

The present and future competence of the European Union in the Arctic*

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ABSTRACT. The European Union's (EU's) intention of becoming a permanent observer in the Arctic Council and the reluctance of Arctic actors to grant it that status have made the union's aspirations in the Arctic the subject of a continuing debate. The discussion appears to be dominated by geographical considerations and the EU's gradually emerging Arctic policy. This article puts forward a different view of the EU's presence in the region, one drawing on an analysis of relevant EU competences. As a complex international actor, the EU has acquired a broad array of decision-making powers from its member states, powers that partly extend to Iceland and Norway via the EEA Agreement. Moreover, the EU has in many cases become a relevant actor in international negotiations and treaty making processes the outcomes of which are of crucial importance for the governance of the Arctic. Our argument in the third and concluding section is that only by including the EU in Arctic governance can the international community provide better prospects for the union to sensitise its policies and discourses to the Arctic realities and for other Arctic actors to understand how the union functions. This argument is supported by an analysis of the EU's restrictions on the import of seal products and the ensuing litigation.

Introduction

When the role of the European Union (EU) is discussed in Arctic forums, the emphasis often seems to lie on the union having no shoreline on the Arctic Ocean. This is indeed the case, for Finland and Sweden have no coastline on the Arctic Ocean and Greenland, although part of Denmark, withdrew from the then European Economic Community (EEC) in 1985 after a 1982 referendum. Another focus of attention has been the application submitted by the European Commission in 2009 to become a permanent observer to the Arctic Council, this being one of the goals of EU Arctic policy identified in the EU Commission Arctic Communication (2008). The member states of the Arctic Council rejected the application at the 2009 ministerial meeting (Graczyk 2011). Many have questioned whether the EU has and, perhaps more importantly, should have, any role in the Arctic.

We argue that the political and legal role of the EU is seriously misunderstood in the region, probably because it is still a comparative newcomer to discussions on Arctic governance, including those in the Arctic Council. In other words, since the EU is rather a new player in the region, the other policy actors have a hard time understanding what its role is. This stems in part from the fact that Arctic governance has thus far been so heavily dominated by geographical notions of who counts as a relevant Arctic policy actor. The

* The present article is based on an extensive report completed by the authors for the European Parliament when it was revising its Arctic policy (see European Parliament website; URL: <http://www.europarl.europa.eu/activities/committees/studies/download.do?language=sv&file=33381>, (accessed 19 April 2011). The report (The EU competences affecting the Arctic) is mentioned in the exploratory statement to the motion for a European Parliament resolution; URL: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2010-0377+0+DOC+XML+V0//EN - title2> (accessed 14 February 2011).

Arctic Circle served as the primary criterion for determining who qualifies for membership in the Arctic Council, and the Arctic Ocean basin as who counts as an Arctic Ocean coastal state. But perhaps more importantly, the Arctic policy actors have difficulties comprehending the complexity of the EU as a supranational organisation.

We claim that it is much more important to examine the legal competences which the EU already has for taking action in various policy fields in the Arctic than to focus on its geographical and institutional presence in the region. Indeed, the EU has strong legal competence in fields of policy that will figure prominently when sea ice on the Arctic Ocean further recedes and becomes predominantly first year ice.

The first section of the article contrasts the EU's territorial presence in the region with its functional competence. While the EU has a clear territorial role in the region, it is admittedly not a major Arctic power in geographical terms. The section then moves on to our core argument: the EU has strong competences to act in the region even now, but these will become all the stronger as the new Arctic Ocean emerges. We explore the EU's competences in the region in terms of a) what the current environmental and other problems in the Arctic are and how these are being tackled and b) what regulatory actions will be needed as the sea ice recedes. In this way, we delineate the EU's role in the Arctic.

The second section takes up a case that illustrates the influence of the EU and its competences in Arctic affairs, a case that also demonstrates the complexity of the union as a supranational organisation. The controversial EU regulation (EC 2009) introducing an almost total ban on placing seal products on the EU market has caused a great deal of consternation between the established Arctic Council actors and the EU; particularly concerned are Canada, Norway and the Inuit, who are represented in the Arctic Council by the Inuit Circumpolar Council (ICC), which has permanent participant status (Arctic Council 2009). The case shows the influence of the EU in Arctic affairs as well as why it is important to include the EU in the Arctic Council. It also shows the need to increase knowledge in the EU of what its regulation means and what is taking place in the Arctic and to disseminate knowledge of the EU and its competence among the *362 established Arctic actors. Because of the demonstrable influence of the EU in the Arctic, we argue that the ban on the marketing of seal products reveals the parties' lack of knowledge and supports the case for increasing cooperation between them and stronger involvement of the EU in Arctic governance.

The EU is a relative newcomer in Arctic affairs, and our argument in the third and concluding section is that only by including it in Arctic governance can the international community provide better prospects for the union to sensitise its policies and discourses to the Arctic realities and for other Arctic actors to understand how the EU functions. As the EU will exercise its competences in the Arctic in any case, if not in the Arctic Council then via other multilateral forums, the section examines in detail the reasons why the EU should be included in the gradually strengthening Arctic governance.

Territorial presence versus functional presence of the EU in the Arctic

Territorial presence

In geographical perspective, if the Arctic Circle is considered the southernmost border of the Arctic, the role of the EU is distinct but not extensive: its only Arctic territory is the northernmost parts of two member states, Finland and Sweden. Although Denmark, also a member state, has sovereignty over Greenland, Greenland withdrew from the then EEC after a 1982 referendum. Since 21 June 2009 Greenland has had extensive self-governance, which includes the option to secede from Denmark (Statsministeriet 2009). Overall, then, the EU's land presence is fairly limited in the Arctic, contributing to the image that it is not a major

player in the region. However, two Arctic members of the European Free Trade Association (EFTA), Iceland and Norway, are parties to the European Economic Area (EEA) Agreement.

The EEA Agreement was signed in 1992 by the member states of both the EU and EFTA. In many respects, the agreement expands the geographical scope of EU legislation beyond the territorial jurisdiction of the union's member states. The instrument is particularly relevant to the scope of the legal competence of the EU in the Arctic, as both Iceland, an EU candidate country, and Norway are parties to it. It should be noted that the EEA is not applicable to the Svalbard archipelago.

The EEA Agreement creates a single market for all 30 states parties. It provides for application of the *acquis communautaire* (the cumulative body of legislation and court decisions which constitute EU law) to the three EFTA countries (including Lichtenstein; Switzerland is the only EFTA state that is not a party to the EEA Agreement) in relation to the four fundamental freedoms (free movement of goods, services, capital and persons). The agreement also covers cooperation between the EU and the EEA/EFTA countries in relation to flanking and horizontal policies. However, the common agriculture policy and the common fisheries policy are excluded from the scope of the EEA internal market. Furthermore, the content of the former second and third pillars of the EU, as well as the provisions of the Economic and Monetary Union (EMU), do not apply to the EEA/EFTA countries.

The EEA/EFTA states have only a consultative role in the decision making process by which EU legislation is adopted. Whenever EU legislation is drafted by the commission and thereafter communicated to the council, the commission consults with the experts of the EEA/EFTA states. If the legislation be adopted, the EEA Joint Committee determines the conditions under which an amendment to the EEA Agreement is required in order to maintain the development of a homogenous legal order under the agreement. The legislation is then forwarded to the pertinent EEA institution, which adopts it as EEA law. Finally, this legislation is integrated into the legal orders of the EEA/EFTA states in accordance with their national decision making processes. In practice, this procedure transfers to the EU institutions the competences related to matters covered by the EEA Agreement, thus strengthening the role of Brussels with regard to several policies of two Arctic states.

Presence of the EU via its competences

Since the EU is not a state, its competences must be based on treaties to which its member states have consented (primary treaties). In other words, in principle, the EU has no competence to act if this has not been conferred on it by its member states (principle of conferral). Irrespective of the principle of conferral, however, the EU has come to possess extensive competences, both exclusive and shared with the member states. These have been acquired via the case law of the European Court of Justice (ECJ) and have been endorsed by the member states via the primary treaties (Craig 2009). The Treaty of Lisbon, which amended the Treaty on European Union (TEU) and the Treaty establishing the European Community (TEC), and renamed the latter the Treaty on the Functioning of the European Union (TFEU), represents the latest step in European integration as far as founding treaties are concerned. The Treaty of Lisbon entered into force on 1 December 2009 and gave clear expression to the legal personality of the EU (TEU (EU (TEU) 2010) article 47). Although the treaty has some modifications aimed at accommodating growing opposition to European constitutionalism, most of its provisions are still inspired by those of the failed treaty aimed at establishing a constitution for Europe, abandoned after the 2005 Dutch and French referenda.

The list of the EU's competences had been progressively extended even before the entry into force of the Treaty of Lisbon. Firstly, the ECJ had considerably extended these in its case law. Secondly, each of the successive agreements amending the Treaty of Rome (the original 1957 Treaty establishing the EEC) included new provisions extending the competences, by either *363 providing explicitly what the ECJ had already stated in its decisions or granting competences to the EU in new policy areas. The consolidated founding treaties did not contain an exhaustive list of the EU's competences but rather set these out with regard to specific subject matter in various sections of the treaty. The Treaty of Lisbon addressed this shortcoming by codifying in its articles 3, 4 and 6 the exclusive, shared and complementary competences, respectively. Each of these categories of competence implies a different sharing of responsibility between the EU and its member states.

Text box 1. Provisions of the TFEU defining the scope of the EU's exclusive and shared competences (EU (TFEU) 2010)

Article 3

1. The Union shall have exclusive competence in the following areas:

- (a) customs union;
- (b) the establishing of the competition rules necessary for the functioning of the internal market;
- (c) monetary policy for the Member States whose currency is the euro;
- (d) the conservation of marine biological resources under the common fisheries policy;
- (e) common commercial policy.

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

Article 4

1. The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6.

2. Shared competence between the Union and the Member States applies in the following principal areas:

- (a) internal market;
- (b) social policy, for the aspects defined in this Treaty;
- (c) economic, social and territorial cohesion;
- (d) agriculture and fisheries, excluding the conservation of marine biological resources;
- (e) environment;
- (f) consumer protection;
- (g) transport;
- (h) trans-European networks;
- (i) energy;
- (j) area of freedom, security and justice;
- (k) common safety concerns in public health matters, for the aspects defined in this Treaty

[...]

As noted, the substantive scope of the EU competences has not been much affected by the entry into force of the Treaty of Lisbon, energy policy being the exception. Rather, the impact of the treaty lies more in the institutional and procedural reforms it introduces than in the extension of the number of policy areas in which the EU operates. One of the principal novelties in the treaty consists in the additional safeguards established to prevent the encroachment of EU law upon the law of the member states (EU 2007). Lastly, it should be noted that the Treaty of Lisbon also clarified the legal status of the EU in explicitly granting it legal personality (TEU (EU (TEU) 2010): articles 21, 24 and 47; TFEU (EU (TFEU) 2010): articles 216 and 191(4); de Schoutheete and Andoura 2007: 7–9).

It is important to note that in principle the EU's external competences mirror its internal ones, in keeping with what is known as the doctrine of parallelism, developed by the ECJ in its jurisprudence (ECJ 1971, 1977). In some cases, the EU has adopted an explicit provision conferring on itself exclusive external competence, such as it has in external trade policy. Yet, many times a policy area has become so extensively regulated over time by the EU that it has assumed what the ECJ has deemed in its case law to be implied external competence. This doctrine prevents the member states from circumventing EU legislation by joining international treaties (Craig and de Búrca 2008: 96–99).

Another noteworthy consideration is that even if the EU's competence is fairly clear in many policy areas, especially now that it is articulated in the Treaty of Lisbon, there remain many 'grey zones'. The ECJ has issued legal guidance concerning how the EU institutions are to evaluate their legal competence to act. This act of determining the legal basis of a specific action by the EU plays a critical role (ECJ 1987). Whether the EU has exclusive, shared or complementary competence with regard to a given action will depend on the choice of legal basis. The ECJ has highlighted the importance of that choice in the adoption of a legislative act as **364* follows: '[t]he choice of the appropriate legal basis has constitutional significance' and the choice of the legal basis should rely on objective factors which are amenable to judicial review (ECJ 2001; Duyck and others 2009). The importance of defining the correct legal basis lies in determining the ensuing decision making procedure within the EU (for example co-decision, assent or consultation), and therefore also the role played by the European Parliament in that procedure.

The choice of legal basis is fairly clear when there is an obvious legal basis relevant to the adoption of a particular policy instrument. In relation to most Arctic policies, however, many EU competences could be invoked; that is, some policies or regulatory actions of the EU might fall under more than one competence. In such a case, according to the ECJ, the determination of the legal basis will rely on a) the identification of the most relevant competences and b) the determination of whether one of those competences prevails over the others. The ECJ has placed crucial importance on EU competence being based on a single predominant competence; only where this proves impossible can two or more legal bases be invoked (ECJ 1987).

EU competence with regard to several policy fields critical to the Arctic

As has been established above, it is not sufficient to examine how the Treaty of Lisbon defines each policy area as belonging to exclusive, shared or complementary competence. One must examine each legal instrument (whether it be an EU regulatory instrument or an international treaty) in the light of its predominant purpose. In the following, some examples relevant to the Arctic are taken up. The climate change competences of the EU and of its member states have been studied in detail elsewhere (Neumann and Rudloff 2010).

Environmental problems in the Arctic

Most of the pressing issues in the Arctic are related to environmental problems caused by sources outside the region. Long range trans-boundary pollutants currently constitute one of the biggest threats to the Arctic environment and its vulnerable ecosystems (AMAP 2009). These can only be dealt with by global or regional treaty regimes, some of which are studied here.

In principle, pollutant reduction clearly falls under environmental policy and is thus a policy in which competence is shared between the EU and its member states; then again, many areas of environmental protection are so exhaustively regulated by the EU that it is

difficult to discern much residual competence for the member states. Moreover, the EU's environmental policy, along with the Common Agricultural Policy (CAP), even influences related policy sectors such as forestry policy, in which, generally speaking, member states have exclusive legal competence (Kokko and others 2006; Duyck and others 2009). The environmental policy of the EU applies in full only in the northern parts of Finland and Sweden, but most of it is applicable in Norway and Iceland as well via the EEA Agreement (1993), given that most environmental policy is relevant to the internal market. Yet, if one considers the Arctic, the most important environmental problems are regulated internationally via the Convention on Biological Diversity, the climate change regime, and like instruments. Both member states and the EU have competence in these issues and both also participate in these global conventions and their institutions. While some aspects of these conventions fall under the exclusive competence of the EU, in most cases of environmental protection both member states and the EU have competence and both can join international environmental treaties. Frequently, third parties demand that a treaty contains a clause defining the respective responsibilities of the EU and its member states.

Persistent organic pollutants (POPs) are regulated mainly by the Stockholm Convention on POPs, to which both the EU and its member states are parties. The European National Implementation Plan requires that most issues falling under the Stockholm Convention are to receive 'close and constructive cooperation between the Commission and the Member States' (EComm 2007: 31). The issues of exclusive competence for the EU are related to competition policy for the internal market and international trade, that is, prohibitions and restrictions on the production, export, and import of POPs.

Mercury poses one of the greatest environmental challenges in the Arctic. It is still not covered by a specific international treaty, although negotiations towards a legally binding agreement are under way (UNEP 2011; EC 2007; EC 2008) on the banning of exports of metallic mercury and certain mercury compounds and mixtures and the safe storage of metallic mercury. The EU has probably assumed exclusive competence over some facets of the mercury policy through commercial, internal market and environmental policies, which need to be taken into account when an international treaty is negotiated. Yet, it is too early to conclude anything here, given that any evaluation of the legal competences of the EU and its member states will depend on the content of the anticipated agreement.

Development of economic activities facilitated by the decreasing ice cover

The changes in the coverage of Arctic sea ice have prompted a great deal of discussion about when the shorter shipping routes will be opened, including the trans-Arctic route presented in the Arctic Council's 2009 Arctic Marine Shipping Assessment (AMSA). In a related projection, the Arctic Climate Impact Assessment (ACIA 2004), sponsored by the Arctic Council, predicts a change in fisheries, with fish stocks moving northwards as waters warm. Citing a related development, the Oil and Gas Assessment, conducted under the direction of the Arctic Council, highlights the intensifying onshore oil **365* and gas exploitation and its gradual shift further seaward (AMAP 2007).

Transport is a policy area in which competence is shared between the EU and its member states. The decreasing and thinning Arctic Ocean sea ice is opening up opportunities for navigation through Arctic waters that could considerably shorten routes from the Atlantic to the Pacific and bring certain other economic benefits. Other potential drivers for increased Arctic shipping activity include the development of offshore (and in some cases onshore) hydrocarbon activities and growth in Arctic cruise ship tourism. With the EU member states collectively possessing the world's largest merchant fleet (EComm 2008: 8), the EU has a number of important interests in Arctic shipping.

Where opening new maritime corridors in Arctic waters is concerned, the most important process from the viewpoint of the EU is the International Maritime Organization's (IMO) aim to make legally binding the non-binding IMO polar code that was adopted in December 2009 (IMO 2010, undated). The EU is not a member of the IMO (the Commission has only observer status), as only states can be members; however, the union has exercised its regulatory competence in certain areas that fall within the common transport policy (Molenaar and others 2010).

Competence in the field of transport is shared by the union and its member states, although competence in areas already covered by European law lies with the union. Matters presently regulated by European law (under TEC (EU (TEC) 2002): article 80(2); presently TFEU (EU (TFEU) 2010): article 100(2)) and having potential impact on the safety of Arctic shipping and its impact on the Arctic environment (both in its present scope and range as well as in the future) include maritime safety and prevention of pollution from ships, rules for ship inspection, port state control, improving the performance of member states as flag states, and the liability of carriers.

The EU has competence to regulate not only shipping conducted under EU flags but also port state control and the use of union ports by shipping. A substantial part of the EU policy in this regard derives from the three Erika packages (EComm 2009). Provisions for environmental policy regulate issues applicable to Arctic transport such as the sulphur content of marine fuels (EC 2005), which in most parts replicates the provisions of MARPOL 73/78 Annex VI) or the extent to which emissions from maritime traffic contribute to acidification, eutrophication and the formation of ground level ozone (EC 2001). To the extent that this is EEA relevant, see EEA Agreement (1993: annex 20).

The directive establishing a vessel traffic monitoring and information system (VTMIS) (EC 2002–2009) sets forth measures to be taken in the event of risks posed by the presence of sea ice, making the authorities of member states responsible for providing proper information on ice conditions. Moreover, member state authorities are to recommend routes and ice breaking services and are empowered to request documents certifying that a vessel's capacity is commensurate with the ice conditions in which it is to operate.

The EU has already regulated aspects of maritime transportation that have direct bearing on the polar code. Even though the EU is not a member of the IMO, it seems clear that the EU and its member states are both competent when it comes to the process of translating the requirements of the polar code into legally binding provisions. Although there is a process under way to translate the requirements of the non-binding polar code into hard law, it is still unclear how this will be effected. Most probably the polar code requirements will be incorporated into existing treaties, such as the 1974 International Convention for the Safety of Life at Sea (SOLAS 1974).

Conservation of marine biological resources under the common fisheries policy falls under an exclusive competence of the EU. The EU must address two main issues as regards Arctic fisheries. First, even though member state flagged vessels do some Arctic fishing, the overall volume remains low. However, developments such as the possible EU membership of Iceland and geographic relocation of fish stocks may change the situation in the Arctic. As the EU already has a much stronger position with regard to trade than to Arctic catches (Rudloff 2010: 38–41), it can play a major role by influencing how the Arctic fisheries are operated. Moreover, the opening of new fisheries in Arctic waters might result in an increase of illegal, unreported and unregulated fishing (IUU) activities. Once the EU has started addressing IUU fishing, it can also monitor fishing vessels flying the flag of third countries and make use of trade restricting measures for this purpose (EC 2008). Such measures are clearly within the exclusive competence of the EU, given that the purpose of any regulation to this end would be conservation of living resources.

The second issue that may arise in the future is one already pointed out by ACIA, namely, the northward movement of fish stocks, a phenomenon that may require new management arrangements for the sustainable harvesting of the stocks. The US Congress (United States Congress 2007) has already proposed considering whether a regional fisheries management organisation (RFMO) conforming to the UN Straddling Fish Stocks Agreement (to which all eight Arctic states are parties) should be concluded (United Nations 1995). The Commission of the EU contemplated in a communication (EComm 2008) the possibility of the North East Atlantic Fisheries Commission extending its present mandate in some Arctic waters further into the Arctic Ocean. Similarly, the Council's *Conclusions on Arctic issues* (EU Council 2009) calls for an extension of the mandate of relevant RFMOs. No progress has been made as yet towards negotiating an RFMO for the Arctic Ocean, but if the process were to begin at some point in the future, the EU would possess exclusive external competence to ***366** negotiate a treaty on many issues on behalf of all the member states and participate in a treaty regime and its meetings, much as it did in the case of the North East Atlantic Fisheries Commission (Franckx and others 2009: 265–344).

One of the clearest changes brought by the Treaty of Lisbon is that energy is now explicitly included in the list of EU competences, one mainly shared between the union and the member states. Since the EU is heavily dependent on fossil fuels produced in the Arctic regions of Norway and especially Russia, it is important to examine the issue from the viewpoint of energy security, an issue that has already been a problem between Russia and the EU. In article 122 of the TFEU energy supply is cited as a specific field in which the Council may adopt measures appropriate to the economic situation in the frame of EU economic policy (EU (TFEU) 2010: article 122). It is important to point out that Norway's EEA obligations do not in principle extend to energy policy.

Prior to the entry into force of the Treaty of Lisbon, decisions related to the regulation of the internal energy market fell under the co-decision procedure prescribed in former article 251 of the TEC (EU (TEC) 2002). The new energy competence of the EU comes mainly within the scope of the ordinary legislative procedure and therefore extends the role of the European Parliament as a co-legislator to all energy policies. However, the measures affecting a member state's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, form an exception. In those cases the council acts unanimously in accordance with a special legislative procedure and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions.

Energy policy is obviously also important for the EU's climate change policy, which is part of its environmental competence, also a shared one. For instance, energy efficiency and energy saving measures are part of the shared energy policy, which is clearly important for the overall climate change policy. The EU's competence in climate change is important for the future of the Arctic, as climate change is the main driver of change in the Arctic and the EU's share of total global emissions is approximately 16 per cent.

In addition to its involvement in the abovementioned policy fields linked to the retreating sea ice and environmental concerns, the EU operates in the Arctic through a number of specific policies. Regional development is a good example of an Arctic dimension in an EU wide policy. The EU conducts its regional policy mainly through various programmes funded from the European Regional Development Fund, European Social Fund or Cohesion Fund (EC 2006; DG 2010). In the Arctic, these financial instruments are currently utilised in a number of cross border programmes, primarily Interreg IV North (European Territorial Cooperation Objective) between Norway, Sweden and Finland, as well as Interreg IV Northern Periphery (with participation of Finland, Ireland, the United Kingdom (Northern Ireland, Scotland), Sweden, Denmark (Faroe Islands, Greenland), Iceland, and Norway). The

priorities of the latter include promoting innovation and competitiveness in remote and peripheral areas and sustainable development of natural and community resources.

The ban on seal products

The allegedly inhumane methods used to kill seals first led Belgium and Netherlands to introduce independently a ban on seal products and then the EU to adopt Regulation No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products (EC 2009; EComm undated). Seal welfare is regulated here through internal market competence, a policy area falling under shared competence, and was already regulated through Council Directive 83/129/EEC concerning the importation into member states of skins of certain seal pups and products derived therefrom (EEC 1983) with later extensions and amendments. The directive is still in force and is based on commercial policy. The regulatory framework for seal products was then expanded via the 2009 Regulation (EC 2009) on trade in seal products together with Commission Regulation No. 737/2010, which lays down detailed rules for the implementation of the Regulation 1007/2009 (EComm 2010b).

The EU regulator claims in the Regulation 1007/2009 (EC 2009: preamble) that the introduction of an import ban by certain member states may cause disturbances of the internal market. Accordingly, the market regulations had to be harmonised, and this was done in line with the Protocol on the Protection and Welfare of Animals (EU 1997), which after the Lisbon Treaty became article 13 of the TFEU (EU (TFEU) 2010). The regulation also highlighted the difficulty of distinguishing products originating from the seal hunt, which are affected by animal welfare concerns, from other products. Thus, the union exercises its competence in the area by banning the *placing* on the EU market of all seal products except those originating from indigenous subsistence hunting. According to article 3:

The placing on the market of seal products shall be allowed only where the seal products result from hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence. These conditions shall apply at the time or point of import for imported products.

Apart from products originating in the Inuit hunt, the import of seal products is allowed only for the personal use of travellers and the placement on the market of by-products of the hunt for the sole purpose of the sustainable management of marine living resources (EC 2009: article 3).

According to the vice-president of the European Parliament, Diana Wallis, one of the major drivers for this regulation was a United States based non-governmental *367 organisation, Humane Society International, which had the resources and capacity to lobby most of the members of the European Parliament (Wallis 2010; Humane Society International 2011). Even though the Inuit and other indigenous communities were exempted from the regulation on the basis of article 3 (if their traditional sealing contributes to their subsistence), they claim to suffer from this import ban as the demand for seal products collapsed even before the entry into force of the ban. Moreover, the commission's implementing regulation made it difficult for indigenous sealers to obtain the required certification. The Inuit and other sealers tried to lobby members of parliament, among other actors, but according to Diana Wallis they simply did not have sufficient resources and capacity to compete with Humane Society International. Nevertheless, the final wording of the regulation is weaker than that originally put forward in 2006, where a complete import ban was proposed (Lester 2010).

Text box 2. Legal disputes regarding the EU regulation on trade in seal products and the possible consequences

Regulation 1007/2009 on trade in seal products (the seal regulation, EC 2009) triggered various controversies and legal action by both Inuit and non-indigenous hunters before the EU's General Court (GC) and by Canada and Norway (separately), that challenged the EU before the World Trade Organization (WTO). The regulation was adopted by the EU due to public concerns about the welfare of seals and cruel hunting methods used in order to obtain seal products.

In the case before the General Court, the Inuit Tapiriit Kanatami and others (ITK and others), as natural and legal persons bringing action against the acts of EU institutions and against regulatory acts primarily questioned the legal basis chosen for the adoption of the seal regulation, that is article 95 TEC (**EU (TEC) 2002**: article 114 TFEU, **EU (TFEU) 2010**). The applicants argue that the legal basis for the seal regulation was incorrect; that is, the objective of improving conditions for the establishment and functioning of the internal market is not applicable to seal products and should not have been used as a legal basis. Moreover, the applicants state that the regulation infringes the principles of subsidiarity and proportionality (article 5 TEU (**EU (TEU) 2010**) and the Protocol 2 to the Treaty of Lisbon, EU 2007) as intervention at the EU level is considered improperly justified and other, less intrusive measures could have been applied instead of a near total ban. Eventually, ITK and others claimed that the regulation undermines traditional economic activities and the regulator did not weigh the interests of Inuit communities against certain moral convictions. If the court had ruled in favour of the applicants' claim, the regulation or part of it would have been declared void *ab initio*, and the Parliament and the Council might have been required to take necessary measures to comply with the court's judgment, for example, by eradicating the effects of the measure. The decision may be subject to review by the ECJ. Recently, following the adoption by the Commission of the implementing regulation (EComm 2010b), the President of the GC ordered the suspension of the operation of the conditions restricting the placing of seal products on the market, insofar as it concerns the applicants (in the case T-18/10) and pending a decision of the Court on interim measures. On 25 October 2010, the General Court dismissed the application for interim measures.

In the second challenge to the ban, Canada triggered the WTO dispute settlement mechanism following the adoption of the seal regulation. Since November 2009, the case (DS400) had been at the consultation stage, that is, the subject of official negotiations between the parties to the dispute. Canada has questioned the compliance of seal regulation with the WTO Agreement on Agriculture (article 4.2. regarding measures which have been required to be converted into ordinary customs duties) (WTO (DS) website), the Agreement on Technical Barriers to Trade (article 2.1 referring to technical regulations) as well as the General Agreement on Tariffs and Trade (GATT, articles I:1, III:4 and XI:1, containing general rules on treatment no less favourable and prohibitions and restrictions other than duties, taxes and charges). Canada also claims that the EU ban will cost its economy over C\$ 5 million per year. Simultaneously, in November 2009, Norway requested consultations with the EC regarding the ban on seal products (case DS401), claiming that it is in fact a prohibition on importation of these products and it is discriminatory in favour of seal products originating in the EU and certain third countries. In 2010, both Norway and Canada filed for supplementary consultations after the adoption of the 2010 commission implementing regulation and they mutually asked to join the supplementary consultations. In February 2011, Canada officially requested that the WTO establish a dispute settlement panel. The initial request was blocked by the EU, but the second application was filed in March 2011 and the panel established (not yet composed at the time of final article submission). The panel is expected to issue a report on the case within 9 to 15 months, with possible further appeal actions. Iceland, among others, reserved third party rights within this dispute. In addition, Canada requested the establishment of a panel to address the cases of the Belgian and Dutch import bans (DS369) (Foreign Affairs and International Trade Canada 2011). Following the actions by Canada, Norway also decided to apply for the establishment of a panel (which was established in April 2011). A Norwegian diplomat stated that for Norway it is mainly a matter of principle and a question of sustainable management of Norwegian marine resources (Berthiaume 2011). The complainants' arguments cite the less favourable treatment of seal products from Canada than seal products originating from the EU, the creation of an unnecessary obstacle to international trade, the lack of a legitimate objective or even if a legitimate objective can be proved that the ban needlessly restricts trade (Kakar 2011). It may also be argued that there exist other measures for achieving the harmonisation of the internal market, that there are products supplementary to those originating from the seals (and thus, elimination of seal products supports

other producers), or the fact that seal products in the EU consist almost exclusively of imported goods, under which the domestic regulation has direct impact on international trade (Lester 2010).
***368** The EU claims that the regulation is in full compliance with its WTO obligations, as the measures adopted are not protectionist or discriminatory and respond to concerns expressed by EU citizens (WTO undated: website). Moreover, the EU as a respondent may cite exemptions to the GATT regarding public morals, animal health, environment, and the lack of a practical possibility to achieve the goal via other measures (Lester 2010).

The WTO procedure includes a 60 day consultation and mediation, and if these fail, the setting up of a dispute settlement panel, which should present its final report to the parties within 6 months (flexible target timeframe) on whether the state's actions are in breach of the WTO agreements. The disputants can appeal to the WTO appellate body, which then has 60 days to adopt the panel's report. It is only then that it becomes binding on the parties. At any time, the parties may reach agreement and withdraw their case from the WTO dispute settlement (Yanovich and Zdouc 2009: 348–376).

The EU seal regulation is EEA-relevant, thus affecting Iceland and Norway as Arctic EEA partners, both of which traditionally engage in seal hunting. The EEA parties (EU and EFTA states) account for about 5 per cent of the world market for seal products. According to **article 92(2)** of the EEA Agreement, '(t)he Contracting Parties, as to the Community and the EC Member States in their respective fields of competence, shall hold consultations in the EEA Joint Committee on any point of relevance to the Agreement giving rise to a difficulty and raised by one of them.' To this end, decisions taken by the European Commission which are relevant for the EEA yet possibly infringe the interests of the EFTA partners are to be discussed within the EEA Joint Committee in order to prevent a breach of the provisions of the agreement. Accordingly, Iceland and Norway could take up this controversy before the EEA Joint Committee.

This case illustrates well how strong the legal and policy influence is that the EU already exerts in the Arctic and how complicated its legal structure and decision making are. One encouraging sign is that the commission has initiated a dialogue with Arctic indigenous peoples as part of its new Arctic policy; the first meeting to this end took place in Brussels on 9 March 2010 (EComm 2010a).

Concluding remarks

As has been demonstrated above, the EU is an extremely complex supranational organisation. It has come to possess extensive competences in various policy fields. Even though the Treaty of Lisbon introduced certain safeguards for member states against the ever-increasing competences of the EU, the treaty also established energy as a new shared competence area. Moreover, and more importantly, it increased the powers of the European Parliament by making the co-decision procedure the ordinary legislative procedure. The policy dynamics in the EU have gradually tilted away from the Council of Ministers, which represents the member states, towards the parliament and the commission wielding more power. In other words, decision-making is increasingly made by integrated EU institutions whose aim is to represent the EU as a whole. This is clear in the case of the ban on seal products, in which the decisions with bearing on the Arctic were made primarily by the EU institutions, not individual member states.

It is important to emphasise that the EU's policy role in the Arctic is very important even though it does not have a shoreline on the Arctic Ocean and its territorial presence in the region is limited. What we have tried to demonstrate in this article is that the EU as a legal person should be distinguished from its member states. Many of the policy areas are already firmly regulated at the EU level, and they will continue to be so regulated. In these fields, the normal decision making process consists of the commission making a proposal and the

Council of Ministers and the European Parliament then adopting the appropriate regulation or directive. In many international policy areas, especially those relevant for the Arctic, the EU has either exclusive competence or shared competence with the member states. And even where the competence is shared, it will often be the EU that coordinates the positions of the member states in international negotiations. The power of an individual member state to make policy has been reduced to a minimum in many areas, several of which are relevant in the Arctic. In this perspective, membership or permanent observership in the Arctic Council should not be seen as the only relevant role for the EU in Arctic governance. Indeed, most policy making relevant to the Arctic is effected in multilateral treaties and inter-governmental organisations that also make Arctic-relevant decisions and recommendations, and it is in these institutions that the EU exercises its competences.

There are many misunderstandings regarding the EU. Sometimes too much attention is given to the non-legally binding policy resolutions of the European Parliament, which can make bold statements, such as the one advocating a new treaty for the Arctic (EP 2008), but which are not followed up on when it comes to real policy making in the EU (the EU Parliament also revising its **369* stance on this issue in its new resolution, see Gahler 2010; EP 2011). Many times the Arctic actors seem to think that it is the individual member states that are still the real actors, which is increasingly not the case. More and more, the principal decision making takes place in the EU institutions, and increasingly the powers in this process are in the hands of the commission and the parliament, supervised by the ECJ. In some other contexts, the EU is referred to as if it were a single policy entity, like a federal state, although it is many times more complicated in its structure than any of the existing federal states. But it is also true that the EU has developed its Arctic policy in the last few years, and gradual institutional learning will probably improve the quality of its input in the Arctic governance and its understanding of the policy dynamics prevailing in the Arctic and the social and environmental realities in the region.

The best way forward would be for the EU Commission to gain a seat as a permanent observer in the Arctic Council. Even though it has caused controversies between the EU and the established Arctic policy actors, the ban on seal products studied in section 3 can be seen as supporting the case for stronger involvement of the EU in Arctic governance. It demonstrates that the EU will make decisions that influence the development of the region, irrespective of whether it is involved in the Arctic Council or not. Accepting the EU as a relevant policy entity in Arctic governance would enable a mutual learning process, sensitise the EU to Arctic policy realities and yield an opportunity for the established Arctic policy actors to learn how complex a policy entity the EU is. The union will exercise its competences in the Arctic; if not in the Arctic Council then via other multilateral forums. Arctic governance will necessarily grow in strength to rise to new policy challenges, given that the region is undergoing a dramatic transformation from being an inaccessible Arctic desert to a new ocean. It is time for the established Arctic policy actors to think seriously about how the EU could be included in the discussion of the region's future.

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