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# **The European Union as an Actor in the Law of the Sea, with Particular Reference to the Arctic**

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## **Abstract**

The first part of this article explores the extent to which the European Union (EU) is an actor in the law of the sea. After explaining when, why and how the EU became such an actor, it considers the legal and political constraints on the capacity of the EU to act; the interests that have shaped its role as an actor; and the various means by which it acts. The second part of the paper applies the conclusions from this analysis to outline the role that the EU has so far played in the ongoing development of the legal regime of the marine Arctic and to predict the role that it will continue to play, especially as regards navigation, fisheries, the exploitation of offshore oil and gas, and the protection of the environment.

## **Key words**

Arctic – European Union – environmental protection – exploitation of offshore oil and gas – fisheries – navigation

## Introduction

The aim of this paper is to consider the extent to which the European Union (EU), as distinct from its Member States acting individually or collectively, is an actor in the law of the sea, and the implications of this situation for the legal regime of the marine Arctic. To address these issues, the paper begins by considering when, why and how the EU became an actor in the law of the sea. It then moves on to consider three inter-linked matters: the legal and political constraints on the EU's capacity to be a law of the sea actor; the EU's interests in the sea, which have helped to shape its role as an actor; and the various means by which the EU performs its role as a law of the sea actor. From this analysis it will be possible to conclude both the extent to which the EU is an actor in the law of the sea and the kind of actor that it is. The latter part of the paper then applies these conclusions to the role that the EU has played and is likely to play in the ongoing development of the legal regime of the marine Arctic.

Before commencing this legal analysis, it is necessary to begin with two issues of terminology. The first is the use of the term "Arctic" in this paper. As is well known, there is no agreed definition of this area. The Arctic Council, for example, has not established a single geographical definition but leaves it up to each of its member States to determine.<sup>1</sup> In this paper the term "Arctic" will generally, and rather imprecisely, be taken to refer to the sea areas north of, and largely enclosed by, the Eurasian and North American landmasses; or, to be a little more precise, the marine areas north of the Barents Sea coast of Norway, the coast of Russia from the border with Norway to the Bering Straits, the north coast of Alaska, the coast of Canada from the border with the north coast of Alaska in the Beaufort Sea as far as the Davis Strait, most of Greenland, and the north coast of Iceland. The second point of

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<sup>1</sup> Arctic Council, *Arctic Offshore Oil and Gas Guidelines* (2009) 1, available online at <http://www.pame.is/index.php/projects/offshore-oil-and-gas>; accessed 31 October 2016. For details of each member State's definition see pp. 83-84.

terminology concerns the nomenclature of the international organization that is the subject of this paper. The term “European Union” was introduced by the eponymous treaty of 1992.<sup>2</sup> As used there, it denoted the three pillar structure of the three Communities (the European Coal and Steel Community, the European Community (as the then European Economic Community was renamed) and the European Atomic Energy Community); the Common Foreign and Security Policy; and cooperation in justice and home affairs. Only with the entry into force in 2009 of the Treaty of Lisbon,<sup>3</sup> when the three pillar structure (including the three Communities) was swept away, did the term “European Union” become the sole way of referring to the organization. In this paper the terms “European Economic Community” (EEC) and “European Community” (EC) will be used in their strict sense. However, the term “European Union” (EU) will be used to refer not only to the organization since 2009 but also on occasions, anachronistically and inaccurately, when referring to the organization before that date, so as to avoid using cumbersome expressions such as “the European Community and European Union” or “the European (Economic) Community/Union”.

### **When, Why and How did the EU become an Actor in the Law of the Sea?**

There has never been any grand design for the EU to be a law of the sea actor. It is something that has happened gradually and almost by accident, a development that has taken place from about 1970 onwards. Three main factors have led to this development: the influence and pressure of external events; the development and logic of the European integration process,

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<sup>2</sup> Treaty on the European Union (Maastricht, 7 February 1992, in force 1 November 1993), available *Official Journal of the European Union (OJ)* 1992 C191/1.

<sup>3</sup> Treaty of Lisbon, Amending the Treaty on European Union and the Treaty establishing the European Community (Lisbon, 13 December 2007, in force 1 December 2009) *OJ* 2007 C306/1.

through amendments and additions to the original EEC Treaty<sup>4</sup> and some notable judgments from the Europe Court of Justice (ECJ);<sup>5</sup> and the enlargement of the EEC to include new Member States with more extensive marine interests than the original six members.

In its original incarnation, the EEC Treaty was almost entirely terrestrially orientated, notwithstanding the long maritime traditions of some of its parties, notably France and the Netherlands. The Treaty contained only two brief references to matters marine, one positive, the other somewhat negative. The latter was Article 84, which excluded sea transport from the scope of the common transport policy unless the Council took a decision to make “appropriate provisions” for such transport. The positive reference was Article 38(1), which defined “agricultural products” as including the products of fisheries. This provision is more significant than might appear at first sight. Article 38(1) also stipulated that “the common market shall extend to agriculture and trade in agricultural products,” while Article 38(4) went on to provide that “[t]he operation and development of the common market for agricultural products must be accompanied by the establishment of a common agricultural policy.” By including fisheries products within the concept of agricultural products, the effect of these provisions, albeit rather obliquely, was to require the establishment of a common agricultural policy (CAP) that included fisheries. In practice, the CAP was established sector by agricultural sector. Fisheries was not addressed until 1968, when the Commission published proposals for a Common Fisheries Policy (CFP). In the Council, at that time the principal decision-taking body in the EEC, the Member States had widely differing views about the Commission’s proposals. What eventually induced a compromise and the adoption, in 1970, of the Commission’s proposals was the need to have a CFP in place before

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<sup>4</sup> Treaty establishing the European Economic Community (Rome, 25 March 1957, in force 1 January 1958) 298 UNTS 11.

<sup>5</sup> For a detailed discussion of such cases (and other law of the sea cases), see S Boelaert-Suominen, ‘The European Community, the European Court of Justice and the Law of the Sea’ (2008) 23(4) *International Journal of Marine and Coastal Law* 643-713.

negotiations began with the four States that had applied for membership – Denmark, Ireland, Norway and the United Kingdom – as the EEC had decided that if the applicants were to become members, they had to accept the *acquis communautaire*. It was important to have an *acquis* for fisheries in place that, however imperfectly, reflected the interests of the original Member States, which were rather different from those of the four applicants.<sup>6</sup> The Act of Accession attached to the Treaty of Accession of 1972, by which Denmark, Ireland and the United Kingdom – but not Norway, membership having been rejected in a referendum – became members of the EEC, provided some temporary derogations to the measures adopted in 1970, including a provision that required the Council to “determine conditions for fishing with a view to ensuring protection of the fishing grounds and conservation of the biological resources of the sea.”<sup>7</sup> In a seminal judgment delivered in 1981, the ECJ interpreted this provision to mean that as from the beginning of 1979 the “power to adopt . . . measures relating to the conservation of the resources of the sea has belonged fully and definitively to the Community. Member States are therefore no longer entitled to exercise any power in the matter of conservation measures in the waters under their jurisdiction.”<sup>8</sup> In other words, since 1979 the EU has had exclusive competence in relation to fisheries conservation, a term that the Court did not define.

Before 1970 the conventional wisdom was that EEC’s treaty-making powers were limited to those expressly stated in the EEC Treaty, which concerned mainly the common commercial policy and association agreements with States that had formerly been colonies of EEC Member States. In a ground-breaking judgment given in 1971, the ECJ turned conventional wisdom on its head, holding that the EEC had not only the express treaty-

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<sup>6</sup> See further R Churchill and D Owen, *The EC Common Fisheries Policy* (Oxford University Press, Oxford, 2010) 4-5.

<sup>7</sup> Art. 102 of the Act of Accession attached to the Treaty of Accession (Brussels, 22 January 1972, in force 1 January 1973), *Journal officiel des Communautés européennes* 1972 L73/5.

<sup>8</sup> Case 804/79, *Commission v. United Kingdom* [1981] European Court Reports (ECR) 1045, para. 17.

making powers stipulated in the Treaty but also wide-ranging implied treaty-making powers, whereby for any matter where the EEC had the competence to adopt common rules on the internal plane, there was a parallel treaty-making competence on the external plane.<sup>9</sup> In 1976 the Court confirmed that this doctrine applied to fisheries, observing that it “follows from the very duties and powers [to take fisheries conservation measures] which Community law has established and assigned to the Community on the internal level that the Community has authority to enter into international commitments for the conservation of the resources of the sea.”<sup>10</sup>

By the middle of 1976 it was clear that as a result of developments in the law of the sea, most North Atlantic States outside the EEC would extend their fisheries jurisdiction to 200 nautical miles (nm) as from the beginning of 1977. To respond to the implications and consequences of this development for EEC Member States, the Commission put forward a package of proposals in September 1976.<sup>11</sup> The package had three main elements: (1) a coordinated extension by EEC Member States of their fisheries jurisdiction to 200 nm with effect from the beginning of 1977; (2) the management of fisheries within these new limits to be undertaken by the EEC and not the Member States; and (3) the negotiation of agreements with third States on the access of EEC fishing vessels to 200 nm fishing zones to be carried out by the EEC and not the Member States.<sup>12</sup> The first and third elements of the package were easily achieved, fishing limits being duly extended to 200 nm by Member States and the first fisheries access agreements being signed in 1977. The EEC also became a member of a regional fisheries management organization in 1978 (the Northwest Atlantic Fisheries Organization) in place of its Member States. The second element of the package took longer

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<sup>9</sup> Case 22/70, *Commission v. Council* [1971] ECR 263. See further I MacLeod, IC Hendry and S Hyett, *The External Relations of the European Communities* (Clarendon Press, Oxford, 1996) 44-53.

<sup>10</sup> Joined Cases 3, 4 and 6/76, *Officier van Justitie v. Kramer* [1976] ECR 1279, para. 33.

<sup>11</sup> Commission Communication to the Council, *Future external fisheries policy and internal fisheries system*, EEC document COM(76)500, 21 September 1976 (copy on file with the author).

<sup>12</sup> See further Churchill and Owen (n 6) 6-7.

to achieve, a Community fisheries management system not being agreed until 1983.<sup>13</sup> Thus, by the end of the 1970s the EEC was well on the way to being a significant international fisheries actor.

The 1970s also saw the development of the EEC as an actor in relation to the protection of the marine environment. The EEC Treaty did not provide the Community with an express competence in relation to environmental matters until amended by the Single European Act in 1986. Nevertheless, in 1973, inspired by the UN Conference on the Human Environment, which had been held in Stockholm the previous year and had for the first time really put the environment on to the international political and legal agenda, the Council adopted what became the first of a series of Environmental Action Programmes.<sup>14</sup> It based the Programme and subsequent legislation on Article 100 of the EEC Treaty, which provided for the adoption of measures to harmonise national rules that affected the functioning of the common market, and/or Article 235, which gave the EEC institutions a general power to adopt measures to achieve Community objectives where there was no express power to do so elsewhere in the Treaty.<sup>15</sup> From the mid-1970s onwards a number of measures were adopted to address the protection of the marine environment, particularly the prevention of pollution from land-based sources.<sup>16</sup> At the same time the EEC began to become a party to a number of regional marine environmental treaties, notably the Paris Convention<sup>17</sup> and the Barcelona

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<sup>13</sup> *Ibid.*, at pp. 7-10.

<sup>14</sup> Declaration of the Council of the Communities and of the representatives of the Governments of the Member States meeting in Council of 22 November 1973 on the programme of action for the European Communities on the environment, *OJ* 1973 C112/1.

<sup>15</sup> On the origins and early development of the EEC's environmental policy and legislation, see D Freestone, 'European Community environmental policy and law' in R Churchill, L Warren and J Gibson (eds), *Law, Policy and the Environment* (Basil Blackwell, Oxford, 1991) 135-154.

<sup>16</sup> For examples, see R Churchill, 'The European Union and the challenges of marine governance: From sectoral response to integrated policy' in D Vidas and PJ Schei (eds), *The World Ocean in Globalisation* (Martinus Nijhoff, Leiden, 2011) 395-436, at pp. 410-411.

<sup>17</sup> Convention for the Prevention of Pollution from Landbased Sources (Paris, 4 June 1974, in force 6 May 1978) 1978 United Kingdom Treaty Series No. 64.

Convention and its protocols.<sup>18</sup> Thus, by the end of the 1970s the EU had also become a significant marine environmental actor.

While the developments in relation to fisheries and the marine environment described above were occurring, the Third UN Conference on the Law of the Sea was in progress. The decision in *Commission v. Council*, referred to above, and its confirmation in several subsequent cases, such as the *Kramer* case, led EEC Member States to propose at the Conference that the EEC itself, and not merely its Member States, should be able to become a party to any convention that the Conference might eventually adopt.<sup>19</sup> That move was eventually successful, Article 305(1)(f) and Annex IX of the UN Convention on the Law of the Sea (LOSC) providing that international organizations to which their member States “have transferred competence over matters governed by this Convention, including the competence to enter into treaties in respect of those matters” may become parties to the Convention if a majority of their member States have ratified or acceded to the Convention.<sup>20</sup> As far as the EC was concerned, that condition was met in 1998 and it duly became a party itself then.

What has been said so far is enough to show that by the early 1980s the EU was an actor in the law of the sea, but it has continued to develop as such an actor since then. Thus, it has deepened and broadened its engagement with fisheries and protection of the marine

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<sup>18</sup> Convention for the Protection of the Mediterranean Sea against Pollution (Barcelona, 16 February 1976, in force 12 February 1978) 1102 UNTS 27.

<sup>19</sup> See further AW Koers, ‘Participation of the European Economic Community in a new law of the sea convention’ (1979) 73(3) *American Journal of International Law* 426-443; KR Simmonds, ‘The Community’s participation in the UN Law of the Sea Convention’ in D O’Keefe and HG Schermers (eds), *Essays in European Law and Integration* (Kluwer, Deventer, 1982) 179-191; and T Treves, ‘The EEC and the law of the sea: How close to one voice?’ (1983) 12 (3-4) *Ocean Development and International Law (ODIL)* 173-189. It has been argued that on substantive matters the EEC never realised its full negotiating potential at the Conference: see R Long, ‘The inexorable rise of the United Nations Convention on the Law of the Sea within the European legal order’ in M Lodge and M Nordquist (eds), *Peaceful Order in the World’s Oceans: Essays in Honour of Satya N Nandan* (Martinus Nijhoff, Leiden, 2014) 157-185, at pp. 158-160.

<sup>20</sup> United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, in force 16 November 1994) 1833 UNTS 3.

environment,<sup>21</sup> as well as becoming active in shipping (since the 1980s), seabed mineral exploitation (since 1994), aquaculture (since 2002), the exploitation of renewable energy at sea (since 2008), and marine scientific research (also since 2008).<sup>22</sup> These developments culminated with the adoption of an EU Integrated Maritime Policy in 2007.<sup>23</sup>

## **Legal and Political Constraints on the EU's Capacity to be a Law of the Sea**

### **Actor**

Although, as we have just seen, the EU has over the years developed as an actor in the law of the sea, it faces various constraints on its capacity to act that do not apply to States. Such constraints are both internal and external. As to the former, the EU does not have unlimited competence. It has only such competences as have been conferred on it by its Member States. This is the principle of conferral, now codified in Article 5 of the Treaty on European Union (TEU). As far as matters relevant to the sea are concerned, the EU has exclusive competence in relation to “the conservation of marine biological resources under the common fisheries policy”,<sup>24</sup> and shared competence in relation to other aspects of fisheries, environment, transport, energy and research.<sup>25</sup> Exclusive competence means that the Member States are

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<sup>21</sup> On fisheries, see Churchill and Owen (n 6); T Markus, *European Fisheries Law: From Promotion to Management* (European Law Publishing, Groningen, 2009); and J Wakefield, *Reforming the Common Fisheries Policy* (Edward Elgar, Cheltenham, 2016). On the marine environment, see V Frank, *The European Community and Marine Environmental Protection in the International Law of the Sea* (Martinus Nijhoff, Leiden, 2007); and L. Krämer, *EU Environmental Law* (8th ed., Sweet & Maxwell, London, 2016).

<sup>22</sup> For details, see Churchill (n 16), at pp. 406-417.

<sup>23</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *An Integrated Maritime Policy for the European Union*, COM(2007) 575, 10 October 1975. COM documents can be accessed online at <http://eur-lex.europa.eu/homepage.html?locale=en>; accessed 2 November 2016. For discussion of the Policy, see Churchill (n 16), at pp. 418-427.

<sup>24</sup> Treaty on the Functioning of the European Union (TFEU) (Lisbon, 13 December 2007, in force 1 December 2009) OJ 2010 C83/47, Art. 3(1)(d). For a discussion of the meaning and scope of the quoted phrase, see Churchill and Owen (n 6), at p. 48.

<sup>25</sup> TFEU, Art 4. For a more detailed discussion of the EU's marine competences, see Churchill (n 16), at pp. 398-417. For discussion of how EU competences apply in the Arctic, see T. Koivurova, K Kokko, S Duyck, N

precluded from acting in the area in question unless authorised to do so by the EU.<sup>26</sup> Shared competence means that in principle both the EU and the Member States may act: however, once the EU has acted in respect of a specific matter, for example in relation to discharges of a specific pollutant into the sea, Member States may no longer act in relation to that matter.<sup>27</sup> The EU also has external competence that broadly parallels the internal competence just described.<sup>28</sup>

So far the discussion has concerned EU competences under the TFEU, but the EU also has a broad and rather ill-defined competence under the Common Foreign and Security Policy (CFSP), which comes under the TEU rather than the TFEU.<sup>29</sup> Under this competence a Working Party on Law of the Sea has been established which prepares the EU position at various international fora that do not fall directly within TFEU competences, such as the annual meetings of States parties to the LOSC and the UN General Assembly annual debates on oceans and law of the sea.<sup>30</sup> The EU response to Somali piracy has also been developed under the CFSP.<sup>31</sup>

It is evident from this description of EU competences that the EU does not have competence in relation to a number of law of sea matters, including the drawing of baselines,

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Sellheim and A Stepien, 'The present and future competence of the European Union in the Arctic' (2012) 48(4) *Polar Record* 361-371. Cf. also the declaration setting out the extent of its competence made by the EC when becoming a party to the LOSC, available online at [http://www.un.org/depts/los/convention\\_agreements/convention\\_declarations.htm#European Community](http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#European%20Community) Declaration made upon formal confirmation; accessed 2 November 2016. This declaration is now out of date, as the competences of the EU have expanded since it was made. The EU has not complied with its obligation under Art. 5(4) of Annex IX to notify the UN Secretary-General of "any changes to the distribution of competence, including new transfers of competence."

<sup>26</sup> TFEU, Art 2(1).

<sup>27</sup> TFEU, Art 2(2). Research is an exception. If the EU acts, the Member States do not lose their competence: see TFEU, Art 4(2). For a general discussion on the nature of EU and Member State competence, see P Craig and G de Búrca, *EU Law: Text, Cases and Materials* (6th ed., Oxford University Press, Oxford, 2015) chap. 3.

<sup>28</sup> TFEU, Arts 3(2) and 216(1).

<sup>29</sup> The ECJ has given some limited indication of the scope of the CFSP in the marine area: see Case C-658/11, *European Parliament v. Council of the European Union* ECLI: EU: C: 2014:2025.

<sup>30</sup> See further Long (n 19), at pp. 167-170.

<sup>31</sup> See further R Gosalbo-Bono and S Boelaert, 'The European Union's comprehensive approach to combating piracy at sea: Legal aspects' in P Koutrakos and A Skordas (eds), *The Law and Practice of Piracy at Sea: European and International Perspectives* (Hart, Oxford, 2014) 81-166.

the establishment of coastal State maritime zones, the delimitation of maritime boundaries, the sponsorship of activities in the International Seabed Area, and the jurisdictional rights and duties of flag States.<sup>32</sup> So, for example, when a Dutch-registered vessel, the *Arctic Sunrise*, was seized and detained by the Russian authorities following a protest by members of Greenpeace against Russian oil activities in the Arctic, dispute settlement proceedings under the LOSC were instituted by the Netherlands as the flag State, not by the EU.<sup>33</sup>

Apart from the substantive constraints of EU law resulting from the EU not having unlimited competence in marine matters, the ability of the EU to act in the law of the sea may also be constrained by internal political and procedural factors. There are three main “political” institutions in the EU – the Council, the European Commission (Commission) and the European Parliament – and, broadly speaking, no significant action under the TFEU relating to the law of the sea may be taken unless all three institutions are in agreement.<sup>34</sup> Before the TFEU the European Parliament had fewer powers and its agreement was not always required. It should not be assumed that the institutions have always been able to agree on a proposed law of the sea action. There have been several instances in the past where agreement was not forthcoming. For example, Commission proposals for EU legislation to control the dumping of waste at sea were twice rejected by the Council (in 1976 and 1985) on the ground that this was a matter that should be left to the Member States.<sup>35</sup> Likewise, a proposal from the Commission that the EU should seek to become a member of the International Whaling Commission has not been agreed to because some Member States argue that this matter is beyond EU competence.<sup>36</sup> A final example concerns the FAO’s

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<sup>32</sup> See further the EU declaration made on becoming a party to the LOSC (n 25).

<sup>33</sup> *In the Matter of the Arctic Sunrise Arbitration (Netherlands v. Russia)*, Award on the Merits, 14 August 2015, available online at <http://www.pcacases.com/web/sendAttach/1438>; accessed 29 August 2016.

<sup>34</sup> See Arts 218 (on the negotiation and conclusion of treaties); 289 and 294 (on law-making); and 314 (on the determination of EU expenditure).

<sup>35</sup> Frank (n 21), at pp. 308-22.

<sup>36</sup> Churchill and Owen (n 6), at pp. 381-2.

Compliance Agreement.<sup>37</sup> The Commission considered that the subject matter of the Agreement lay wholly within Community competence, and that therefore only the EC, and not the Member States, should become a party to it. The Council disagreed. The matter was referred to the ECJ, which decided in favour of the Commission.<sup>38</sup> As can be seen from these examples, disagreement over whether or what action should or might be taken by the EU in relation to the law of the sea often concerns disputes about the division of competence between the EU and its Member States. While the general principles, explained above, are reasonably clear, their application to concrete situations not infrequently gives rise to dispute. In the case of the Council, a further potential obstacle to action is getting the agreement of a sufficiently large number of Member States in favour of a proposed action in order to constitute the qualified majority necessary to take most decisions, especially where the Member States have divergent interests in the matter in hand. In the European Parliament there may also be problems in obtaining the necessary majority of votes for a decision.

As well as internal constraints on the ability of the EU to perform as a law of the sea actor, there are external constraints in the form of the unwillingness or inability of third States to deal with the EU. States are not usually unwilling for purely political reasons to have dealings with the EU in law of the sea matters. The general economic power of the EU, as the world's third largest economy and its largest trading bloc, coupled with the EU's significant interests in many marine matters (as explained in the next section), mean that it is not in the interests of most States to decline to deal with the EU in law of the sea matters. The one significant exception has been the then Communist States of central and Eastern Europe in the 1970s and 1980s. Consistent with their ideological position that only States could be the subjects of international law, they were reluctant to admit that the EU could be a law of the

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<sup>37</sup> Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (Rome, 24 November 1993, in force 24 April 2003) 2221 UNTS 91.

<sup>38</sup> Case C-25/94, *Commission v. Council* [1996] ECR I-1469.

sea actor. Thus, the USSR refused to consider negotiating a fisheries access agreement with the EEC when both parties extended their fisheries jurisdiction to 200 nm in 1977; and the USSR and other members of the Soviet bloc delayed by significant periods EEC membership of the International Baltic Sea Fisheries Commission and the conclusion of negotiations on the establishment of the North-East Atlantic Fisheries Commission.<sup>39</sup> They also refused to permit the EEC to become a party to the 1974 Helsinki Convention on pollution of the Baltic Sea.<sup>40</sup> At the Third UN Conference on the Law of the Sea the USSR raised objections to the EEC becoming a party to any convention adopted by the Conference, although those objections were eventually withdrawn towards the end of the Conference.<sup>41</sup> Since the collapse of Communism at the beginning of the 1990s, instances of States refusing to deal with the EU on political grounds have been rare and sporadic. Conversely, the EU has occasionally refused to deal with third States to make a political point. For example, the EU suspended its fisheries partnership agreement with Guinea-Bissau in 2012 in protest at a military coup and only lifted that suspension when constitutional order was restored in 2014.<sup>42</sup>

More enduring are external legal constraints on EU action. Treaties, including the constituent treaties of international organizations, concluded before the 1970s provide for participation only by States. Thus, it is impossible for the EU to become a party to such treaties, and a member of such international organizations, unless the treaty in question is amended. Such amendment has been made in a number of cases, but is often a time-consuming process. Examples of treaties so amended include the Convention on International

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<sup>39</sup> See RR Churchill, *EEC Fisheries Law* (Martinus Nijhoff, Dordrecht, 1987) 187-188.

<sup>40</sup> See M Fitzmaurice, *International Legal Problems of the Environmental Protection of the Baltic Sea* (Martinus Nijhoff, Dordrecht, 1992) 27 and 215-216.

<sup>41</sup> S Rosenne and LB Sohn (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. V (Martinus Nijhoff, Dordrecht, 1989) 187-9.

<sup>42</sup> Information online at [http://ec.europa.eu/fisheries/cfp/international/agreements/guinea\\_bissau/index\\_en.htm](http://ec.europa.eu/fisheries/cfp/international/agreements/guinea_bissau/index_en.htm); accessed 28 September 2016.

Trade in Endangered Species<sup>43</sup> and the constituent treaties of the International Commission for the Conservation of Atlantic Tunas,<sup>44</sup> the General Fisheries Commission for the Mediterranean<sup>45</sup> and the Food and Agriculture Organization.<sup>46</sup> Nevertheless, there remain many other treaties and international organizations to and of which the EU is not, and cannot become, a party or member. They include the International Maritime Organization (IMO) and the many treaties concluded under its auspices, the International Whaling Commission, and the International Council for the Exploration of the Sea. Where the EU is not a member of an international organization or a party to a treaty, EU Member States cannot act at meetings of that organization or at meetings of States parties to that treaty except in accordance with the common position adopted by the EU institutions. That reflects the principle of loyal cooperation found in Article 4(3) of the TEU. Any departure from the common position, or any initiative by an individual Member State where there is no common position, will almost certainly be a breach of Article 4(3).<sup>47</sup>

Most law of the sea treaties and international organizations concluded and established since the 1970s provide for participation by the EU either specifically or generically as a regional economic integration organization. Thus, the EU is a party or member, either exclusively or together with its Member States, to the LOSC and its two implementing agreements; of all regional fisheries management organizations (RFMOs) in areas where EU fishing vessels are active; of the FAO and fisheries agreements concluded under its auspices;

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<sup>43</sup> Amendment to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (Gaborone, 30 April 1983, in force 29 November 2013) available online at <https://www.cites.org/eng/disc/gaborone.php>; accessed 2 November 2016.

<sup>44</sup> Protocol amending the International Convention for the Conservation of Atlantic Tunas (Paris, 10 July 1984, in force 14 December 1997) *OJ* 1986 L162/33.

<sup>45</sup> Amendment to the Agreement for the Establishment of the General Fisheries Commission for the Mediterranean (Rome, 16 October 1997, in force 6 November 1997) *OJ* 1998 L190/34.

<sup>46</sup> Amendment to the Constitution of the Food and Agriculture Organization (Rome, 1991, in force 1991) available online at <http://www.fao.org/3/a-mp046e.pdf>; accessed 2 November 2016.

<sup>47</sup> See, for example, Case C-45/07, *Commission v. Hellenic Republic* [2009] ECR I-701; Case C-246/07, *Commission v. Sweden* [2010] ECR I-3317; and Case C-399/12, *Germany v. Council (Organization of Wine and Vine)* EU:C:2014:2258. See also the contribution by C Hillion in this symposium.

of the Bonn Convention on Migratory Species and agreements concluded thereunder; of the Convention on Biological Diversity; and of regional marine environmental protection organizations whose area of application includes coasts to which the EU treaties apply.<sup>48</sup>

### **The EU's Interests in the Sea**

It is a truism that the way in which States conduct themselves in their international relations is determined largely – or, as the realist school of international relations would say, exclusively – by self-interest.<sup>49</sup> This is certainly the case with the law of the sea. In other words, the conduct of States in the marine arena, and position that they take on any marine issue, is largely determined by their interests in the sea and the issue in question. Indeed, negotiations at the Third UN Conference on the Law of the Sea were based on that assumption.<sup>50</sup>

If the conduct of States in marine policy-making and the law of the sea is determined by their interests in the sea, one might wonder whether this would also be true of an international organisation like the EU. That would assume that the EU had its own interests in the sea, as distinct from those of its Member States. While the European Commission, which is charged with “promot[ing] the general interest of the Union”,<sup>51</sup> often takes the position that there is a distinct EU interest in a particular marine matter, the Member States are less

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<sup>48</sup> There is one exception to this last category, the Convention on Protection of the Black Sea against Pollution (Bucharest, 21 April 1992, in force 15 January 1994) 2099 UNTS 195. At the time of the adoption of the Convention, there was no EU coastline in the Black Sea, although some EU Member States contributed to land-based sources of pollution in the Black Sea via the Danube.

<sup>49</sup> See, for example, M Byers, *Custom, Power and the Power of Rules* (Cambridge University Press, Cambridge, 1999) 13-14 and the literature cited there; and L Henkin, *How Nations Behave* (2nd ed., Columbia University Press, New York, 1979).

<sup>50</sup> L Henkin, ‘Old Politics and New Directions’ in R Churchill, KR Simmonds and J Welch (eds), *New Directions in the Law of the Sea*, Vol. III (Oceana, Dobbs Ferry, 1973) 3-11; and J Harrison, *Making the Law of the Sea* (Cambridge University Press, Cambridge, 2011) 44-53.

<sup>51</sup> TEU, Art. 17(1).

inclined to agree. Their interests in any particular issue often vary significantly. Thus, if the EU can be said to have an interest in any particular matter, it is usually a compromise between, a synthesis of, or the highest common factor of its Member States' interests. Some political scientists have argued that the EU's external actions are founded on the notion of the EU being "a normative power, wanting to engage 'as a force for good' rather than adhering to a realist interest policy"; or, alternatively, that EU action is determined by "sociological institutionalism", where the EU institutions (especially the Commission) "constitute an interest on their own and work to expand their own influence and power."<sup>52</sup> There is probably some truth in all of these ideas.

Before turning to try to determine what the EU interest might be is in relation to the main areas of marine activity relevant to the Arctic – navigation, fisheries, seabed mineral exploitation, and protection of the marine environment – it is worth noting that from the point of view of marine geography there are sharp differences between EU Member States. Five Member States are landlocked – Austria, the Czech Republic, Hungary, Luxembourg and Slovakia. Five Member States – France, Ireland, Portugal, Spain and the United Kingdom – have extensive maritime zones and all have made submissions to the Commission on the Limits of the Continental Shelf that their continental shelves extend beyond 200 nm. The remaining 18 Member States are, to a greater or lesser extent, zone-locked, that is to say that their geographical situation, bordering the nearly-enclosed Baltic, Black, Mediterranean and North Seas, makes it impossible for them to claim anything like a full 200 nm exclusive economic zone (EEZ) or continental shelf.

Turning to specific marine activities, beginning with navigation: as the world's largest trading bloc, with almost 90 per cent of the EU's trade with third States being seaborne, as

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<sup>52</sup> A Østhagen, 'The European Union – An Arctic Actor?' (2013) 15(2) *Journal of Military and Strategic Studies* 73-92, at pp. 73-74 and literature cited there. See also Long (n 19), at pp. 166-167 on the diversity of EU Member States' interests and the consequent difficulty for EU policy formulation.

well as more than 40 per cent of intra-EU trade,<sup>53</sup> one would expect the EU to have a strong interest in upholding the navigational rights laid down in the LOSC – innocent passage in the territorial sea, transit passage through international straits, archipelagic sea lanes passage through sea lanes in archipelagic waters, and freedom of navigation in the EEZ and on the high seas. Nationals of Member States are the beneficial owners of 36.0 per cent of the total world fleet by tonnage, although only 26 per cent of this tonnage is registered in the State of nationality of the beneficial owner,<sup>54</sup> the remainder being registered in another EU Member State or, more commonly, under flags of convenience. In the distinction usually made in relation to interests in navigation between flag, coastal and port States, one would expect the EU, on the basis of what has just been said to have the interests of a flag State. That was probably true up until the end of the last century. However, following two shipping disasters, the *Erika* in 1999 and the *Prestige* in 2002, when two elderly and sub-standard oil tankers broke up off the coasts of France and Spain respectively, spilling large quantities of oil, the EU appears now to have more the interests of a coastal and port State than a flag State, as those disasters led to substantial EU legislative activity that imposes significant and restrictive conditions on foreign ships visiting EU ports and traversing EU waters.<sup>55</sup>

It is common to characterise the fisheries interests of States as being either coastal (meaning that a State's vessels fish exclusively or very largely in its own maritime zones) or distant-water (meaning that a State's fishing vessels conduct a significant degree of their activity in the waters of non-neighbouring States or on the high seas). A few States have both interests. The EU comes into this category. The maritime zones of its Member States are

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<sup>53</sup> European Commission, *Maritime Facts and Figures* (no date), 5, available online at <http://www.bookshop.europa.eu/>; accessed 3 November 2016.

<sup>54</sup> European Commission, *Transport in Figures* (2015) 95, available online at <http://ec.europa.eu/transport/sites/transport/files/pocketbook2015.pdf>; accessed 3 November 2016. Figures are for 2014.

<sup>55</sup> For details, see V Frank, 'Consequences of the *Prestige* Sinking for European and International Law' (2005) 20(1) *IJMCL* 1-64; and H Ringbom, *The EU Maritime Safety Policy and International Law* (Brill, Leiden, 2008), especially chapters 2, 3 and 5.

highly productive and a substantial degree of EU fisheries activity takes place there, with little or no surplus available for third States. At the same time, the EU is a significant distant-water fishing entity (principally through vessels from France, Portugal and Spain), with EU vessels fishing in foreign waters under access agreements between the EU and 20 or so third States and on the high seas in accordance with the measures of the relevant RFMO, the EU being a member of 15 RFMOs. Collectively, EU fishing vessels take around five per cent of the total world marine catch, making the EU the world's fifth largest producer.<sup>56</sup>

In the most recent basic regulation on the Common Fisheries Policy of 2013, the EU commits itself to sustainable fishing, the application of the precautionary and ecosystem-based approaches to fisheries management, and to restoring and maintaining fish stocks to and at the level of maximum sustainable yield.<sup>57</sup> In the past the EU's actions have not always matched its fine words. Thus, according to a Commission report of 2009, at that time "European fish stocks ha[d] been overfished for decades", 88 per cent of fish stocks in the waters of EU Member States, for whose management the EU was responsible, were being fished beyond the level of maximum sustainable yield, and 30 per cent of stocks were outside safe biological limits.<sup>58</sup> The past conduct of EU activity in the waters of third States and on the high seas has also been criticised for exceeding prescribed catch limits and as undermining the conservation efforts of the third States and RFMOs concerned.<sup>59</sup> There is some evidence that in the past few years there has been a gradual improvement in the

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<sup>56</sup> European Commission, *Facts and Figures on the Common Fisheries Policy* (2016), p. 19, available online at [https://ec.europa.eu/fisheries/sites/fisheries/files/docs/body/pcp\\_en.pdf](https://ec.europa.eu/fisheries/sites/fisheries/files/docs/body/pcp_en.pdf); accessed 3 November. The figures are for 2013.

<sup>57</sup> Regulation (EU) No. 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, *OJ* 2013 L354/22, Art. 2.

<sup>58</sup> European Commission, *Green Paper: Reform of the Common Fisheries Policy*, COM(2009) 163, 5 and 7. See also European Environment Agency, *EU 2010 Biodiversity Baseline*, Technical Report No 12/2010, 84, available online at <http://www.eea.europa.eu/publications/eu-2010-biodiversity-baseline>; accessed 20 November 2012, which gives a figure of 46 per cent of stocks being fished outside safe biological limits.

<sup>59</sup> See, for example, Churchill and Owen (n 6), at pp. 348-50; and R Churchill, 'The EU as an International Fisheries Actor – Shark or Minnow?' (1999) 4(4) *European Foreign Affairs Review* 463-483,

position, with more stocks being fished sustainably, although there is still a long way to go to achieve the goals of the Common Fisheries Policy.<sup>60</sup>

Unlike the position with navigation and fisheries, there is no dichotomy in States' interests between coastal, flag and port States when it comes to the exploration and exploitation of the continental shelf for mineral resources. Here all States, apart from those that are landlocked, have the interests of a coastal State. It is true that at the Third UN Conference on the Law of the Sea there was intense debate over the continental shelf between the group of landlocked and geographically disadvantaged States, whose members, including some then present and future EU Member States, argued for a narrow continental shelf with the right to participate in the exploitation of neighbouring States' shelves, and those States favouring the possibility of the outer limit of the continental shelf extending beyond 200 nm with exclusive rights of exploitation for the coastal State in all parts of the shelf. The latter group of States eventually emerged victorious and saw their preferences included in the LOSC.

As mentioned earlier, the extent of EU Member States' continental shelves varies considerably, as do the amounts of oil and gas found in those shelves. Most hydrocarbon activity on EU continental shelves began well before the EU had obtained competence relevant to that activity. Thus, there has so far been little EU legislation regulating offshore hydrocarbon exploitation. Perhaps the most important measure that the EU has adopted to date is Directive 2013/30 on the safety of offshore oil and gas operations,<sup>61</sup> which was prompted by the Deepwater Horizon (a.k.a. Macondo) disaster in the Gulf of Mexico in 2010.

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<sup>60</sup> See, *inter alia*, European Environment Agency, *Status of Marine Fish Stocks* (2017), available online at <https://www.eea.europa.eu/data-and-maps/indicators/status-of-marine-fish-stocks-2/assessment>; accessed 9 May 2017; Institute for European Environmental Policy, *The Potential Policy and Environmental Consequences for the UK of a Departure from the European Union* (2016), 84-86, available online at [http://www.ieep.eu/assets/2000/IEEP\\_Brexit\\_2016.pdf](http://www.ieep.eu/assets/2000/IEEP_Brexit_2016.pdf); accessed 9 May 2017; and New Economics Foundation, *Landing the Blame: Overfishing in the Atlantic 2017* (2017), available online at [http://neweconomics.org/wp-content/uploads/2017/04/NEF\\_LTB\\_ATLANTIC\\_2017.pdf](http://neweconomics.org/wp-content/uploads/2017/04/NEF_LTB_ATLANTIC_2017.pdf); accessed 9 May 2017.

<sup>61</sup> Directive 2013/30/EU of 12 June 2013 on safety of offshore oil and gas operations, *OJ* 2013 L178/66.

In due course the EU's targets for reducing greenhouse gas emissions<sup>62</sup> may have an impact on the level of offshore hydrocarbon activity.

As for the exploitation of mineral resources beyond the continental shelf, i.e. in the International Seabed Area, a number of companies having the nationality of an EU Member State have signed exploration contracts with the International Seabed Authority.<sup>63</sup> However, as mentioned earlier, the sponsorship and regulation of such companies lie outside the competence of the EU.

Over the years the activities of EU nationals have had a substantial adverse impact on the marine environment. This has come from a variety of sources, including land-based and airborne pollution from EU territory; pollution from vessels registered in EU Member States; overfishing and destructive practices by EU fishing vessels; and the dumping of waste at sea. The EU has increasingly been concerned by its impact on the marine environment, as evidenced by its environmental action programmes (referred to earlier<sup>64</sup>), and has taken action to address and reduce that impact. Much such action has taken the form of sectoral measures.<sup>65</sup> In addition, there are two important horizontal measures, the Habitats Directive<sup>66</sup> and the Marine Strategy Framework Directive.<sup>67</sup> The latter requires EU Member States to ensure that EU waters have achieved “good environmental status” by 2020. The EU is also a party to all relevant regional treaties and multilateral treaties concerned with protection of the marine environment that permit participation by the EU specifically or generically as a regional economic integration organization.

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<sup>62</sup> The EU has committed itself to reduce its emissions of greenhouse gases from 1990 levels by 20% by 2020, by 40% by 2030, and by 80-95% by 2050. See [https://europa.eu/european-union/topics/climate-action\\_en](https://europa.eu/european-union/topics/climate-action_en); accessed 9 May 2017.

<sup>63</sup> For details, see <https://www.isa.org.jm/deep-seabed-minerals-contractors>; accessed 9 May 2017.

<sup>64</sup> See text at (n 14).

<sup>65</sup> For details, see Krämer (n 21).

<sup>66</sup> Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, *OJ* 1992 L206/7, as amended.

<sup>67</sup> Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive), *OJ* 2008 L164/19.

## **The Means by which the EU performs its Role as a Law of the Sea Actor**

The means available to the EU in performing its role as a law of the sea actor are broadly the same as for States, namely diplomacy, treaty-making, participation in the work of international organizations, litigation and domestic legislation. The one means that is not available to the EU are displays of force, or the threat or use of force in self-defence or where authorised by the UN Security Council, as the EU has no naval power of its own. Some brief comments will now be made about how in practice the EU has exercised the various means of law of the sea action that are open to it.

### ***Diplomacy***

The EU has its own diplomatic service, known as the European External Action Service, which is headed by the High Representative of the Union for Foreign Affairs and Security Policy.<sup>68</sup> There is no doubt from time to time routine diplomatic intercourse between the EU and third States over law of the sea matters, but this rarely gets publicised. Only occasionally does EU diplomatic action become more high profile. For example, in 1995 there were sharp diplomatic exchanges between the EU and Canada, which became dubbed the “turbot war”, when Canadian officials arrested a Spanish ship, the *Estai*, on the high seas for alleged illegal fishing of Greenland halibut, a straddling stock managed by the Northwest Atlantic Fisheries Organization (NAFO). The dispute was fairly swiftly resolved through diplomacy and the negotiation of an agreement.<sup>69</sup> Another example of public EU diplomatic action is protest by

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<sup>68</sup> TEU, Art. 27(3).

<sup>69</sup> The incident generated a substantial literature. See, for example, D Freestone, ‘Canada and the EU reach Agreement to settle the *Estai* Dispute’ (1995) 10(3) *IJMCL* 397-411; and CC Joyner and AA von Gustedt, ‘The Turbot War of 1995: Lessons for the Law of the Sea’ (1996) 11(3) *IJMCL* 425-458.

individual Member States on behalf of the EU against the straight baselines claimed by Canada<sup>70</sup> and Thailand,<sup>71</sup> which, it is argued, contravene the LOSC.

### *Treaty-making*

As indicated earlier, the EU has its own treaty-making powers and is a party to most global and relevant regional law of the sea treaties that have been concluded since the mid-1970s, as well as a few earlier treaties that have been amended to allow it to become a party. On occasions the EU has taken the lead in proposing new treaties. For example, following the *Erika* disaster, the EU proposed that a protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage should be adopted to provide for an additional tier of compensation for damage caused by oil pollution from tankers. That proposal was successful, resulting in the adoption of a new protocol in 2003.<sup>72</sup> In 2007 the EU, together with Canada, proposed far-reaching amendments to the 1978 constituent treaty of NAFO to bring it into line with modern approaches to fisheries management. That proposal was adopted and the amended treaty eventually came into force in May 2017.<sup>73</sup>

The EU is also a party to a number of bilateral law of the sea treaties. Most are concerned with the access of EU fishing vessels to third States' 200 nm EEZs,<sup>74</sup> but there are also some interesting treaties with East African States relating to cooperation in criminal proceedings against alleged Somali pirates.<sup>75</sup>

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<sup>70</sup> JA Roche and RW Smith, *Excessive Maritime Claims* (3rd ed., Martinus Nijhoff, Leiden, 2012) 112.

<sup>71</sup> *Law of the Sea Bulletin*, No. 28 (1995), at p. 31.

<sup>72</sup> W Oosterveen, 'Some Recent Developments regarding Liability for Damage resulting from Oil Pollution – from the Perspective of an EU Member State' (2004) 6(4) *Environmental Law Review* 223-239.

<sup>73</sup> See <https://www.nafo.int/Portals/0/PDFs/key-publications/NAFOConvention-2017.pdf>; accessed 21 November 2017.

<sup>74</sup> For details, see Churchill and Owen (n 6), at pp. 330-351 and the website reference in (n 42).

<sup>75</sup> See further Gesalbo-Bono and Boelart (n 31), at pp. 119-125; and Long (n 19), at p. 181.

### *Participation in international organizations*

As indicated earlier, the EU is a member of a number of international organizations concerned with the law of the sea, particularly RFMOs and regional bodies for the protection of the marine environment. Even where the EU is not a member of a particular law of the sea organization (such as the IMO) but (some) EU Member States are members, the latter can normally participate in the work of the organization only in accordance with any EU common position that has been agreed. In the space of a short article it is not possible to attempt to give any detailed picture of the ways in which the EU has participated in the international organizations of which it is a member. The one matter that should be mentioned is that the EU was a very active participant in the UN Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction, and has continued to be very active in its successor, the Preparatory Committee to develop an international legally binding instrument under the LOSC for such conservation and sustainable use. The EU has been one of the leading advocates for the adoption of such an instrument.<sup>76</sup>

### *Litigation*

The EU is a party to several law of the sea treaties that provide for compulsory dispute settlement, notably the LOSC. If the EU had a dispute with another State party over the interpretation or application of such a treaty, it could refer the matter to a judicial body for binding legal settlement.<sup>77</sup> In practice, the EU has never yet done so. However, on two

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<sup>76</sup> D Tladi, 'Conservation and Sustainable use of Marine Biodiversity in Areas beyond National Jurisdiction: Towards an Implementing Agreement' in R Rayfuse (ed), *Research Handbook on International Marine Environmental Law* (Edward Elgar, Cheltenham, 2015) 259-271.

<sup>77</sup> Further on such possibility, see R Long, 'Law of the Sea Dispute Settlement and the European Union' in J Barrett and R Barnes (eds), *Law of the Sea: UNCLOS as a Living Treaty* (British Institute of International and Comparative Law, London, 2016) 417-455, especially at pp. 419-440.

occasions the converse has occurred, and proceedings have been brought against the EU.<sup>78</sup>

The EU has also been a party, usually the respondent, to several cases under the WTO's Dispute Settlement Understanding that have a law of the sea element.

### ***Legislation***

The EU adopts a large amount of legislation relating to the law of the sea. Much of this legislation applies only to the Member States and their nationals, such as the legislation operationalizing the Common Fisheries Policy and regulating marine pollution from land-based sources. From time to time, however, the EU adopts legislation that applies primarily to third State nationals and is designed unilaterally to address a problem common to the international community and/or exert pressure to raise international standards. A few examples of such legislation may be given. Following the *Erika* disaster referred to earlier, the EU adopted a regulation that banned the transport of heavy oil to and from EU ports in single-hull tankers and provided for the phasing out of such tankers at a faster rate than under the then IMO measure.<sup>79</sup> A second example is a regulation adopted in 2008, designed to combat illegal, unreported and unregulated fishing (IUU fishing), that bans the landing in an EU port or the import into the EU of fish suspected of being caught in IUU fishing.<sup>80</sup> A final example concerns greenhouse gas emissions from ships. Concerned by the failure of the IMO to develop effective measures to control and limit such emissions, the EU adopted a regulation in 2015 that requires every ship over 5,000 GRT, regardless of nationality, calling at an EU port to report on the verified amount of CO<sub>2</sub> emitted during its voyage from its last

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<sup>78</sup> For details, see *ibid.*, at pp. 436-440.

<sup>79</sup> Regulation (EC) No 417/2002 of the European Parliament and Council of 18 February 2002 on the accelerated phasing-in of double-hull or equivalent design requirements for single hull oil tankers, *OJ*, 2002, L64/1.

<sup>80</sup> Regulation (EC) No 1005/2008 of the European Parliament and Council of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, *OJ*, 2008, L266/1.

port of call to an EU port and from an EU port to its next port of call, as well as between EU ports; and to monitor and report on data such as distance travelled, time spent at sea and cargo carried, so as to enable EU authorities to calculate ships' average energy efficiency.<sup>81</sup> Although the regulation is little more than an information collecting exercise, it is intended only as a first step in addressing, and reducing, emissions of greenhouse gases from shipping.<sup>82</sup>

### **The EU's Role as an Actor in the Marine Arctic**

Having explained how and why the EU is a significant actor in the law of the sea, this paper turns to consider how the EC has acted, and may be expected to act in the future, in the marine Arctic and in the ongoing development of a legal regime for that region.

An important, if rather obvious, preliminary point is that the EU is not an Arctic coastal entity, i.e. none of the territory to which the EU treaties apply has an Arctic coastline, even though three EU Member States are members of the Arctic Council and are therefore considered to be Arctic States. In the case of Finland and Sweden, their coastlines, even in the northern part of the Baltic Sea, are not considered to be in the Arctic: their Arctic status derives from having land territory north of the Arctic Circle.<sup>83</sup> Denmark's membership of the Arctic Council derives from the fact that Greenland is part of the Kingdom of Denmark. However, Greenland is not part of the EU.

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<sup>81</sup> Regulation (EU) No 2015/757 of the European Parliament and of the Council of 29 April 2015 on the monitoring, reporting and verification of carbon dioxide emissions from maritime transport, and amending Directive 2009/16/EC, *OJ*, 2015, L123/55.

<sup>82</sup> See recitals 10 and 12 of the Regulation.

<sup>83</sup> Arctic Offshore Oil and Gas Guidelines (n 1), at p. 83.

While no EU Member State has a coastline in the Arctic, rather curiously, perhaps, some EU legislation does apply to Arctic waters. This unusual state of affairs stems from the fact that two Arctic States, Iceland and Norway, are members of the European Economic Area (EEA). Under the Agreement establishing the EEA,<sup>84</sup> Iceland and Norway are bound by a considerable body of EU law. Most of this relates to the operation of the single market (i.e. the free movement of goods, persons, services and capital) and is of little direct relevance to the marine Arctic. More pertinent are Article 74 and Annex XX, which provide that Norway and Iceland are also bound by parts of EU environmental legislation.<sup>85</sup>

Like a number of non-Arctic States, the EU has strong aspirations to be an actor in the Arctic. This first became evident in 2008. In November of that year the Commission presented a Communication to the European Parliament and the Council entitled “The European Union and the Arctic Region”.<sup>86</sup> In this document the Commission advocates that the EU should develop a policy towards the Arctic. The Commission’s rationale for such action is the historical, geographical, economic and scientific research links between the EU and the Arctic; the effect of existing EU policies on the Arctic; and environmental changes in the Arctic that are “altering the geo-strategic dynamics of the Arctic with potential consequences for international stability and European security interests.”<sup>87</sup> The Commission followed up its 2008 Communication with further Communications on the development of an

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<sup>84</sup> Agreement on the European Economic Area (Brussels, 17 March 1993, in force 1 January 1994) *OJ* 1994 L1/3.

<sup>85</sup> Further on how EU law applies to Iceland and Norway, see Koivurova et al. (n 25), at p. 362. Note that the EEA Agreement does not apply to Svalbard.

<sup>86</sup> Communication from the Commission to the European Parliament and the Council, *The European Union and the Arctic Region*, COM(2008) 763, 20 November 2008. On the background to this document, see N Wegge, ‘The European Union’s Arctic Policy’ in LC Jensen and G Hønneland (eds), *Handbook of the Politics of the Arctic* (Edward Elgar, Cheltenham, 2015) 533-549, at pp. 535-541.

<sup>87</sup> COM(2008) 763 (n 86), at p. 2. For academic comment on this rationale, see Østhagen (n 52), at pp. 74-76.

EU Arctic policy in 2012<sup>88</sup> and 2016.<sup>89</sup> The latter Communication adds as a rationale for EU engagement with the Arctic that “many of the issues affecting the Arctic region . . . can be more effectively tackled through regional or multilateral cooperation.”<sup>90</sup> The 2008 Communication suggested three broad objectives of an EU Arctic policy: protecting and preserving the Arctic in unison with its population; promoting the sustainable use of resources; and contributing to enhanced Arctic multilateral governance.<sup>91</sup> Those objectives have been broadly repeated in the two later Communications<sup>92</sup> and relate to both the terrestrial and marine Arctic. The Commission’s three Communications have been generally welcomed by the European Parliament<sup>93</sup> and the Council.<sup>94</sup>

A few weeks before the Commission published its 2008 Communication, the European Parliament adopted a rather ill-conceived resolution in which it urged the Commission to “take a proactive role in the Arctic by at least, as a first step, taking up ‘observer status’ on the [Arctic] Council . . . [and] be prepared to pursue the opening of

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<sup>88</sup> Joint Communication from the European Commission and the High Representative of the European Union for Foreign Affairs and Security Policy to the European Parliament and the Council, *Developing a European Union Policy towards the Arctic Region: progress since 2008 and next steps*, JOIN(2012) 19, 26 June 2012 (JOIN documents are available online at <http://eur-lex.europa.eu/homepage.html?locale=en>; accessed 2 November 2016). This was accompanied by a Joint Staff Working Document, *The inventory of activities in the framework of developing a European Union Arctic Policy* SWD(2012) 182, 26 June 2012.

<sup>89</sup> Joint Communication from the European Commission and the High Representative of the European Union for Foreign Affairs and Security Policy to the European Parliament and the Council, *An integrated European Union policy for the Arctic*, JOIN(2016) 21, 27 April 2016.

<sup>90</sup> *Ibid.*, at p. 2.

<sup>91</sup> COM(2008) 763 (n 86), at p. 3.

<sup>92</sup> JOIN(2012) 19 (n 88), at p. 5; and JOIN(2016) 21 (n 89), at p. 4.

<sup>93</sup> European Parliament Resolution of 20 January 2011 on a Sustainable EU Policy for the High North, P7\_TA(2011) 0024, available online at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONGML%2bTA%2bP7-TA-2011-0024%2b0%2bDOC%2bPDF%2bV0%2f%2fEN>; accessed 3 November 2016; European Parliament Resolution of 12 March 2014 on the EU Strategy for the Arctic, P7\_TA(2014) 0236, available online at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONGML%2bTA%2bP7-TA-2014-0236%2b0%2bDOC%2bPDF%2bV0%2f%2fEN>; accessed 3 November 2016; and European Parliament Resolution of 16 March 2017 on an integrated European Union policy for the Arctic, P8\_TA(2017) 0093, available online at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2017-0093&language=EN&ring=A8-2017-0032>; accessed 21 November 2017.

<sup>94</sup> Foreign Affairs Council Meeting, 8 December 2009, *Council Conclusions on Arctic Issues*; Foreign Affairs Council Meeting, 12 May 2014, *Council Conclusions on developing a European Union Policy towards the Arctic Region*; and Foreign Affairs Council Meeting, 20 June 2016, *Council Conclusions on the Arctic*. Council conclusions are available online at <http://www.consilium.europa.eu/en/council-eu/conclusions-resolutions/>; accessed 3 November 2016.

international negotiations designed to lead to the adoption of an international treaty for the protection of the Arctic, having as its inspiration the Antarctic Treaty.”<sup>95</sup> The latter suggestion seemingly ignores basic geographical and legal differences between the Arctic and the Antarctic. It also caused considerable irritation to the Arctic States,<sup>96</sup> which a few months earlier, in May 2008, had adopted the Ilulissat Declaration.<sup>97</sup> In this Declaration the Arctic 5 (Canada, Denmark, Norway, Russia and the USA) had rejected the idea of a new treaty for the Arctic and strongly affirmed the adequacy of the existing legal regime, based on the LOSC. Consequently, the Commission has never followed up the Parliament’s suggestion, but has been more sensitive to the governance concerns of the Arctic States, especially in its Communications of 2012 and 2016, and has accepted the current governance structure for the Arctic and endorsed the importance of the LOSC in this regard.<sup>98</sup>

The Commission did, however, pursue the European Parliament’s first suggestion. On 1 December 2008 it applied for permanent observer status at the Arctic Council. Although seven EU Member States have permanent observer status (France, Germany, Italy, the Netherlands, Poland, Spain and the United Kingdom), the EU’s application was not accepted until 2013, and then only in principle. As the Arctic Council put it: “The Arctic Council receives the application of the EU affirmatively, but defers a final decision on implementation until the Council ministers are agreed by consensus that that the concerns of Council members . . . are resolved.”<sup>99</sup> A “final decision” has yet to be taken. The “concerns of Council members” mentioned relate principally to the objections of Norway and especially

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<sup>95</sup> European Parliament Resolution of 9 October 2008 on Arctic Governance, P6\_TA(2008) 0474, paras. 14 and 15, available online at <http://www.europarl.europa.eu/plenary/en/texts-adopted.html#sidesForm>; accessed 3 November 2016.

<sup>96</sup> Wegge (n 86), at p. 538

<sup>97</sup> The Declaration is available at <http://www.arcticgovernance.org/the-ilulissat-declaration.4872424.html>; accessed 15 March 2015.

<sup>98</sup> COM(2008) 763 (n 86), at pp. 10-11; JOIN(2012) 19 (n 88), at pp. 10-11; and JOIN(2016) 21 (n 89), at p. 14.

<sup>99</sup> Arctic Council, Ministerial Declaration, Kiruna, 15 May 2013, available on line at <https://oarchive.arctic-council.org/handle/11374/93>; accessed 1 November 2016.

Canada to the introduction by the EU in 2009 of a ban on the import of seal products.<sup>100</sup> The two States took their complaints to the WTO, arguing that the ban was a breach of WTO law. Both the panel established to hear the dispute and the Appellate Body agreed.<sup>101</sup> How far the dispute still persisted at the time of writing was not clear. In the interim, until the Arctic Council does take a “final decision”, the EU has participated as an ad hoc observer at Council meetings and in the work of various Council working groups, task forces and expert groups.<sup>102</sup>

Drawing in part on the Commission’s three Communications, this paper will now turn to examine what the EU’s involvement has been and is likely to be in relation to four principal issues in the marine Arctic: navigation, fisheries, exploitation of seabed hydrocarbon resources, and protection of the Arctic marine environment.

### *Navigation*<sup>103</sup>

The gradual and seemingly inexorable reduction of Arctic summer sea ice cover will in the coming decades make transpolar navigation by commercial shipping possible. This will cut the current distance by sea from the Far East to Western Europe by roughly one third, thereby

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<sup>100</sup> Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products, *OJ* 2009 L286/3.

<sup>101</sup> DS400 *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* (complainant Canada) and DS401 *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* (complainant Norway). The reports of the panel and Appellate Body are available on line at [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds400\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds400_e.htm) and [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds401\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds401_e.htm); accessed 31 October 2016. See also the paper by M Hennig in this Symposium; and R Long, ‘Arctic Governance: Reflections on the Evolving Tableau of EU Law and Policy Measures’ in MH Nordquist, JN Moore and R Long (eds), *Challenges of the Changing Arctic: Continental Shelf, Navigation and Fisheries* (Brill, Leiden, 2016) 363-303, at pp. 386-393; and Wegge (n 86), at pp. 540-542.

<sup>102</sup> JOIN(2016) 21 (n 88), at p. 14; and SWD(2012) 182 (n 87), at pp. 27-28. See also Koivurova et al. (n 25), who strongly argue that it is in interests of both the Arctic States and the EU that that the EU participates in the Arctic Council, thus increasing each side’s presently imperfect knowledge and understanding of the other.

<sup>103</sup> See further the paper by H Ringbom in this symposium and N Liu, ‘The European Union’s Potential Contribution to Enhanced Governance of Arctic Shipping’ (2013) 73(4) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 705-733.

reducing transport costs and CO<sub>2</sub> emissions from ships.<sup>104</sup> As the world's largest trading bloc, most of whose trade with third States is seaborne, the EU has an obvious interest in this development. Not surprisingly, therefore, the EU institutions have emphasised the importance of upholding the navigational rights of the LOSC and are resistant to unilateral attempts to weaken those rights.<sup>105</sup> At the same time they recognise the importance of promoting the safety of shipping and the need to minimise the risks of pollution.<sup>106</sup> Accordingly, the EU has been a strong supporter of the adoption of a mandatory Polar Shipping Code by the IMO.<sup>107</sup> If and when commercial shipping in the Arctic develops on any scale, the EU (through its Member States) will be in a strong position to enforce the Code, both in respect of its own ships as the flag State, and as a port State exercising port State jurisdiction and control, since many non-EU ships will begin or end their voyages at an EU port.

### *Fisheries*<sup>108</sup>

For many years EU vessels have fished in most of those areas of the Arctic where the absence of sea ice currently permits commercial fishing, either in areas of EEZ under access agreements with Greenland, Iceland and Norway<sup>109</sup> or in two high seas enclaves in the Norwegian and Barents Seas, known as the Banana Hole and the Loophole respectively, in

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<sup>104</sup> COM(2008) 763 (n 86), at p. 8; and JOIN(2012) 19 (n 88), at p. 3.

<sup>105</sup> See, from the Commission, COM(2008) 763 (n 86), at p. 8 (on p. 9 it is noted that "there are different interpretations of the conditions for passage of ships in some Arctic waters, especially in the Northwest Passage") and JOIN(2012) 19 (n 88), at p. 17; Council Conclusions of 2014 (n 94), at para. 10; and European Parliament resolutions of 2014 and 2017 (n 93), at paras. 27 and 33, respectively.

<sup>106</sup> COM(2008) 763 (n 86), at p. 8; and JOIN(2012) 19 (n 88), at p. 9. See also Arctic Council, *Arctic Marine Shipping Assessment* (2009), available online at <http://www.pame.is/index.php/document-library/amsa-documents>; accessed 1 November 2016.

<sup>107</sup> JOIN(2012) 19 (n 88), at p. 9; and JOIN(2016) 21 (n 89), at p. 13; Council Conclusions of 2014 (n 94), at para. 9; and European Parliament resolutions of 2014 and 2017 (n 93), at paras. 27 and 59, respectively. The Code came into force at the beginning of 2017.

<sup>108</sup> See further the paper by G Andreone in this symposium and N Liu, 'The European Union's Potential Contribution to Enhanced Governance of Arctic Fisheries' in N Liu, EA Kirk, and T Henriksen (eds), *The European Union and the Arctic* (Brill, Leiden, 2017).

<sup>109</sup> For details, see Churchill and Owen (n 6), at pp. 333-340.

accordance with the regimes applying in those areas.<sup>110</sup> Such fishing may be expected to continue for the foreseeable future. In general terms the EU “supports the exploitation of Arctic fisheries resources at sustainable levels based on sound scientific advice.”<sup>111</sup>

The thinning or disappearance of Arctic sea ice in the future as a result of global warming may lead to the possibility of commercial fishing in the Arctic EEZs of Canada and the USA. It is possible that the EU may seek access for its vessels to those waters, but it seems unlikely that access would be granted as Canadian and US vessels would seem to be more than capable of taking the whole of any allowable catch. Of more practical interest to the EU in due course, given the current degree of distant-water fishing by EU vessels, would be the high seas area in the central Arctic Ocean. The reduction of ice cover may eventually allow fishing in this area, although at present it is not known whether sufficient fishery resources to interest commercial fishing vessels will be found there.<sup>112</sup>

In July 2015, the five Arctic States whose EEZs border this high seas area (Canada, Denmark, Norway, Russia and the USA) adopted a Declaration concerning the Prevention of Unregulated High Seas Fishing in the Central Arctic Ocean.<sup>113</sup> In this Declaration the five States agree that “there is no need at present to establish a regional fisheries management organization.” Instead they intend to implement a number of interim measures. These measures include the establishment of a joint programme of scientific research with the aim

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<sup>110</sup> For details, see R Churchill, ‘The Exploitation and Management of Marine Resources in the Arctic: Law, Politics and the Environmental Challenge’ in Jensen and Hönneland (eds) (n 86) 147-184, at p. 156.

<sup>111</sup> JOIN(2012) 19 (n 87), at p. 10.

<sup>112</sup> Arctic Council Working Group on the Conservation of Arctic Flora and Fauna (CAFF), *Arctic Biodiversity Assessment: Status and Trends in Arctic Biodiversity* (2013) 219-232, available online at <http://www.arcticbiodiversity.is>; accessed 10 April 2014.

<sup>113</sup> The Declaration is available online at <https://www.regjeringen.no/globalassets/departementene/ud/vedlegg/folkerett/declaration-on-arctic-fisheries-16-july-2015.pdf>; accessed 3 November 2016. For comment, see S Ryder, *Declaration concerning the Prevention of Unregulated High Seas Fishing in the Central Arctic Ocean*, JCLOSE Blog, 11 August 2015, available online at <http://site.uit.no/jclos/2015/08/11/the-declaration-concerning-the-prevention-of-unregulated-high-seas-fishing-in-the-central-arctic-ocean/#more-122>; accessed 3 November 2016; and EJ Molenaar, ‘International Regulation of Central Arctic Ocean Fisheries’ in Nordquist, Moore and Long (eds) (n 101) 429-463, especially at pp. 455-461.

of improving understanding of the ecosystem of the area, as well as an agreement to authorize their vessels to conduct commercial fishing in the area only pursuant to any regional fisheries management organization or arrangement that “may be established to manage such fishing in accordance with recognized international standards,” thus effectively creating a moratorium on commercial fishing for the time being. The Declaration “encourages” other States to act consistently with its interim measures and “acknowledges the interest of other States in preventing” unregulated fishing in the area. The five signatories to the Declaration “look forward to working with them [i.e. other States] in a broader process to develop measures consistent with this Declaration that would include commitments by all interested States.” That “broader process” has taken the form of a series of meetings, beginning in December 2015.<sup>114</sup> The EU has been a participant in the meetings, along with the five States that adopted the Declaration and four other States. At the time of writing those meetings were still ongoing. It seemed that their likely outcome might well be the adoption of a legally binding agreement generally reflecting the provisions of the Declaration. In the meantime the Commission has proposed that the EU should support the Declaration.<sup>115</sup>

The EU is well placed to enforce the Declaration. Any commercial fishing taking place in the high seas area of the central Arctic Ocean before the adoption of an internationally agreed management regime for the area would constitute unregulated fishing within the definition of illegal, unreported and unregulated (IUU) fishing used in FAO instruments. As a party to the FAO Port State Measures Agreement,<sup>116</sup> of whose adoption it

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<sup>114</sup> See further EJ Molenaar, *The December 2015 Washington Meeting on High Seas Fishing in the Central Arctic Ocean*, JCLOS Blog, 5 February 2016, available online at <http://site.uit.no/jclos/2016/02/05/the-december-2015-washington-meeting-on-high-seas-fishing-in-the-central-arctic-ocean/#more-135>; accessed 3 November 2016. For details of the most recent meeting at the time of writing, held in March 2017, see <https://www.state.gov/e/oes/ocns/opa/rls/269126.htm>; accessed 9 May 2017.

<sup>115</sup> JOIN(2016) 21 (n 89), at p. 16. The European Parliament also supports the Declaration and the ongoing broader process: see its resolution of 2017 (n 93), at paras. 7-9 and 52-6.

<sup>116</sup> Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (Rome, 22 November 2009, in force 5 June 2016), available online at <http://www.fao.org/fishery/psm/agreement/en>; accessed 4 November 2016.

was a leading proponent, the EU is obligated to prevent direct landing of fish taken in IUU fishing. The EU has in fact had its own legislation in operation since 2010 that prohibits, through a system of certification, not only direct landings and transshipments but all forms of imports of fishery products that result from IUU fishing.<sup>117</sup> Furthermore, the EU has legislation that allows it to ban imports from any State that allow unsustainable fishing for stocks of common interest to the EU and that third State and to prevent EU fishing vessel owners from reflagging their vessels in such States.<sup>118</sup>

### *The exploitation of seabed hydrocarbon resources*

There is already some exploitation of offshore hydrocarbons in the Arctic, principally in the southern Barents Sea.<sup>119</sup> The reduction in sea ice cover in the coming years may well permit exploitation in other areas of Arctic continental shelf. As a major importer of oil and gas to satisfy its energy needs, the EU clearly has an interest in such development. EU oil companies may also want to apply for licences to explore for and exploit hydrocarbons on the continental shelves of Arctic States, although one major EU oil company, Shell, has decided to withdraw from Arctic activity following a series of mishaps off the coast of Alaska.<sup>120</sup> At the same time the EU is conscious of the fact that the exploration and exploitation of hydrocarbons in the Arctic is a risky business, with the potential to cause catastrophic pollution.<sup>121</sup> The EU has therefore called for the Arctic Council's currently voluntary Arctic

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<sup>117</sup> Council Regulation (EC) No 1005/2008 (n 80).

<sup>118</sup> Regulation (EU) No 1026/2012 of the European Parliament and of the Council on certain measures for the purpose of the conservation of fish stocks in relation to countries allowing non-sustainable fishing, *OJ* 2012 L316/34. The legislation was challenged for its compatibility with WTO law by Denmark on behalf of the Faroe Islands under the WTO's Dispute Settlement Understanding, but the case was withdrawn without a decision by a WTO panel after the parties reached a settlement of the dispute. See further Long (n 77), at pp. 439-440.

<sup>119</sup> For details, see Churchill (n 110), at p. 165.

<sup>120</sup> *Ibid.*, at p. 166.

<sup>121</sup> See further *ibid.*, pp. 165-166.

Offshore Oil and Gas Guidelines<sup>122</sup> to be strengthened and made legally binding.<sup>123</sup> The chances of the EU being able to give effect to this aspiration seem rather small. Although the Guidelines have been amended from time to time (the present version is the third), the three EU Member States that are members of the Arctic Council would probably face difficulty in persuading Russia to accept stricter standards in the current political climate. Even if the Council were prepared to depart from its normal practice of consensus in decision-making, there would be no point in strengthening the guidelines without Russian acceptance. It would be an even greater challenge to secure agreement on making the guidelines legally binding as the Arctic Council has traditionally avoided legally binding commitments. It only began doing adopting legally binding measures in 2011, when an agreement on search and rescue was concluded,<sup>124</sup> followed by a further agreements in 2013 and 2017 on pollution preparedness and response and scientific cooperation.<sup>125</sup> How far the Council will continue to adopt legally binding instruments remains to be seen, particularly where they would contain rather more demanding commitments than the existing agreements.

There are ways in which the EU could partially achieve the adoption of stricter regulations to govern offshore hydrocarbon activities in the Arctic. The first is through the OSPAR Convention.<sup>126</sup> The Convention applies to a part of the Arctic, namely those sea areas between the lines of longitude of 42° West and 51° East, running to the North Pole.<sup>127</sup>

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<sup>122</sup> See (n 1).

<sup>123</sup> COM(2008) 763 (n 86), at p. 8; and JOIN(2016) 21 (n 89), at p. 8. A similar call is made in recital 52 of Directive 2013/30 (n 61).

<sup>124</sup> Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic (Nuuk, 12 May 2011, in force January 2013 (exact date not known)) available online at <http://www.ifrc.org/docs/idrl/N813EN.pdf>; accessed 4 November 2016.

<sup>125</sup> Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic (Kiruna, 15 May 2013, in force 25 March 2016), available online at <http://www.arctic-council.org/eppr/agreement-on-cooperation-on-marine-oil-pollution-preparedness-and-response-in-the-arctic/>; accessed 4 November 2016; and Agreement on Enhancing International Arctic Scientific Cooperation (Fairbanks, 11 May 2017, not yet in force), available online at <https://oaarchive.arctic-council.org/handle/11374/1916>; accessed 21 November 2017.

<sup>126</sup> Convention for the Protection of the Marine Environment of the North-East Atlantic (Paris, 22 September 1992, in force 25 March 1998) (1993) 32(4) *International Legal Materials* 1069-1100.

<sup>127</sup> *Ibid.*, Art. 1(a).

Annex III deals with pollution from offshore installations. The Commission established by the Convention has adopted a number of measures to build on the provisions of Annex III.<sup>128</sup> As the EU and its Member States constitute a majority of the members of the Commission, they are in a strong position to secure the adoption of further measures by the Commission specifically for the Arctic. Any such measures would not apply to Russia, however. Although Russian maritime zones fall partly in the area of application of the Convention, it is not a party to it.

A second way in which the EU could seek to raise safety standards for offshore hydrocarbon activity in the Arctic is by imposing higher standards on oil and gas companies having the nationality of an EU Member State that engage in such activity, regardless of where in the Arctic it takes place, the basis being the well-established principle of extraterritorial legislative jurisdiction that a State has in respect of its nationals (the nationality or active personality principle).<sup>129</sup> The EU has in fact already made a start in this direction. Directive 2013/30, referred to earlier, requires EU companies to report the circumstances of any accident in which they have been involved to the Member State whose nationality the company has.<sup>130</sup>

A third way in which the EU could seek to raise standards is by adopting stricter measures for its own waters and then stipulating that such measures are environmental in nature and therefore apply to Iceland and Norway under the EEA Agreement. The EU has already purported to do this, as Directive 2013/30 is described under its title as being a “text of EEA relevance”. However, that is contested by Norway.<sup>131</sup> Ironically, the directive is less

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<sup>128</sup> For details, see <http://www.ospar.org/work-areas/oic>; accessed 4 November 2016.

<sup>129</sup> N Liu and EA Kirk, ‘The European Union’s Potential Contribution to Protect Marine Biodiversity in the Changing Arctic: A Roadmap’ (2015) 30(2) *IJMCL* 255-284, at p. 278.

<sup>130</sup> Directive 2013/30 (n 61), Art. 20.

<sup>131</sup> Personal communication from an official in the Norwegian Ministry of Foreign Affairs.

strict than Norwegian domestic legislation. The practical consequences of this disagreement may thus be academic, but the principle may be important for the future.

If the EU were really serious about climate change, it would call for a moratorium on all future hydrocarbon activity in the Arctic. It has been argued that oil and gas in the seabed of the Arctic needs to be left where it is if there is to be any hope of avoiding dangerous increases in global warming.<sup>132</sup> In fact, the European Parliament has already called for a moratorium, at least for EU and EEA waters,<sup>133</sup> but the chances of the EU as such doing so are remote for reasons of *realpolitik*. Such a call would undoubtedly antagonise Norway and especially Russia. The EU would not want that to happen, not only to avoid creating friction at a time when it is still seeking to secure permanent observer status at the Arctic Council, but particularly because it is heavily dependent on those two States for its energy needs. In 2010 the EU imported just over half of the energy that it consumed, of which Norway and Russia between them accounted for nearly 50 per cent of oil imports and 60 per cent of natural gas imports.<sup>134</sup>

### ***Protection of the Arctic marine environment***

The EU, along with various third States, is a major contributor to the Arctic's two most significant environmental problems, the continuing reduction in summer sea ice cover caused by global warming and airborne pollution.<sup>135</sup> As to the first problem, the consequences of reduced ice cover include threats to populations of polar bears and seals, for which adequate ice cover is an essential part of their habitat; a reduction in the amount of algae living on the

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<sup>132</sup> C McGlade and P Ekins, 'The Geographical Distribution of Fossil Fuels Unused when Limiting Global Warming to 2° C' (2015) 517 *Nature* 187.

<sup>133</sup> Resolution of 2017 (n 93), at para. 14.

<sup>134</sup> Østhagen (n 52), at p. 75.

<sup>135</sup> See further Ecologic Institute, *EU Arctic Footprint and Policy Assessment: Final Report* (Berlin, 2010), available online at [http://arctic-footprint.eu/sites/default/files/AFPA\\_Final\\_Report.pdf](http://arctic-footprint.eu/sites/default/files/AFPA_Final_Report.pdf); accessed 31 October 2016. The Report (p. ES-2) calculates that in the case of airborne pollution the EU is responsible for 35 per cent of total global impact. The figures for greenhouse gas emissions and black carbon are 16 and 59 per cent, respectively.

underside of ice, which are one of the foundations of the Arctic food chain; and the warming and acidification of Arctic waters, with potentially far-reaching and unknown impacts on species distribution in the Arctic.<sup>136</sup> All of these consequences have major implications for the indigenous peoples of the Arctic, who are often highly dependent on marine species to support their traditional lifestyles. The EU has taken considerable steps to reduce its greenhouse gas emissions. Thus, it has met its commitments under the Kyoto Protocol;<sup>137</sup> committed itself to reducing its emissions of greenhouse gases by substantial amounts;<sup>138</sup> taken a leading role in the negotiation of, and become a party to, the 2015 Paris Agreement;<sup>139</sup> and strongly supported the adoption, at the 28<sup>th</sup> meeting of the parties in October 2016, of an amendment to the Montreal Protocol on Substances that deplete the Ozone Layer that will phase out production and consumption of hydrofluorocarbons (HFCs), a powerful greenhouse gas.<sup>140</sup> Furthermore, frustrated at the slow progress of the IMO in adopting measures to curb greenhouse gas emissions from ships, which are covered neither by the Kyoto Protocol nor the Paris Agreement, the EU has adopted its MRV regulation as a first step towards addressing this issue.<sup>141</sup> However, it would seem that all these efforts, commendable though they may be, are too little, too late, as the reduction and probable eventual disappearance of sea ice appears irreversible.

Turning to the second major environmental problem in the Arctic, airborne pollution is a threat to both wildlife and humans, and, in the case of black carbon, a climate pollutant.<sup>142</sup> The EU has taken various steps to address its contribution to this problem. It is a

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<sup>136</sup> See further *ibid.*, pp. 27-30; and Arctic Council Working Group on the Conservation of Arctic Flora and Fauna (CAFF), *Life linked to Ice*, CAFF Assessment Series No. 10 (2013), available at: <http://www.caff.is/sea-ice-associated-biodiversity>; accessed 4 November 2016.

<sup>137</sup> JOIN(2012) 19 (n 88), at p. 13.

<sup>138</sup> See (n 62).

<sup>139</sup> Paris Agreement (Paris, 12 December 2015, in force 4 November 2016) Doc. FCCC/CP/2015/L.9.

<sup>140</sup> Available at <http://conf.montreal-protocol.org/meeting/mop/mop-28/final-report/English/MOP28-Compiled-Decisions.pdf>; accessed 4 November 2016.

<sup>141</sup> See text at (n 80).

<sup>142</sup> JOIN(2016) 21 (n 88), at p. 7.

party to the Convention on Long-Range Transboundary Air Pollution and most of its protocols,<sup>143</sup> to the Stockholm Convention on Persistent Organic Pollutants,<sup>144</sup> and to the Minamata Convention on Mercury.<sup>145</sup> While none of these instruments is aimed specifically at the Arctic, they will go a long way to reducing airborne pollution in the Arctic if they are widely ratified and properly implemented (including by the EU).

There are other Arctic environmental issues where the EU can play a role. First, as mentioned earlier, the EU will be able to enforce the Polar Code both as a flag State and as a port State. In addition, the EU will be able to prosecute any instances of pollution from ships under the powers given to port States by Article 218 of the LOSC. Second, the Commission and European Parliament have called for the creation of a network of marine protected areas in the Arctic in order to conserve species and habitats.<sup>146</sup> The EU has some prospect of partly fulfilling this aim through the OSPAR Convention. As mentioned above, the Convention applies to part of the Arctic. The Commission established by the Convention has already established a number of MPAs both within zones of national jurisdiction and on the high seas.<sup>147</sup> Since the EU and its Member States constitute a majority of the members of the Commission, they are in a good position to secure the adoption of MPAs by the Commission for that part of the Arctic to which the Convention applies. Furthermore, the 10<sup>th</sup> Ministerial Meeting of the Arctic Council, held in 2017, adopted the Marine Protected Area Network

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<sup>143</sup> For details of the Convention and its protocols, see <http://www.unece.org/env/lrtap/welcome.html>; accessed 4 November 2016.

<sup>144</sup> Stockholm Convention on Persistent Organic Pollutants (Stockholm, 22 May 2001, in force 17 May 2004) 2256 UNTS 119.

<sup>145</sup> Minamata Convention on Mercury (Geneva, 19 January 2013, in force 16 August 2017) available online at <https://treaties.un.org/doc/Treaties/2013/10/20131010%2011-16%20AM/CTC-XXVII-17.pdf>; accessed 2 November 2016.

<sup>146</sup> COM(2008) 763 (n 86), at p. 11; JOIN(2012) 19 (n 88), at p. 12; JOIN(2016) 21 (n 89), at p. 7; and European Parliament resolution of 2017 (n 93), at paras. 6, 49 and 51.

<sup>147</sup> For details, see <http://www.ospar.org/work-areas/bdc>; accessed 4 November 2016.

Toolbox and encouraged additional work to help implement the Framework for a Pan-Arctic Network of Marine Protected Areas.<sup>148</sup>

## **Conclusions**

The EU has been a significant actor in the law of the sea for the best part of the last 40 years. Its role is distinct from that of its Member States. At times it acts together with them, at times in place of them. As an actor in the law of the sea, the EU engages in treaty-making, participates in the work of international organizations, implements and applies international instruments and responds to implementation and application by third States. It is no doubt something of an over-simplification, but it can be said that generally the EU has moved from being a rather hesitant and at times somewhat obstructive and negative actor to playing a much more proactive and positive role, as witnessed, for example, in it being in the vanguard of those calling for the negotiation and adoption of a legally binding instrument to conserve biodiversity in areas beyond national jurisdiction and, earlier, the FAO's Port State Measures Agreement.

As an actor in the law of the sea, the EU has not unnaturally focused much of its attention on the seas adjoining its own coasts. Nevertheless, it has already played a role, and aspires to play a greater role, in the marine Arctic. It has asserted its navigational rights under the LOSC, while advocating strict measures to ensure that navigation is as safe and free from the risk of causing pollution as is possible through its successful support for the Polar Code to

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<sup>148</sup> Declaration of the 10<sup>th</sup> Ministerial Meeting of the Arctic Council, Fairbanks, 11 May 2017, para. 8, available online at [https://oaarchive.arctic-council.org/bitstream/handle/11374/1910/EDOCS-4339-v1-ACMMUS10\\_FAIRBANKS\\_2017\\_Fairbanks\\_Declaration\\_Brochure\\_Version\\_w\\_Layout.PDF?sequence=8&isAllowed=y](https://oaarchive.arctic-council.org/bitstream/handle/11374/1910/EDOCS-4339-v1-ACMMUS10_FAIRBANKS_2017_Fairbanks_Declaration_Brochure_Version_w_Layout.PDF?sequence=8&isAllowed=y); accessed 21 November 2017. For details of the Toolbox and Framework, see <https://oaarchive.arctic-council.org/handle/11374/1965>; accessed 21 November 2017.

be made mandatory. It has endorsed a moratorium on the exploitation of potential future fishery resources in the high seas area of the Central Arctic unless and until a proper management regime is in place; and it has the means to help make that moratorium effective through its power to ban imports from IUU fishing. The EU has called for strict and legally binding safety and anti-pollution measures for offshore hydrocarbon exploitation in place of the current voluntary guidelines, but stopped short of calling for a moratorium on exploitation. Lastly, the EU is helping to address the two current major environmental problems that face the marine Arctic, the reduction in ice cover and airborne pollution, through its participation in and implementation of relevant treaties. However, as far as the reduction of ice cover is concerned, the EU's efforts, along with those of third States, have been too little and probably come too late. To promote the conservation of species and habitats, the EU has called for the creation of a network of MPAs in the Arctic.