the Galileo satellite navigation system to improve navigation safety, maritime surveillance and emergency response; *ibid* at 8, "Proposals of Action," online: <[http://ec.europa.eu/arctic\\_region/docs/com\\_08\\_763\\_en.pdf](http://ec.europa.eu/arctic_region/docs/com_08_763_en.pdf)>.



## V. Fisheries

The Common Fishery Policy applies to fisheries and related activities “practised on the territory of Member States or in Community waters or by Community fishing vessels or, without prejudice to the primary responsibility of the flag State, nationals of Member States.”<sup>66</sup> The Community waters are subsequently defined by the basic Regulation as “the waters under the sovereignty or jurisdiction of the Member States with the exception of waters adjacent to the territories mentioned in Annex II to the Treaty.”<sup>67</sup> The exclusion in the definition of Community waters refers to the Overseas Countries and Territories of the Member States.

In *Commission v Ireland*,<sup>68</sup> the Court stated that “[a]s institutional acts adopted on the basis of the Treaty, the Regulations apply in principle to the same geographical area as the Treaty itself.”<sup>69</sup> Therefore, the Common Fishery Policy applies to the entire extent of the Community waters, including “waters beyond the territorial sea that are subject to coastal State jurisdiction,” notably the “exclusive economic zone (EEZ) and/or exclusive fishing zone (EFZ).”<sup>70</sup> Unlike competence over shipping, the EU competence over fisheries is not limited to the EU EEZ and territorial and internal waters. EU competence over the Common Fisheries Policy also follows fishing vessels registered in EU states wherever they may be, including in the Arctic.

Questions arise about the extent to which the seabed, as opposed to the water column, is covered by the definition of “Community waters” with respect to the seabed of the EEZ and EFZ, since these zones are not part of the Member States’ territory. The distinction made by the basic regulation between Community waters and Member States’ territory may serve as guidance to infer that the Community waters include the seabed within 200 nm from the coastline of the Member States. Under international law, a coastal State has exclusive sovereign rights to exploit sedentary species on its continental shelf, including the outer shelf (beyond 200 nm).<sup>71</sup> Does the fishery policy apply to the outer continental shelf as well? It has to be noted that the continental shelf comprises the seabed and subsoil and has no water column element, therefore it may be difficult to argue that

66. EC, *Council Regulation EC No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy*, [2002] OJ L 358/59 at art (2).

67. *Ibid*, Art 3(a).

68. *Commission v Ireland*, C-61/77, [1978] ECR I-417.

69. *Ibid* at para 46.

70. See Churchill & Owen, *supra* note 32 at 63.

71. *UNCLOS*, *supra* note 24 at art 76(5).

the outer continental shelf, which has no water column component, falls within Community waters. Nevertheless, art. 9.3.a of Council Decision 2001/431 clearly implies that it does.<sup>72</sup> Another example is Directive 2008/56/EC establishing a framework for community action in the field of marine environmental policy.<sup>73</sup>

In addition, the “Green Paper” on Reform of the Common Fisheries Policy of 22 April 2009 explicitly refers to the external dimension of the CFP, and proposes the management of the fishing activities of “EU fleets in non-EU waters,” in order “to extend the principles of sustainable and responsible fisheries internationally.”<sup>74</sup> The Reform of the Common Fisheries Policy also expresses the idea that “[o]ther objectives that currently guide the external dimension of the CFP, such as maintaining the presence of an EU fleet internationally and ensuring that this fleet supply the EU market, may be less relevant today.”<sup>75</sup> Even more significantly, the European Commission states that “the sheer importance of the EU market in world trading of fisheries products provides sufficient legitimacy for our action in regional and other multilateral fora.” The Reform of the Common Fisheries Policy shows that in the Commission’s view, this policy encompasses non-EU waters and that EU policy should be guided by principles of sustainable and responsible fishing. Unfortunately, the fact that Common Agriculture and Fisheries Policies are not covered by the EEA Agreement may reduce in part the impact of that policy in the Arctic region. For this reason the CFP does not apply to Norway or Iceland, two major actors in the Arctic.

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72. EC, *Council Decision 2001/431/EC of 28 May 2001 on a financial contribution by the Community to certain expenditure incurred by the Member States in implementing the control, inspection and surveillance systems applicable to the common fisheries policy*, [2011] OJ L 154/22:

The Commission may decide on a rate of contribution higher than that provided for in paragraph 2, of up to 50 % of eligible expenditure, in the following cases: (Article 9(3))

- (a) to Member States which have to control an extensive Exclusive Economic Zone, Exclusive Fishing Zone or continental shelf or which have to deal with disproportionate obligations arising in connection with the control of fishing at sea.

73. EC, *Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive)*, [2008] OJ 164/19 states that:

“marine waters” means:

- (a) waters, the seabed and subsoil on the seaward side of the baseline from which the extent of territorial waters is measured extending to the outmost reach of the area where a Member State has and/or exercises jurisdictional rights, in accordance with the Unclos, with the exception of waters adjacent to the countries and territories mentioned in Annex II to the Treaty and the French Overseas Departments and Collectivities.

74. EC, *Green Paper: Reform of the Common Fisheries Policy*, COM(2009) 163 final [*Reform of the Common Fisheries Policy*] at para 5.8.

75. *Ibid* at para 5.8.

In addition, equal access to the Contracting Parties' ports is ensured, unless the fish are taken from stocks over which disagreement over management practices exists between the Contracting Parties.<sup>76</sup> In its conclusions on EU relations with EFTA countries the Council expressed the intention to "further strengthen[ing] cooperation with Iceland on issues such as Arctic policy, the Northern Dimension, fisheries, renewable energy and climate change."<sup>77</sup>

VI. *Resource exploitation on the continental shelf and in the international seabed area*

UNCLOS divides marine waters into various zones measured from the relevant coastal State's baseline. The Territorial Sea of up to 12 nm from the baseline is the zone in which the State exercises full sovereignty, subject to the right of innocent passage to be exercised by ships of other states. Seaward to 200 nm the State has more limited jurisdiction over economic uses of the area, including the "sovereign right to explore and exploit the natural resources, including those lying in the seabed,"<sup>78</sup> and to exercise certain specified environmental jurisdictions. Beyond the 200 nm limit, a state may be entitled to exploitation and management rights over the continental shelf (but not the water column), subject to the limitations imposed by Art. 76 of UNCLOS. The outer limits of the continental shelf are to be determined in accordance with the criteria found in Art. 76, which defines the outer limits with reference to combined geological and geomorphological factors. A state's potential claim is further limited according to Art. 76.5: "the outer edge of the continental shelf shall not exceed 350 nm from the baseline or 100 nm from the 2,500 meter isobath, whichever is more favorable to the coastal State." The latter constraint is particularly significant given the fact that most parts of the Arctic Ocean are not deeper than 2,500 meters. It is on the basis of the Art. 76 criteria that Canada, U.S.A., Denmark (representing Greenland), Russia, Norway and possibly Iceland define their outer continental shelf claims to seabed areas which would otherwise be within the International Seabed Area (i.e., outside of any coastal state's jurisdiction).

In order to establish the outer limits of an extended continental shelf under UNCLOS a State has to make an application to the United Nations Commission on the Limits of the Continental Shelf (CLCS) providing

76. *EEA Agreement*, *supra* note 7 at art 5 Protocol 9.

77. EC, Council of the European Union, *Council conclusions on EU relations with EFTA countries*, (3060th General Affairs Council meeting, 2010) at para 14, online: Council of the European Union <[http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/foraff/118458.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/118458.pdf)>. *Reform of the Common Fisheries Policy*, *supra* note 72 at para 14.

78. *UNCLOS*, *supra* note 24 at art 56(1)(a).

“supporting scientific and technical data...within 10 years after the entry into force of [UNCLOS] for that State.”<sup>79</sup> Russia and Norway so far are the only States that have submitted extended continental shelf claims for the Arctic to the CLCS, whereas Denmark has made two partial submissions outside the Arctic, in 2009 (areas north of the Faroes) and 2010 (south of Greenland).<sup>80</sup> Furthermore, Denmark in August 2011 released a “Strategy for the Arctic 2011-2020”<sup>81</sup> in which it is said that Denmark’s Science Ministry has started collecting data to formally submit a claim for several areas to the CLCS no later than 2014.<sup>82</sup>

The CLCS makes recommendations with regard to coastal State submissions, and where the State defines its outer limits in accord with those recommendations, such limits are to be considered “final and binding,” under Art. 76(8). Article 9, UNCLOS Annex II states expressly that the CLCS’s recommendations “shall not prejudice matters relating to delimitation of boundaries between States with opposite or adjacent coasts” following Article 76(10) UNCLOS. Thus, the CLCS has no mandate to either determine maritime boundaries between coastal States or to settle disputes. In addition to their general obligations to settle any maritime boundary disputes peacefully, in accordance with international law, Articles 279, 287(1)(a-d) UNCLOS may oblige parties to the Convention, where they have not agreed otherwise, to settle any such dispute between them using the mandatory dispute settlement system provided for in the Convention. Unfortunately, Article 298 UNCLOS allows a State to declare that it does not accept such methods of resolution for disputes relating to delimitation. Canada, Denmark and Russia have all issued declarations of non-acceptance in relation to their respective Arctic claims. Bearing in mind that the U.S. is not bound by UNCLOS, the dispute resolution procedures of UNCLOS are currently only binding on Norway in this regard, and the non-acceptance of the other Arctic States would preclude any mandatory imposition of the procedures on Norway.

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79. *Ibid* at Annex II, art 4.

80. See Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the progress of work in the Commission at UNCLOS, 24th Sess, UN Doc LOS/CLCS/64 (2009) at 18.

81. Denmark, Greenland and the Faroe Islands, *Kingdom of Denmark Arctic Strategy 2011–2020* (August 2011), online: <[http://um.dk/en/~media/UM/English-site/Documents/Politics-and-diplomacy/Arktis\\_Rapport\\_UK\\_210x270\\_Final\\_Web.pdf](http://um.dk/en/~media/UM/English-site/Documents/Politics-and-diplomacy/Arktis_Rapport_UK_210x270_Final_Web.pdf)>.

82. *Ibid* at 14. Even if the CLCS receives all these applications in time, its decisions may not provide a final and binding resolution of all Arctic outer continental shelf disputes. This is further complicated by the fact that the United States is not yet a party to the UNCLOS and, therefore, not yet formally bound. It is not yet clear whether the CLCS is a forum that has the capacity to provide final and binding solutions.

At this point it is not at all clear what role the EU can play in this process. Matters of territorial sovereignty are still within exclusive national jurisdiction, and EU Member States may well wish to keep the EU entirely out of what may be a very contentious process. It is also possible that it may be very difficult for the EU to develop a consensus on the status of the Arctic Ocean's seabed. Many EU Member States, having no Arctic coastline or continental shelf, may prefer to press for the maximum international seabed area in order to have access to resources through the UNCLOS legal regime, rather than to be forced to submit to the regulation of a few Arctic states. This can only be a matter of speculation at this point.

### VII. *Environmental protection*

According to Article 4.2(e) TFEU, environmental policy is shared between Member States and the EU. The environmental policy of the EU is based on the "integration principle,"<sup>83</sup> which implies that "environmental protection requirements should be integrated into all EU policies according to the principle of sustainable development." Contrary to other policies over which Member States and EU share competence, Member States retain a high level of competence over environmental policy issues. According to Article 191.2 TFEU, "a high level of environmental protection is a goal that should be pursued by member states taking into account the diversity of situations in the different regions of the Union." Furthermore, Member States maintain the power to "introduce other national provisions [...]" even after the "adoption of harmonization measure[s]" at the EU level if these provisions are "based on new scientific evidence" concerning the "protection of the environment" or related issues.<sup>84</sup> Member States are usually entitled to "introduc[e] more stringent [...] measures" than those incorporated in the EU harmonization directives, so long as they are "compatible with the Treaties."<sup>85</sup>

According to TFEU Articles 191-193, the actions of the EU regarding environmental protection should be designed to preserve, protect and improve the quality of the environment, protect human health, rationally and prudently utilize natural resources and put in place strategies to fight climate change. This principle applies to the treaties the EU signs. For this reason, the EU can reasonably be expected to support the adoption of environmentally responsible measures in the Arctic. The EU has enacted a number of policies within the general competence it has over

83. *Consolidated version of the Treaty on European Union*, [2010] OJ L 83/13 at art 11 [TEU]; TFEU, *supra* note 20 at art 114.3

84. *Ibid*, art 114.5.

85. *Ibid*, art 193.

environmental protection. The most important aspects of this policy for the Arctic are those related to the regulation of marine pollution, climate change, prevention of natural disasters and civil protection.

### 1. *Marine pollution*

The position that might be taken by the EU concerning marine pollution in the Arctic, particularly pollution from ships navigating in the Arctic, may pose problems for Canada and Russia. This is because these two states have committed to regulate navigation in Arctic waters under their jurisdiction. The level of conflict will depend on whether the EU takes a strong position to reduce pollution from ships or whether, under the guise of protecting EU registered ships' freedom of navigation, it decides to restrict pollution prevention measures to those based on strictly international standards. So far the indications are limited but positive from the Canadian and Russian perspective.

*Directive 32/1999*,<sup>86</sup> concerning the sulphur content of marine fuels, which potentially applies to EU ships traveling in Arctic waters states:

Member States shall take all necessary measures to ensure that marine fuels are not used in the areas of their territorial seas, exclusive economic zones and pollution control zones falling within SOx Emission Control Areas if the sulphur content of those fuels exceeds 1,5 % by mass. This shall apply to all vessels of all flags, including vessels whose journey began outside the Community.<sup>87</sup>

*Directive 81/2001* on national emission ceilings for certain atmospheric pollutants may also be relevant. This Directive applies only within member states' territories and their EEZs. International maritime traffic is explicitly excluded.<sup>88</sup> Yet, it is applicable to the part of the Arctic that is included within the territories of EU Arctic Member States and for intra-EU traffic.

86. EC, *Council Directive 1999/32/EC of 26 April 1999 relating to a reduction in the sulphur content of certain liquid fuels and amending Directive 93/12/EEC*, [1999] OJ L 121/12 [*Directive 32/1999*]; As amended by *Directive 2005/33/EC of the European Parliament and of the Council of 6 July 2005 amending Directive 1999/32/EC*, [2005] OJ L 191/59.

87. EC, *Directive 2005/33/EC of the European Parliament and Council, 6 July 2005, amending Directive 1999/32/EC*, Article 4a. This provision also designates the Baltic Sea, the North Sea and the English Channel as sulphur emission control areas (SECAs) and limits the maximum sulphur content of the fuels used by ships operating in these sea areas to 1.5%; in doing so, it transposes provisions of Annex VI of IMO's Marine Pollution Convention, MARPOL 73/78. The European Parliament and the Council have requested the Commission to report on the implementation of the Directive and to consider submitting a proposal for an amendment. Following this request and considering the development at the IMO in 2008, the Commission carried out a review of the Directive and adopted a proposal for its revision on 15 July 2011.

88. EC, *Directive 2001/81/EC of the European Parliament and of the Council of 23 October 2001 on national emission ceilings for certain atmospheric pollutants*, [2011] OJ L 309/22 at art 2(c).

In 2008, the *Maritime Strategy Framework Directive* (MSFD)<sup>89</sup> entered into force and it requires Member States to take measures to achieve or maintain high environmental standards in the marine environment by 2020 through adaptive management. This Directive applies in EU ports and in EU EEZs. This Directive also provides that the Arctic waters are a “neighboring marine environment of particular importance for the [EU]” and that “climate change” concerns “need to be [addressed] by the [Union’s] institutions and may require action [by the EU] to ensure the environmental protection of the Arctic.”<sup>90</sup> In addition, in its conclusions on Integrated Maritime Policy,<sup>91</sup> the Council invites the Commission to present “proposals for the financing of integrated maritime policy actions,” including the environmental protection of the Arctic. This highlights the importance of funding further development and implementation of the IMP.

## 2. Climate change

Climate change is given special consideration in Article 191 TFEU as a worldwide environmental problem, which requires the promotion of measures at the international level. Despite the failure of the Copenhagen Conference on Climate Change, the EU has enacted the so called “20-20-20 package.”<sup>92</sup> In addition, the climate change policy of the EU is based on the second European Climate Change Programme (ECCP II), launched in 2005. In the ECCP II there is no specific focus or sub-group activity on the Arctic region. However, more specific reference to the Arctic was made since. A paper presented to the Council, “Climate Change and International Security,” discusses that climate change mutations in the Arctic region are opening new maritime commercial routes.<sup>93</sup> Furthermore, the “increased

89. EC, *Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive)*, [2008] OJ L 164/19.

90. *Ibid* at 42.

91. EC, Council of the European Union, Press Release, *Council Conclusions on an Integrated maritime policy*, 2973rd General Affairs Council meeting, (16 November 2009), online: Council of the European Union <[http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/en/gena/111184.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/gena/111184.pdf)> at 6.

92. See EC, *The 2010/C 141/09 Own-initiative opinion of the Committee of the Regions on forest policy: the 20/20/20 targets of 29 May 2010*, [2010] OJ L 141/45. This requires the reduction of 20% of greenhouse emissions below 1990 level by 2020; 20% of EU energy consumption to come from renewable resources; and a 20% reduction in primary energy use compared with projected levels, to be achieved by improving energy efficiency.

93. EC, High Representative, European Commission, *Climate Change and International Security: Paper by the High Representative and the European Commission to the European Council*, S113/08 (14 March 2008), online: Council of the European Union <[http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/reports/99387.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/reports/99387.pdf)>.

accessibility” to hydrocarbon resources affects “the geo-strategic dynamics of the region with potential consequences for international stability and European security interests.”<sup>94</sup> The 2008 follow-up report,<sup>95</sup> endorsed by the Council in 2009, underlines the importance of satellite monitoring of climate change, security and disaster response. In connection with the Arctic, a later progress report said that “[c]limate change-related activities where satellite imagery analysis bring added value include monitoring Arctic ice-fields to assess the practicability of new Arctic routes, updating coastline changes and monitoring of water as a valuable and scarce asset.”<sup>96</sup>

### 3. *Security and civil protection*

Civil protection policy has now been upgraded as an autonomous policy included in the TFEU Art. 196 in the Lisbon Treaty. Member States maintain their competence for civil protection; nevertheless, the EU has competence to support, coordinate and supplement their actions in order to guarantee prompt and effect reaction in case of natural disasters. This competence has the potential to be of significance for the Arctic, due to the increase of human activities in the Arctic, and in particular oil and natural gas extraction.

In the case of oil spills in marine waters the civil protection directorate would act in coordination with the European Maritime Safety Agency and non-EU regional partners. The EU, in fact, has signed or promoted a number of agreements assuring cooperation in civil protection action. The relevant agreements for the Arctic are the 2008 inter-regional agreement on emergency prevention, preparedness and response between Finland, Norway, Sweden and Russia and the 2004 bilateral arrangement between the EU civil protection service and its Russian counterpart.<sup>97</sup> The geographical scope of Decision 2850/2000, “setting up a Community framework for

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94. *Ibid* at 8.

95. EC, Council of the European Union, *Climate Change and Security: Recommendations of the High Representative on follow-up to the High Representative and Commission report on Climate Change and International Security*, 16994/1/08 REV 1 (10 December 2008), online: Council of the European Union <<http://register.consilium.europa.eu/pdf/en/08/st16/st16994-re01.en08.pdf>>.

96. EC, Council of the European Union, *Joint progress report and follow-up recommendations on climate change and international security (CCIS) to the Council*, 16645/09 (25 November 2009) at 8, online: Council of the European Union <<http://register.consilium.europa.eu/pdf/en/09/st16/st16645.en09.pdf>>.

97. *Protocol to the Partnership and Cooperation Agreement establishing a partnership between the European Communities and their Member States, of the one part, and the Russian Federation, of the other part, to take account of the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Hungary, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, and the Slovak Republic to the European Union*, 27 April 2004, [2006] OJ L185/17 [entered into force 1 March 2005].



cooperation in the field of accidental or deliberate marine pollution,” is limited to “national, regional and local levels,” with the exclusion of “pollution originating from land-based sources.”<sup>98</sup> Article 1(2) of the Council Decision establishing the Mechanism, states that the mechanism applies to “emergencies [that occur] inside or outside the Community.”<sup>99</sup> Thus the scope of this measure goes beyond the community territory and waters. This is particularly relevant for the Arctic region, as the Mechanism covers environmental accidents, including accidental marine pollution.

### VIII. *Scientific research programmes related to the Arctic*

Article 4.3 of the TFEU establishes that research is a shared competence. The EU has competence to carry out research activities, but the exercise of this competence cannot be an obstacle to the exercise of Member States’ competence. Thus both the EU and Member States are obliged to “coordinate their research and technological...activities” in order to render them “mutually consistent.”<sup>100</sup> To this end, the Commission shall take specific coordination initiatives. The competence of the EU in this field is exercised by the establishment and implementation of multiannual framework programmes.<sup>101</sup> For the establishment of framework programmes the consent of the European Parliament is required, whereas in the case of special programmes, it only has a consultative role.

The EU has launched and carried out several research programmes focusing specifically on the Arctic or the polar regions—including Antarctica. Typically these programmes have lasted 24 to 48 months. In terms of budget, a precise estimation of the total amount of the funds destined to research in the Arctic is not available, nevertheless, in a recent speech, EU Commissioner for Maritime Policy, Ms. Maria Damanaki, has claimed that “in the last decade the European Commission has spent 200 million euro on Arctic research projects which focuses on key areas such as sea ice retreating and thinning, rising sea levels and Arctic pollution.”<sup>102</sup>

98. EC, *Decision No 2850/2000/EC of the European Parliament and of the Council of 20 December 2000 setting up a Community framework for cooperation in the field of accidental or deliberate marine pollution*, [2000] OJ L332/1 at art 1.

99. EC, *Council Decision 2007/779/EC, Euratom of 8 November 2007 establishing a Community Civil Protection Mechanism*, [2007] OJ L 314/9 at (6).

100. TFEU, *supra* note 20 at art 181.1.

101. *Ibid* at art 182.

102. Maria Damanaki, “The Arctic: a Test Bench for International Dialogue” (Arctic Science, International Law and Climate Protection Conference delivered at Berlin, 17 March 2011) SPEECH/11/192, online: European Union <<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/192&format=HTML&aged=0&language=EN&guiLanguage=en>>.

1. *SIOS—Towards an integrated arctic earth observation system (SIOS)*

The EU has contributed with goal No 4 of SIOS to establish an observational research infrastructure for the Arctic Earth System, integrating studies of geophysical, chemical and biological processes from the research and monitoring platforms.

2. *ArcRisk*

Arctic Health Risks is a project dealing with the impact on health in the Arctic resulting from climate-induced changes in contaminant cycling. It benefits from EU funding.

3. *EU Arctic Footprint*

The EU Arctic Footprint and Policy Assessment Project (EU Arctic Footprint) is a project launched by the European Commission as a first attempt at calculating Europe's contribution to the impact of environmental degradation on the Arctic environment and inhabitants. This project also examines the effectiveness of EU policies in mitigating adverse environmental Arctic impacts. The aim of Arctic Footprint is to "improve the effectiveness of EU environmental policies with respect to the Arctic region," especially as they relate to the implementation of existing policies and a new Arctic Policy for the EU. The Final Report was released in 2010.<sup>103</sup>

4. *Ice2sea*

Ice2sea is a collaborative research program involving 24 institutional partners. Ice2sea is a research program specifically focused on the contribution to sea-level rise that will arise from loss of continental glaciers and ice sheets and which gives rise to the largest part of the uncertainty in the projections. This program involves 24 institutional partners and the European Commission contributes with 10 million Euros. The program will run until 2013. Part of this research is held in the Arctic region, notably in Greenland and Svalbard Archipelago (Norway).

5. *EUROPOLAR*

EUROPOLAR is a consortium composed of 25 Government Ministries, National Funding Agencies and National Polar RTD Authorities from 19

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103. Sandra Cavalieri et al, *Arctic Footprint and Policy Assessment: Final Report* (Berlin: Ecologic Institute, 2010) at 16, 19, 20, 31 and 41, online: The EU Arctic Footprint <[http://www.arctic-footprint.eu/sites/default/files/AFFPA\\_Final\\_Report.pdf](http://www.arctic-footprint.eu/sites/default/files/AFFPA_Final_Report.pdf)>. According to the Report, the EU share of global trans-boundary pollution in the Arctic varies: 35% of Hexachlorobenzene (HCB) (data of 2005), 27% of mercury (data of 2005) and 43% of SO<sub>2</sub>. As of greenhouse house emissions EU impact on the Arctic is 16 % (data of 2007). As of energy, the EU receives 24% of the total output of the Arctic oil and natural gas industry, including pipeline transportation.

European Member States and the European Polar Board.<sup>104</sup> This consortium intends to coordinate European Polar research technological development RTD programs in order to deepen and strengthen the interactions between countries with significant Polar RTD programs.

#### 6. *The Arctic tipping points*

The Arctic Tipping Points was launched in February 2009 with a budget of 4.9 million Euros, for a duration of 36 months. Its major aims were to identify elements of the Arctic marine ecosystem which show abrupt modifications caused by climate change, examine climate drivers inducing the regime shift for these elements, analyze the impact of activities that are strategically important for the EU in the Arctic ecosystems, examine possible alternative post-Kyoto policies and stabilization targets to avoid tipping points. This was carried out by the EU in partnership with Russia and Greenland.

#### *Conclusions*

Despite many efforts to develop a coherent policy for the Arctic, the EU still has a very restricted and contested role in the region. The refusal of the Arctic Council Member States to accept the EU as a permanent observer demonstrates the hostility of the other Arctic stakeholders as well as of indigenous peoples. Yet the pace of climate change is escalating, causing a progressive melting of the ice, which in turn suggests that the region has potential both in terms of natural resources and navigation routes.<sup>105</sup> The EU, like other Arctic stakeholders, has an interest in the division of the seabed of the Arctic Ocean, and its impact on the remaining areas of international seabed. So far, this situation has generated a *pacta ad excludendum*, rather than strategic cooperation agreements: we refer here to the Ilussat declaration,<sup>106</sup> a document adopted by the five major Arctic States (U.S.A., Canada, Russia, Denmark, and Norway) in an attempt to leave out other states, specifically on matters of exploitation of natural resources. This strategy is particularly harmful to the EU's interests, due to the fact that one EU country, Denmark, by signing the Ilussat declaration, has now adopted a strategy potentially conflicting with the Union's interests. This may seriously hinder the full construction of a EU strategy in the Arctic, because consensus within the Union may be

104. The European Polar Board (EPB) is Europe's strategic advisory body on science policy in the Arctic and Antarctic. It is a platform for European engagement in international science programmes and provides strategic science policy advice to the European Commission and international bodies.

105. See Malte Humpert, *EU Arctic Policy: A Memorandum to the European Commission*, (Washington, DC: The Arctic Institute Publication, 2011) at para 2.1.

106. *Ilulissat*, *supra* note 5.

difficult to achieve. Nonetheless, while consensus of all Member States is necessary to act within the formal common foreign and security policy, the external dimensions of other policies, notably those in which the EU has exclusive or shared competences, remain relevant for the Arctic region.

EU external action may certainly cover Arctic fisheries conducted by ships flying the flag of a EU member state. The EU is also party to several RMFOs, as it is endowed of treaty making powers within the fishery sector. The possible enlargement of the mandate of the North-East Atlantic Fishery Commission to parts of the Arctic can only lead to a greater impact of the Union in that region. As for the regulation of pollution from ships, it is certainly possible to envisage the adoption of EU regulations of certain forms of ship-source pollution. Beyond this, the EU certainly has the authority to join international environment agreements and legal regimes which may extend to the Arctic.

The participation of the EU within specialized international instruments that are relevant for the Arctic may well strengthen the hand of the EU in its sometimes difficult dialogue with other Arctic stakeholders. In addition to this, the EU has tremendous economic influence which could play a determinant role to influence Arctic policies. Finally, the institutional innovations introduced by the Treaty of Lisbon, such as the strengthening of the role of the High Representative of the Union Foreign Affairs and Security Policy as well the creation of the European External Action Service, may contribute significantly to providing the Union with a stronger voice in the Arctic.

How should Canada view the emergence of the EU as an Arctic power? So far the Canadian reaction has been very guarded and little has been done to open a dialogue. Given the potential impact of the EU on Arctic policy, dialogue would seem to be more constructive policy for Canada than hesitation and distrust. The fact is that the EU can be a great support for Canadian policies if it chooses to do so, although the contrary is also possible. It is possible that the EU will take up the concerns of its maritime State Members who continue to call for recognition of the Northwest Passage as an international strait and the application of the transit passage regime, who insist on the primacy of international standards for ships in the Arctic over those adopted by Canada, and who apparently adopt a restrictive meaning of UNCLOS article 234 (providing for enhanced environmental jurisdiction over ice-covered waters). This would not be in Canada's best interests. To avoid this unfortunate outcome, Canada should engage the EU and ensure that the accent is put on its duty to promote high standards of environmental protection in all its dealings both internal and external. The EU could be a redoubtable ally in future debates over these

issues. Canada should do all that it can to make the EU an ally, rather than an opponent on these issues.