



**DIRECTORATE-GENERAL FOR EXTERNAL POLICIES  
POLICY DEPARTMENT**



# **IMPACT OF EU POLICIES ON THE HIGH NORTH**

## **The Cases of Climate Policy and Fisheries**

**AFET**



DIRECTORATE-GENERAL FOR EXTERNAL POLICIES OF THE UNION

**DIRECTORATE B**

POLICY DEPARTMENT

STANDARD BRIEFING

**IMPACT OF EU POLICIES ON THE HIGH NORTH**

***THE CASES OF CLIMATE POLICY AND FISHERIES***

**Abstract**

The EU has an increased interest towards the Arctic. Whether the EU is a relevant actor in this respect, and how this role should be developed in future, is still under political debate. Against this background, the present paper outlines the general external competences of the EU in the field of climate change and fisheries, taking into consideration the specific relationship between the EU and the Arctic states – characterized by its externality in legal and geographical terms – as well as the relevance of EU climate change and fisheries activities towards this region. From these findings, options for EU activities concerning climate change, fish capture and trade in relation to the Arctic are then developed.

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## EXECUTIVE SUMMARY

Climate change is one of the key drivers of an increasing interest currently displayed towards the Arctic. It delivers new opportunities such as possible access to resources, including fish, facilitated transport shipping routes or new prospects for tourism. At the same time, climate change causes additional concern as regards the Arctic environment and the possible negative effects on the traditional livelihoods of the region's inhabitants. The EU's interest towards the region covers both: tapping the region's natural resources while recognizing its specific vulnerability to the consequences of climate change.

At present, however, the impact of climate change in the Arctic does not play a very prominent role within the overall EU climate change policy. As regards fisheries, the picture varies: For capture, on the one hand, the EU currently holds an unimportant share in respect to the total Arctic catch, while it has a significant market position as regards fish imports, in particular from the Arctic states' perspective, on the other hand.

One of the major constraints in relation to both policy areas, climate change and fisheries, is the externality of the EU as regards the majority of Arctic states, in geographical and legal terms: The EU has no coastline to the Arctic Ocean and EU law directly applies only to three of the eight Arctic states (in the case of Denmark, Greenland and the Faroe Islands are excluded). Thus, foreign policy plays an important role in respect to EU activities in the field of climate change and fisheries towards the Arctic. Additionally, Arctic coastal states hold the decisive position as regards fish captures due to their rights within their internal and territorial waters as well as in their Exclusive Economic Zones (EEZs). Thus, the EU's impact in this respect is primarily limited to the remaining areas of the High Seas.

The EU, on the base of the present provisions of the Lisbon Treaty, has external competences to act – in the case of trade explicitly and in the cases of climate change and fish capture implicitly. When conducting these external competences, the EU has to engage member states depending on the respective distribution of competences between them: While the EU's competence as regards the capture and trade of fish is exclusive, the EU generally has to share its competence with the member states in the field of climate change. Importantly, the role of the Parliament has been enhanced in respect to the negotiation and conclusion of international agreements in the policy areas in question. Most of them now require the consent of the Parliament, although exceptions may exist as regards the "fixing and allocation of fishing opportunities".

The general legal base for EU climate change and fish capture and trade related measures can be illustrated by the following table:

	<b>Climate change</b>	<b>Fish capture</b>	<b>Fish trade</b>
<b>Competences</b>	<b>Shared</b> Art. 4 (2) (e) TFEU	<b>Exclusive</b> Art. 3 (1) (d) TFEU	<b>Exclusive</b> Art. 3 (1) (e) TFEU
<b>Decision-making process</b>	<b>Ordinary legislative procedure</b> Art. 192 (1) TFEU <b>Special legislative procedure</b> Art. 192 (2) TFEU	<b>Ordinary legislative procedure</b> Art. 43 (2) TFEU Exception for "fixing and allocation of fishing opportunities": Council decision Art. 43 (3) TFEU	<b>Ordinary legislative procedure</b> Art. 207 (2) TFEU

<b>International agreements</b>				
<b>Substantial base</b>	<b>legal</b>	Art. 192 (1) and (2) TFEU	Art. 43 (2) TFEU for CFP measures generally, <i>(Art. 43 (3) TFEU for measures on "fixing and allocation of fishing opportunities")</i>	Art. 207 (2) TFEU
<b>Procedural base</b>	<b>legal</b>	Art. 218 TFEU	Art. 218 TFEU, <i>(Exception for "fixing and allocation of fishing opportunities": Council decision Art. 43 (3) TFEU)</i>	Art. 207 in connection with Art. 218 TFEU

In the light of these legal preconditions determining the EU's role in respect to the Arctic, the EU would be well advised to strengthen its role in existing relations with Arctic states: In respect to **climate change**, particular attention should be paid to the external dimensions of relevant internal policies with strong climate change indications. Here an explicit recognition of the specific problems faced by the Arctic region as regards climate change consequences would be required. A particular forum to address climate change with respect to the Arctic lies in the EU's role in international climate change negotiations in the UNFCCC framework since many questions currently facing the EU in this context also affect its potential role as an Arctic actor in the field of climate change. As regards **fish captures**, the EU could use its membership of existing fishery management organizations. In relation to the proposed extension of the NEAFC regime, the EU would have a stronger position if respective negotiations on the extension take place among the current small group of the five contracting partners. Otherwise, the scope of an extended NEAFC-area would result in a very large management area that would probably disregard specific characteristics of the Arctic marine ecosystem. As a strong **trade** actor, especially in respect to fish imports from the Arctic states, the EU could use this strength by taking a leading role on promoting sustainable fisheries. This in particular applies to measures against illegal, unreported and unregulated fisheries (IUU), where the EU recently adopted a regulation on IUU relevant for importing countries and agreed additional bilateral records on fulfilling IUU requirements with most Arctic countries.

## 1 INTRODUCTION

The cases of climate change and fisheries are significantly different due to their contrasting nature: While climate change with its worldwide implications is a matter of global concern, fisheries can be characterized primarily as a regional issue resulting in specific governance structures for the Arctic as a distinctive region. However, both issues are intrinsically linked to each other since climate change may become the driving force for changes in fish stock patterns in the Arctic: If Arctic warming, with the melting of ice and the change of decisive oceanic patterns, were to change Arctic fish stocks significantly, existing regional fisheries regimes could call for changes.

The EU, having a leading role in global climate change policy and as an important market for fish imports globally, has an increasing interest in both policies, and particularly towards the Arctic. This has been demonstrated by the Commission's Communication on the Arctic region of 2008 and the Council's Conclusions on Arctic issues at the end of 2009. Thus the mitigation of negative impacts of climate change and the support of efforts to adapt to inevitable changes as well as the sustainable exploitation of Arctic fisheries through a change in existing regimes belong to the main objectives of an EU Arctic policy.

Against this background, the present paper outlines general external competences of the EU in the field of climate change and fisheries. Concerning the latter, a distinction is made between the capture and trade dimension. The outline takes particular consideration of the specific relationship between the EU and the Arctic states – characterized by its externality in legal and geographical terms – as well as the relevance of EU climate change and fisheries activities towards this region. On this basis, options for EU activities concerning climate change, fish capture and trade in relation to the Arctic are briefly identified in the final section.

## 2 THE EU AND THE ARCTIC

### 2.1 Defining the Arctic

There is no universally accepted legal definition of the Arctic. From a *geographical* point of view, the area referred to as “the Arctic” encompasses, following the definition used in the Arctic Human Development Report (AHDR), all of Alaska, Canada north of 60°N, including northern Quebec and Labrador, all of Greenland, the Faroe Islands, and Iceland, the northernmost counties of Norway, Sweden and Finland, and Russia.<sup>1</sup> While there is no area in the Arctic specifically related to climate or climate change, the *fishing area of the region* clearly refers to the Arctic Ocean. Here also, no generally agreed definition exists. However, according to different criteria, a different geographical scope of marine arctic areas can be defined: Based on (*marine*) *ecosystem characteristics*, four major areas with current major fisheries relevance can be distinguished:<sup>2</sup>

- (1) the North East Atlantic (Barents Sea, the east and south of the Norwegian Sea, waters around Iceland and East Greenland),
- (2) the Northwest Atlantic (Northeast Canada Sea around Newfoundland and Labrador area)
- (3) the Northwest Pacific (southwest-line along mainland coast of Russia to Alaska, Canada and USA)
- (4) the Northeast Pacific (Bering Sea).<sup>3</sup>

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<sup>1</sup>Arctic areas in Russia are the Murmansk Oblast, the Nenets, Yamalo-Nenets, Taimyr, and Chukotka autonomous okrugs, Vorkuta City in the Komi Republic, Norilsk and Igarka in Krasnoyarsky Krai, and “those parts of the Sakha Republic whose boundaries lie closest to the Arctic Circle” (Arctic Human Development Report (ADHR), 2004, available at: <[http://hdr.undp.org/en/reports/regionalreports/other/arctic\\_2004\\_en.pdf](http://hdr.undp.org/en/reports/regionalreports/other/arctic_2004_en.pdf)>)

<sup>2</sup> Arctic Climate Impact Assessment (ACIA), Scientific Report (Cambridge et al.: Cambridge University Press, 2005).

<sup>3</sup> Regarding data on catches, different statistical areas have to be considered which are defined by the FAO, for example.

## 2.2 The EU - An external actor

Taking the eight Arctic states as a point of departure, three of them are EU member states – Denmark (Greenland), Finland and Sweden. However, as Greenland and the Faroe Islands do not belong to the EU,<sup>4</sup> the EU itself has no coastline to the Arctic marine area. Norway and Iceland, as Arctic states, belong to the European Economic Area (EEA) and are therefore considerably impacted by EU law. Iceland, which applied for EU membership in July 2009, “has already aligned a large part of its legislation and policies with European standards,” according to the Commission in its Opinion of February 2010.<sup>5</sup> Furthermore, Russia is the main partner of the EU within the Northern Dimension, while both Canada and the United States are strategic partners of the EU, linked to it by several bilateral agreements.

Notwithstanding these links between the EU and the eight Arctic states, EU law only directly applies to three of them, and in the case of Denmark this application does not cover Greenland and the Faroe Islands. Thus, in legal terms, the EU is an external actor in relation to the majority of Arctic states. This distinguishes its Arctic policy decisively from that of other sea-related regions, such as the Mediterranean or Baltic Sea Region, and has consequences for the determination of its policy actions towards the Arctic region.

## 3 THE RELEVANCE OF EU CLIMATE CHANGE AND FISHERIES POLICY FOR THE ARCTIC

### 3.1 The relevance of climate change

Although the topic of climate change, in general, is still of high relevance within the EU’s policies, this does not apply necessarily in the case of the Arctic.

There is considerable discrepancy between the EU’s declared interest towards the Arctic in the field of climate change and its factual actions relating to this subject. This applies both to its external policies explicitly dedicated to the Arctic, such as the Northern Dimension with the European Arctic and Sub-Arctic areas as declared priority areas of its policy, and to its internal policies that have a potential Arctic relevance through their specific external dimensions.

In detail, although the Arctic is recognized in many EU policy documents as an area specifically vulnerable to climate change consequences, it has been neither particularly emphasized nor specifically addressed within the relevant EU positions during international climate change negotiations, such as those at COP 15 in Copenhagen 2009. Moreover, the topic of climate change, although declared as a primary field of work within the Northern Dimension, is scarcely visible when it comes to factual actions, for instance within the Northern Dimension Environmental Partnership (NDEP) which has been specifically developed to address serious environmental problems in north-west Russia. Only very few projects indicate climate change considerations, and the additional problem of unclear delineation of the respective projects under this instrument, in relation to projects of other EU policy instruments, seems to remain present. When it comes to the external dimensions of EU internal policies, here in particular the EU’s climate change adaptation, environment and maritime policies, although the Arctic is specifically addressed in some of the respective strategic documents, it remains peripheral as regards concrete actions. One exception has to be pointed out in

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<sup>4</sup> Greenland withdrew from the EU on 1 February 1985. Following that it was granted the status of an Overseas Countries Territories (OCT) and later on linked to the EU by several partnership agreements. The Faroe Islands are regarded as a third country in relation to the EU. The formal relationship between the parties is primarily regulated by two bilateral agreements: the Free Trade Agreement of 1991, last amended in 1998, and a Fisheries Agreement of 1977.

<sup>5</sup> European Commission, Key findings of the Commission’s Opinion on Iceland, Brussels, 24 February 2010, available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/10/48>.

relation to research. Research policy, as one of the most important policy sectors within the EU's climate change policy, has by far the most direct implications for the Arctic.

### 3.2 The relevance of fisheries

As regards EU fisheries policy towards the Arctic, capture and trade carry different weight in significance. Thus, a differentiation between both dimensions is made in the following.

#### 3.2.1 Capture relevance

At present, the relevance of EU captures in respect to the Arctic is rather limited.<sup>6</sup> The EU holds a minor share, 4% of all Arctic catches, equalling only 139,000 tons in 2006. This represents only 2.6 % of all EU catches of 5.4 million tons worldwide.<sup>7</sup> The main EU fishing nations in the Arctic region are Denmark, Germany, the United Kingdom and Spain (together amounting to 70% of all EU-27 catches during the period 1990-2006). The major species caught by the EU are Atlantic cod, Atlantic redfish and increasingly, Atlantic herring.

However, the Arctic capture relevance for the EU may change in future since the access to and availability of Arctic fish stocks will be decisively affected by climate change. The access to new fishing areas in the Arctic as well as the availability of new fish stocks may lead to different scenarios as regards the existing fishery management regimes. The role of the EU in these scenarios will depend decisively on its stake within the respective management regime and on the factual changes in access and availability.<sup>8</sup>

#### 3.2.2 Trade relevance

The EU, as an important fish market actor globally, represents an important actor as regards **fish imports** from the Arctic states. For Norway and Iceland, for example, the EU is nearly the only export destination with 80 % of all Icelandic and 60% of all Norwegian fish exports going to the EU. As regards Canada, Russia and the US, although not the major export destination, the EU provides nevertheless a relevant export market for these states (the US exports less than 25%, Russia 12% and Canada 10% of fish capture to the EU market).<sup>9</sup>

In contrast, EU **fish exports** are of minor relevance for the Arctic. Regarding fish exports, the EU exports only 28 % of overall fish exports worldwide, equivalent to \$3.5 billion in 2009. Major exporting EU member states are Spain, Denmark and the Netherlands, which together make up 41% of all EU exports. In total the EU covers only 4.4% of all fish imports into the Arctic states, dominated by 11% of EU exports going to the USA.<sup>10</sup>

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<sup>6</sup>All data on catches are extracted from the FAO Fishstat database. The area assumed as Arctic fishing area is defined as comprising the complete FAO area No. 18, and the northern parts of areas 21 (0A, 0B, 1A-F) and 27 (I, II, Va, XIV), i.e. only areas north of 66° latitude. According to this definition, areas 61 and 67 (including the Bering Sea) are excluded and thereby, all US catches mainly in the south of area 27 and in area 67.

<sup>7</sup> FAO Fishstat, Eurostat.

<sup>8</sup> At present, relevant management organizations covering partly Arctic high seas areas (the only areas where *freedom of fishing* exists, Article 87 (1) (e) UNCLOS, whereas in the internal and territorial waters as well as in the Exclusive Economic Zone (EEZ) generally coastal states have the right to fish) are the two spatially defined regional fisheries management organizations (RFMOs): the Northwest Atlantic Fisheries Organization (NAFO) and the North-East Atlantic Fisheries Commission (NEAFC). The scientific organization International Council for the Exploration of the Sea (ICES) provides scientific advice for catches. While NAFO and NEAFC address only a limited part of the Arctic high seas areas, broad parts of the remaining area would come within the scope of the Western and Central Pacific Fisheries Commission (WCPFC), the International Commission for the Conservation of Atlantic Tuna (ICCAT) and the North Atlantic Salmon Conservation Organization (NASCO) that have in principle competence for the entire FAO Statistical Area No. 18. However, the latter management organizations only address tuna and tuna-like fish, which are both irrelevant in FAO Statistical Area No. 18 at present.

<sup>9</sup> All trade data calculated with data from UN Comtrade Database, accessed 30 April 2010.

<sup>10</sup> Ibid.

## 4 THE LEGAL BASE FOR EU CLIMATE CHANGE AND FISHERIES ACTIVITIES RELEVANT TO THE ARCTIC

### 4.1 The legal base in general

The legal basis for EU policy actions is provided by the founding treaties of the EU. With the entering into force of the Lisbon Treaty on the 1<sup>st</sup> of December 2009, two of them – the Treaty on European Union (TEU) and the Treaty Establishing the European Community, the latter renamed Treaty on the Functioning of the European Union (TFEU) – have been amended to the effect that the European Union and European Community merged into one European Union. The European Union thus succeeded to the legal personality of the European Communities as a consolidated entity.<sup>11</sup> As an international legal personality, the EU is now able to conclude an agreement with third countries or international organisations in its own name.

Concerning institutional competences, the Treaty of Lisbon introduced a catalogue of those competences that were formerly distributed over the whole treaty arrangement and have now become concentrated in Articles 2–6 TFEU. Accordingly, climate change policy, as a part of environmental policy, as well as fisheries in reference to agricultural policy, fall in the “shared competence” area where both the Union and the member states may legislate and adopt legally binding acts with the qualification that member states shall exercise their competence [only] to the extent that the Union has not exercised its competence. In contrast, as regards the capture and trade dimension of its fishery policy, the EU holds “exclusive competence” and thereby may legislate and adopt legally binding acts, while member states are only allowed to do so if explicitly empowered. Indeed, this situation has not particularly changed under the Lisbon Treaty, except as regards foreign direct investments (FDI) as part of international investment treaties as well as trade related aspects of intellectual property rights (TRIPS) that formerly fell under the “shared competence” and that are now exclusively regulated by the Union.

Since EU actions in relation to the majority of Arctic states are determined by the EU’s role as an external actor, **foreign policy** plays an important role in respect to the Arctic. The EU’s foreign policy is relatively new, and still lacks the supranational structure of other EU policy domains. The Lisbon Treaty has not principally changed this, although new external policy institutions have been introduced, such as the High Representative of the Union for Foreign Affairs and Security Policy and a new External Action Service, both aiming at greater coordination and consistency in EU foreign policies. Both instruments have a potential relevance for the EU’s climate change policy but less for fishery and trade policies as the latter two are currently only addressed by small interface units coordinating with the Commission and the Council.

In the context of external relations, the question of **external competences** is of decisive importance: Who is authorized to act in external relations, the EU – now with its own legal personality - or the member states, and what is the power-sharing between them? A general distinction can be made between “integrated external competences” and “intergovernmental external competences” (competences within the Common Foreign and Security Policy (CFSP)). In both areas of competence, the principle of conferral applies stating that “the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties”<sup>12</sup>. In the area of “integrated external competences”, the Treaty of Lisbon, for the first time, introduced a codification of the previous jurisdiction of the European Court of Justice (ECJ) concerning respective competences. Accordingly, the “Union may conclude an agreement [...] 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”<sup>13</sup>. Thus the Union has **explicit external**

<sup>11</sup> Article 47 TEU.

<sup>12</sup> Article 5 (2) TEU.

<sup>13</sup> Article 216 (1) TFEU.

**competence** where the treaty so provides or **“implied” external competence** where the competence in external affairs follows that in internal affairs.<sup>14</sup> Thus, explicit external competence is accorded to the EU in trade relations while in the other policy areas here in question - climate change and fish capture – the external competence of the Union follows from the internal distribution.

In the following, a brief survey of the general competences, including the institutional arrangement within the Commission, the objectives, the decision-making process as well as the negotiation and conclusion of international agreements of EU climate change and fishery measures will be provided. Since the conclusion of international agreements is decisively determined by the division of external competencies between the Union and the member states, this last point will also cover these respective aspects.

## 4.2 The legal base for EU climate change activities

### Competencies

Climate change policy falls under the “shared competence” area where both the Union and the member states may legislate and adopt legally binding acts with the qualification that member states shall exercise their competence [only] to the extent that the Union has not exercised its competence, Articles 2 (2) and 4 (2) (e) TFEU.

Institutionally, as an expression of the high priority of this topic within EU policies, the Commission recently enhanced the status of climate change by creating a new and specific Directorate-General for Climate Action when the new Commission came into office in February 2010. Previously, the main responsibility for this within the Commission was carried by the Directorate-General for Environment. In practice, however, it can become difficult to clearly separate the two Directorates’ responsibilities from each other since climate change and environmental issues remain closely linked. The mandate of the new Commissioner for Climate Action is to “have a central role in continuing EU leadership in fighting climate change and leading our [the EU’s] international negotiations on climate as well as helping the EU to deal with the consequences of climate change.”<sup>15</sup> In practice it remains to be seen to what extent EU member states are willing to allow the Commission to play the central role in leading the EU’s efforts in climate change negotiations.<sup>16</sup>

### Objectives

The principles and objectives of the EU’s climate change policy, as part of its environmental policy, remain virtually the same, now regulated in Articles 191 – 193 TFEU. Accordingly, the Union’s policy on the environment shall contribute to the preservation, protection and improvement of the quality of the environment, the protection of human health, the prudent and rational usage of natural resources as well as to the promotion of measures at the international level to deal with regional or worldwide environmental problems.<sup>17</sup> Under the Lisbon Treaty, climate change has been explicitly emphasized as one of these problems.

### Decision-making process

The varying application of the “ordinary legislative procedure” (formerly “co-decision procedure”) and the “special legislative procedure” (formerly “consultation procedure”) remains under the Lisbon Treaty. Whilst the bulk of environmental measures have long been subject to co-decision and qualified majority voting, certain sensitive issues are still subject to unanimity in the Council, and

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<sup>14</sup> For the principled parallelism between the constitutional regime for internal and external Community policies see: AETR-jurisdiction, basically EuGH, Rs. 20/70 Commission v Council, 1971, ECR 263, para 22; For the early debate on the term “implied powers” see: P. Pescatore “External Relations in the Case Law of the ECJ”, 1979, 16 CML Rev. 615, pp. 517-528.

<sup>15</sup> Commissioner Connie Hedegaard’s mandate provided by President Barroso on 27 November 2009, available at: [http://ec.europa.eu/commission\\_2010-2014/hedegaard/about/mandate/hedegaard\\_climate\\_en.pdf](http://ec.europa.eu/commission_2010-2014/hedegaard/about/mandate/hedegaard_climate_en.pdf).

<sup>16</sup> P. M. Kaczynski, Single Voice, Single Chair? – How to Re-organise the EU in International Negotiations Under the Lisbon Rules, Centre for European Policy Studies (CEPS), No. 207, March 2010, p. 4.

<sup>17</sup> Article 191 (1) TFEU.

hence the national veto.<sup>18</sup> Measures that could become particularly relevant to climate change in the latter context are those that affect member states' choice between different energy sources and the general structure of its supply.

### **International agreements**

In general, due to the shared competence between the EU and member states on climate change matters in internal affairs, both play a role in the conclusion of international climate change agreements (having shared competence also in external affairs). This in particular applies against the backdrop that each member state as a UN member has the right to participate in the UN process. However, member states' activities at the global level cannot be managed independently from those of the EU, rather the Union and the member states have to work in close cooperation. The substantial legal base for the EU to negotiate and conclude international agreements in the field of climate change is provided by Article 192 TFEU in connection with Article 216 (1) TFEU, while the procedural legal base is provided by Article 218 TFEU. Due to the shared competence between the Union and the member states in climate change matters, many international climate change agreements are so-called "mixed-agreements", which means that the Union as well as the member states are parties to the respective agreement.<sup>19</sup> The Lisbon Treaty does not specifically cover these kinds of agreements. However, as a general rule, member states have to be involved in the negotiation and conclusion of mixed agreements in the field of climate change. As far as Article 218 TFEU therefore applies, Council decisions on international climate change agreements need to obtain the consent of the Parliament, Article 218 (6) (a) (v) TFEU.

## **4.3 The legal base for EU fisheries activities**

The legal base for EU's fish capture and trade activities differs significantly from that of the Common Fisheries Policy (CFP). Therefore, the following statements will cover these two dimensions in particular, while a reference to the CFP is only made when necessary.

### **4.3.1 Captures**

#### **Competencies**

The Union's competence in fisheries is not subject to a monistic approach and relates to different aspects within the CFP. This policy is generally characterized by shared competences between the EU and its member states, Article 4 (2) (d) TFEU, except the conservation of marine biological resources – which also covers the allocation of fishing quotas - that falls within the Union's exclusive competence, Articles 3 (1) (d) TFEU.

Following the endorsement of the Integrated Maritime Policy (IMP) in 2007, the administrative structure of the Commission was adjusted; the Directorate-General for Fish was restructured and renamed the Directorate-General for Maritime Affairs and Fisheries.

#### **Objectives**

Under the Lisbon Treaty, the CFP is now addressed under Part 3, Title III of the TFEU, along with the Common Agricultural Policy (CAP) (Art. 38-44 TFEU). Article 38 (1) TFEU makes a clear reference of fisheries policy to agriculture by stating that "references to the common agricultural policy or to agriculture, and the use of the term 'agricultural', shall be understood as also referring to fisheries, having regard to the specific characteristics of this sector." Therefore the major objectives of CAP under Article 39 TFEU should be applicable to the CFP, too, and encompass, unchanged since the Treaty of Rome, the increase of productivity by promoting technical progress and ensuring the

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<sup>18</sup> Article 192 (2) (a) – (c) TFEU.

<sup>19</sup> The classification as "mixed-agreement" has to be decided on a case-by-case-basis and does not apply automatically to all international agreements dealing with climate change. The UNFCCC as well as the Kyoto-Protocol can be classified as "mixed-agreements".

rational development of production; the optimal utilisation of the factors of production, in particular labour; the fair standard of living for the sectoral working community; the stabilisation of markets, and the availability of supplies and reasonable prices for the consumer. Additionally, the CFP today also aims at ensuring sustainable exploitation of resources as evidenced by legislation and political actions.<sup>20</sup>

### Decision-making process

Most importantly for the capture dimension, the former consultation procedure has been replaced under the Lisbon Treaty by the ordinary legislative procedure, meaning that all decisions have to be taken jointly between the Parliament and the Council, Article 43 (2) TFEU. Accordingly, decisions have to be taken by qualified majority voting in the Council. An important exception from this general rule of the ordinary procedure applies to **decisions on the fixing and allocation of fishing opportunities** which will be taken by a simplified procedure, i.e. the Council only, Article 43 (3) TFEU.<sup>21</sup> Thus the European Parliament may now formally be entirely excluded from such decisions, whereas in the past consultations were required as a minimum. Insofar, the participatory rights of the Parliament in relation to decisions on fixing and allocation of fishing opportunities have been diminished.

### International agreements

Generally, international fisheries agreements fall under the procedure of Article 218 TFEU. Accordingly, the power to open negotiations, to authorise the signing and conclusion of agreements lies with the Council. If fisheries agreements do not exclusively or principally relate to the CFSP, the Commission submits recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominate the Union's negotiator or the negotiating team. The negotiator in practice will be the Commission, more specifically the Commissioner for Maritime Affairs and Fisheries. However, from the exception contained in Article 43 (3) TFEU it could be concluded that international agreements concerning the **fixing and allocation of fishing opportunities** are subject to a different procedure. In this case, the Council, on a proposal from the Commission, would adopt decisions, and neither consent nor consultations with the Parliament would be required.<sup>22</sup>

#### 4.3.2 Trade

### Competencies

Trade policy as an exclusive EU competence has been completed by integrating trade-related aspects of intellectual property rights (TRIPS) and foreign direct investments (FDI), Article 3 (1) (e) TFEU. The latter may become particularly relevant for future agreements on investments in the fisheries sector across the EU and the Arctic countries, However, how these new future EU-wide investment treaties would look and how they can replace the currently existing, vast number of bilateral investment treaties between the EU and Arctic Countries still has to be clarified.<sup>23</sup> A recent Commission

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<sup>20</sup> Among others, sustainability has been stressed within the context of the last CFP reform 2002. See Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy, OJ L 358, 31.12.2002, p. 59.

<sup>21</sup> The interpretation of Article 43 (3) TFEU, in particular the terminus "fixing and allocation of fishing opportunities" is still debated. Opinions differ between a very broad interpretation covering all kinds of associated conditions, on the one hand, and a very limited scope referring to total allowable catches (TACs) and catch quotas only, on the other hand.

<sup>22</sup> Apart from the question of interpretation of the term "fixing and allocation of fishing opportunities", the external dimension of Article 43 (3) TFEU, and thus its applicability on international fisheries agreements has not been clarified yet. In practice, fisheries partnership agreements (as framework agreements) will be concluded on the base of Article 43 (2) in connection with Article 218 (6) (a) TFEU. Whether this approach will also apply to associated protocols that regulate the "fixing and allocation of fishing opportunities" exclusively has still to be clarified. As to the knowledge of the authors, no such a protocol has been concluded since the entry into force of the Lisbon Treaty.

<sup>23</sup> E.g. currently six EU member states signed such treaties with the US and even 20 member states with Russia which in the future may be replaced by EU-wide treaties.

communication on that issue of July 2010 stresses the need to consider current differences and to investigate best practices prior to defining a new model. Additionally, it mentions the consideration of potential coverage of FDI within the scope of ongoing trade negotiations.<sup>24</sup>

The administrative structure within the Commission remains complex as not only the Directorate on Trade is involved. For example, the Directorate on External Relations addresses the trade parts within the European Neighbourhood Policy (ENP) such as the Association Agreements of the European Economic Area (EEA).

### **Objectives**

As the EU, now with its own legal personality, is a member of the WTO, the EU trade policy is always linked to the WTO. The major aims expressed in the *WTO's mission statement* are economic growth, the increase in living standards by trade liberalization, effective ruling of disputes, and the promotion of good governance. An important change by the Lisbon Treaty as regards European trade policy is the inclusion of external trade and investment policy in the now unified European external action, so that trade policy is henceforth to be conducted within the "context of the principles and objectives of the Union's external action", Article 207 (1) TFEU.

### **Decision-making process**

According to Article 207 (2) TFEU, European trade related measures are subject to the ordinary legislative procedure implying a joint decision between the Parliament and Council with qualified majority voting in the Council.

### **International agreements**

According to Article 216 (1) TFEU, the EU has external competence to conclude an international agreement, among others, where the Treaties so provide. Due to the division of competence according to Article 3 (1) (e) TFEU, the EU's external competence for trade related measures is exclusive. Article 207 TFEU provides specific procedural rules for the negotiation and conclusion of international trade agreements and is thus *lex specialis* to Article 218 TFEU. According to this, the Commission conducts the negotiation by support of a special committee to be appointed by the Council, Article 207 (3) TFEU. The precursor of this committee (ex Article 133 TEC) has primarily consisted of senior member state trade officials. Moreover, decisions are taken by qualified majority in the Council, Article 207 (4), first sentence TFEU. An exception exists as regards the negotiation and conclusion of agreements concerning TRIPS or FDIs, where the "the Council shall act unanimously where such agreements including provisions for which unanimity is required for the adoption of internal rules", Article 207 (4), second sentence TFEU. In all cases where Article 207 TFEU does not provide a specific procedural rule for negotiating and conducting an international agreement, Article 218 TFEU applies. This becomes particularly relevant for the involvement of the Parliament. According to Paragraph 6 (a) (v) TFEU, the Council has to obtain the consent of the Parliament as regards international agreements covering fields to which the ordinary legislative procedure applies, which, by virtue of Article 207 (2) TFEU, is the case for external trade.

As association agreements, agreements within the EEA - relevant for Norway and Iceland – fall under Article 218 (6) (a) (i) TFEU and thus also require the consent of the European Parliament.

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<sup>24</sup> European Commission Communication, Towards a comprehensive European international investment policy, 8 July 2010, COM(2010)343 final.

## 5 OPTIONS FOR EU CLIMATE CHANGE AND FISHERIES ACTIVITIES TOWARDS THE ARCTIC

In light of the external relationship determining the EU's role in respect to the Arctic and on the basis of the external competencies outlined above, the following options for future EU activities may arise:

With respect to **climate change**, particular attention could be paid to the external dimensions of relevant internal policies with strong climate change indications. Here an explicit recognition of the specific problems faced by the Arctic region as regards climate change consequences would be required. Moreover, a systematic and better coordination of relevant action among the different policies is needed. A particular potential for the EU to address climate change with respect to the Arctic lies in its role in international climate change negotiations. Many questions currently facing the EU in this context also affect its potential role as an Arctic actor in the field of climate change. Thus, the more the EU is capable of speaking with "one voice" at international fora in the future, the more credible its Arctic policy in the field of climate change will be.

As regards **fish captures**, the EU – although playing a rather limited role in respect to the Arctic – could use its membership within existing fishery management organizations. According to the proposal of both the Commission and the Council within the Communication and Conclusion on Arctic issues and the Arctic region, the regime of the North-East Atlantic Fisheries Commission (NEAFC) could be spatially extended: Negotiating such an extension would take place either among the current small group of the five contracting partners (the EU, Denmark in respect of the Faroe Islands, Greenland, Iceland, Norway and Russia), or else other actors, such as cooperating non-contracting parties (e.g. Canada and Japan), or even unconnected countries (e.g. the USA and China), could become involved. An agreement between few countries would be easier and the EU might potentially have a stronger position in this case. However, simply extending the present NEAFC-area would result in a very large management area as the current area reaches far southwards to Spain and it would thereby ignore specific characteristics of the Arctic marine ecosystem. From that point of view, a spatial subdivision could be more appropriate. If an agreement on extending the NEAFC could not be achieved, then, in principle, the scope of the Western and Central Pacific Fisheries Commission (WCPFC), the International Commission for the Conservation of Atlantic Tunas (ICCAT) and the North Atlantic Salmon Conservation Organization (NASCO) would become applicable, but only for their addressed species which are currently irrelevant in the Arctic waters. The EU is a member of all of them and may receive new fishing rights in the given context. However, these organizations have an enormous number of members (e.g. 48 in the case of ICCAT) and the method of allocating fishing rights in these organizations according to historical catches would make negotiations difficult.<sup>25</sup>

As a strong **trade** actor, especially in respect to fish imports from the Arctic states, the EU could use its strength by taking a leading role in promoting sustainable fisheries. Appropriate measures usable in this context are those that support EU respective management goals or penalize their infringements such as measures against illegal, unreported and unregulated fisheries (IUU), for example. The EU recently adopted a regulation on IUU relevant for importing countries and agreed additional bilateral records on fulfilling IUU requirements with most Arctic countries. No mutually agreed records on IUU measures exist so far with Russia but a change in this situation should be the aim. As the EU is for some Arctic countries the dominant import market any import requirements under IUU rules may become very successful, because, in consequence, failing to fulfil these requirements bears the economic risk of losing market access to the EU.

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<sup>25</sup> Some estimates do not expect any high future relevance of fisheries in newly accessible Arctic areas in the future. Leading assumptions are that the ice-melt will open access only during the summer and that potential new fishing areas will belong to the deep seas which are limited for fishing activities. For a more comprehensive discussion on possible scenarios and their likelihood, see among others: T. Koivurova; E.J. Molenaar, D.L. Vanderzwaag, 2009: Canada, the EU, and Arctic Ocean Governance: a tangled and shifting seascape and future directions, in *Journal of Transnational Law & Policy*, Vol. 18.2, spring 2009, p. 282.

## 6 CONCLUSIONS

Climate change in respect to the Arctic does not play a very prominent role in the present EU's climate change policy. As regards fisheries, the picture differs: For capture, on the one hand, the EU currently holds an unimportant share in respect to the total Arctic catch, while it has a significant market position as regards fish imports, in particular from the Arctic states' perspective, on the other hand.

One of the major constraints in relation to both policy areas, climate change and fisheries, is the externality of the EU as regards the majority of Arctic states, in geographical and legal terms: The EU has no coastline to the Arctic Ocean and EU law only directly applies to three of the eight Arctic states (in the case of Denmark, Greenland and the Faroe Islands are excluded). Thus, foreign policy plays an important role in respect to EU activities in the field of climate change and fisheries towards the Arctic. Additionally, Arctic coastal states hold the decisive position as regards fish captures due to their rights within their internal and territorial waters as well as in their Exclusive Economic Zones (EEZs). Thus, the EU's impact in this respect is primarily limited to the remaining areas of the High Seas.

On the basis of the present provisions of the Lisbon Treaty, the EU has external competences to act – in the case of trade, explicitly, and in the cases of climate change and fish capture, implied. When exercising these external competences, the EU has to engage member states depending on the respective distribution of competences between them: While the EU's competence as regards the capture and trade of fish is exclusive, the EU generally has to share its competence with the member states in the field of climate change. Most importantly, the role of the Parliament has been enhanced in respect to the negotiation and conclusion of international agreements in the policy areas under consideration. Most of them now require the consent of the Parliament, although exceptions may exist as regards the "fixing and allocation of fishing opportunities".

As an overall conclusion, it may be fruitful for the EU to use its external competences in the area of climate change and fisheries and to define an Arctic position in these areas rather pragmatically: By maintaining a leading role in combating global climate change while increasing efforts to recognize regional characteristics and by using its strengths as a dominant economic partner.





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