



## Declaration 25 of the *Treaty on European Union*: Danish Territories and whaling

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Declaration No. 25, attached to the Final Act of the *Treaty on European Union* (Maastricht Treaty) in 1992, provides that where, in exceptional circumstances, divergences arise between the interests of the Union and those of the Member States' overseas countries and territories, and a solution cannot be reached which accords with the position of the Union, the Member State concerned may act separately in the interests of their overseas countries and territories, without this affecting the Community's interests.

Declaration No. 25 TEU has been invoked by Denmark in support of the whaling activities of its territories, Greenland and the Faroe Islands. Denmark's reliance on this Declaration at the International Whaling Commission (IWC) has prevented the EU from presenting a more united stand on whaling issues at the IWC.

Declaration 25 was not appended to the *Treaty of Lisbon* but it appears still to command respect among other EU Member States. In international law declarations are not legally binding, but they may have political weight. There are different views as to the status of this Declaration.

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## 1 Declaration No. 25 of the *Treaty on European Union*

### 1.1 Text of Declaration

Declaration No. 25 was [appended to the Final Act of the Intergovernmental Conference \(IGC\)](#) which agreed the *Treaty on European Union* (Maastricht Treaty). It is on the “Representation of the Interests of the Overseas Countries and Territories Referred to in Article 227(3) and (5)(a) and (b) of the Treaty Establishing the European Community” [now Article 355 of the *Treaty on the Functioning of the European Union*]:

The Conference, noting that in exceptional circumstances divergences may arise between the interests of the Union and those of the overseas countries and territories referred to in Article 227(3) and (5)(a) and (b), agrees that the Council will seek to reach a solution which accords with the position of the Union. However, in the event that this proves impossible, the Conference agrees that the Member State concerned may act separately in the interests of the said overseas countries and territories, without this affecting the Community’s interests. The Member State concerned will give notice to the Council and the Commission where such a divergence of interests is likely to occur and, when separate action proves unavoidable, make it clear that it is acting in the interests of an overseas territory mentioned above.

This declaration also applies to Macao and East Timor.<sup>1</sup>

Declaration No. 25 was not incorporated into or appended to the [Treaty of Lisbon](#) in 2008.

### 1.2 Status of Declarations

Declarations appended to the Treaties are non-binding expressions of agreement by the Treaty signatories. There are two types of declarations common to EC/EU Treaties: those adopted by the Intergovernmental Conference (IGC), which are adopted unanimously, and those made by Member States, which are unilateral.

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<sup>1</sup> OJC 191, 29 July 1992 <http://europa.eu/abc/treaties/archives/en/entr10.htm>

Declarations attached to the Final Act of the IGC do not have legal force, but those adopted by the Conference, such as Declaration No. 25, do represent political commitments and they might be found to have political weight in the event of a challenge. *Oppenheim's International Law* states that "the Final Act of a Conference does not itself normally constitute an agreement or treaty".<sup>2</sup> A Final Act is not normally a legally binding instrument, unless the parties intend it to be so. The former Labour Government's Explanatory Memorandum on the Lisbon Treaty stated of its Declarations: "They represent a political commitment on the part of those making them and in some cases are relevant for the purposes of interpreting the Treaty".<sup>3</sup>

## 2 EU relations with Greenland and the Faroe Islands

Denmark has devolved arrangements for two island territories: Greenland and the Faroe Islands, which have different cultures and are located far from each other and from Denmark. Each territory has a population of around 50,000. They exercise legislative and administrative autonomy over most internal matters and have some rights in matters of international concern to the islands. For example, in August 2004 the United States and Denmark, including the Home Rule Government of Greenland, signed agreements in Igaliku, Greenland, setting up a Joint Committee to broaden and deepen cooperation between the US and Greenland in a range of scientific, environmental, economic, commercial and educational areas.

Both Greenland and the Faroe Islands elect two representatives to the Danish parliament, the *Folketing*.

### 2.1 Greenland

Greenland was a colony of Denmark, becoming an integral part of the Kingdom of Denmark in 1953. Under the *Greenland Home Rule Act* of 1978 Greenland secured autonomy from Denmark in 1979. The Act provided Greenland with an elected assembly and executive with responsibility for taxation, education, planning, economic activity, social issues, labour, health, housing, transportation, environmental protection and other matters. The official languages are Danish and Greenlandic, the latter being closely related to the languages spoken by the Inuit in Canada, US and Siberia. Greenland has had its own flag since 1985. Politics are dominated by three parties. *Siumut* (Social Democratic) is the largest and seeks extensive autonomy within the framework of Danish sovereignty. The *Inuit Ataqatigiit* (Socialist) is the second largest party and pursues independence for Greenland. The third party, *Atassut*, supports close cooperation with Denmark. These three parties form a governing coalition.<sup>4</sup>

Greenland became a member of the then European Economic Community (EEC) when Denmark joined in 1973, but after Home Rule was introduced Greenland held a consultative referendum on membership of the EC in 1982. Greenlanders chose to leave the EC with effect from 1 February 1985. A special status and commercial agreements linked to withdrawal were agreed in protocols to the amendment treaty, and various legal instruments were agreed by all the Member States.

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<sup>2</sup> 9<sup>th</sup> edition 1992, ed. Sir R. Jennings and Sir A. Watts, p. 1187

<sup>3</sup> [Explanatory Memorandum on Lisbon Treaty](#), 30 September 2009

<sup>4</sup> [Danish Foreign Affairs Ministry Factsheet](#)

The EU has had a fisheries agreement with Greenland since 1985, which has been extended every few years until it was replaced by the Fisheries Partnership Agreements. The current Fisheries Partnership Agreement runs from 2007 to 2012 with a financial contribution of €15 847 244. This agreement allows EU vessels, mainly from Germany, Denmark, UK, Spain and Portugal, to fish in Greenland waters.

## 2.2 The Faroe Islands

The Faroe Islands are an autonomous region of Denmark. They were a Danish county until 1948, but have since then been self-governing in accordance with provisions of the *Home Rule Act* of 1948. This Act made the Faroe Islands part of the Danish Kingdom with special status as a self-governing community, its own flag and Faroese as the main language. Legislative and local administrative powers were transferred to the Faroes elected legislative assembly, the *Lagting*, and to the *Landsstyre*, which is the government of the islands. Defence and foreign affairs, the judiciary and the monetary system remained under Danish central government control, although the Faroese can influence legislation in these areas through the Danish government's local representative, the *Rigsombudsmand* or through their two seats in the *Folketing*. Although defence matters and foreign policy generally do not come under Home Rule, the Faroese authorities do conduct negotiations regarding fishing rights with other countries, both with and without the participation of the Danish Foreign Office. The Faroe Islands did join the EC with Denmark in 1973.

In the early 2000s the Faroese and Danish governments entered into negotiations to reform their relationship, in particular their financial relations and the duration of an interim arrangement in the event of increased home rule or full sovereignty. In 2002 the Danish Government and the Faroese Home Rule Government entered into negotiations on full sovereignty, which have not yet been concluded. The general election in April 2002 resulted in the creation of a new coalition government which slowed down the political process of achieving full sovereignty.<sup>5</sup> Elections in January 2004 returned the incumbent, pro-independence coalition, but internal splits among the parties gave rise to a new governing coalition from which the pro-independence Republican Party was excluded.

The question of increased home rule, or even total independence, has been much debated in Copenhagen and in the islands themselves. The exploration and extraction of oil in Faroese waters would no doubt have a considerable impact on the result of a referendum on full sovereignty. In 2005 The Danish Government set out its plans for further self-government for Greenland and the Faroe Islands.<sup>6</sup>

The Faroe Islands are not part of the EU and do not benefit from EU structural or regional funding. Their relations with the EU are governed by a 1977 Fisheries Agreement and a 1991 Free Trade Agreement (revised 1998), under which they participate in certain EU policies and initiatives.<sup>7</sup> The Faroe Islands are covered by the INTERREG IIIB [Northern Periphery Programme](#), which means they contribute to a co-financed fund of €55,627,531. The European Regional Development Fund contributes €22.6 million, Norway contributes €5.5 million, Iceland €1.57 million, the Faroe Islands €375 000 and Greenland €378 000 in programme funds.

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<sup>5</sup> Ibid

<sup>6</sup> Danish government website, "[New Goals, Government Platform](#)"

<sup>7</sup> See also the [Faroes Mission to the EU](#) website.

The Faroe Islands have become associated to the EU's [Seventh Framework Programme for Research \(FP7 2007-13\)](#) in areas of common research interest, such as energy, food, agriculture and fisheries, and biotechnology, socio-economic sciences and the humanities. Regular meetings of a Joint EU-Faroe Islands Research Committee, created under the Agreement, help identify common research priorities for joint research efforts. The Faroe Islands have made a financial contribution to the FP7 budget since 1 January 2010, in return for which organisations from the Faroes are treated on the same footing as those in EU Member States.

For a few years now there have been reports that the Faroese Government would like a closer relationship with the EU, although full membership is not being sought because the Government wants to retain fisheries rights which it might lose under the EU's Common Fisheries Policy.

### **3 The EC/EU and Denmark at the International Whaling Commission**

The EC has had competence in the areas covered by the International Whaling Commission (IWC) under former Article 174(1) TEC, which stipulated as an objective of the Community's environmental policy, the promotion of measures at international level to deal with regional or worldwide environmental problems. This includes the conservation of species, such as whales, on a global level.<sup>8</sup> The Lisbon Treaty further explicitly recognises the EU's exclusive competence in the area of marine conservation (Article 3(d) TFEU).<sup>9</sup>

The European Community/Union is not a member of IWC. It could not accede to the 1946 Convention, which reserves membership of the IWC to States only, but it has observer status. The European Commission cannot negotiate on behalf of EU Member States but 23 individual EU Member States, including the UK, are currently parties to the International Regulation on the Regulation of Whaling. These States individually express at each IWC meeting their position on proposals which fall within EC/EU competence. The IWC meeting in 2008 was the first in which the EC had a mandate, under Council Decision 9818/08, to exercise competence over some of the issues discussed

The European Scrutiny Committee reported in February 2009 on a proposal "establishing a position to be adopted on behalf of the European Community with regard to proposals for amendments to the Schedule of the International Convention on the Regulation of Whaling and its schedule".<sup>10</sup> The Committee cleared the document, noting that "the Government would pursue within the International Whaling Commission a line which accords closely with the UK position". The document was adopted by the Council on 2 March 2009.<sup>11</sup>

The Council decision states in Article 1 that "The position of the Community at the meetings of the International Whaling Commission (IWC) shall be in accordance with the Annex to this

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<sup>8</sup> See Commission Communication "Community action in relation to whaling", COM(2007) 823 final, 19 December 2007, para. 16 and Proposal for a Council Decision establishing the position to be adopted on behalf of the European Community with regard to proposals for amendments to the International Convention on the Regulation of Whaling and its Schedule", COM(2008) 711 final, 6 November 2008, p. 2.

<sup>9</sup> See also ECJ, Case 141/78 France v UK [1979] ECR 2923, para. 6 and Commission v UK, para. 17. Cetaceans come within the scope of the Common Fisheries Policy as set out in Annex I to Treaty. See also Council Regulation (EC) Nr. 2371/2002.

<sup>10</sup> See also ESC Report on (COM(08) 711, [ESC Ninth Report 2008-09, February 2009](#)

<sup>11</sup> See EU Environment Council press release, 2 March 2009 at [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/envir/106430.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/envir/106430.pdf)

Decision and shall be expressed by the Member States acting jointly in the interest of the Community".<sup>12</sup>

Article 2 provides for a coordinated approach even in the absence of an established Community position:

Where the position referred to in Article 1 is likely to be affected by new scientific or technical information presented before or during the meetings of the IWC or where proposals are made on the spot on matters which are not yet the subject of a Community position, a position shall be established on the proposal concerned through co-ordination, including on the spot, before the proposal is put to a vote.

The Annex confirms that "The Member States acting jointly in the interest of the Community shall take the following position on proposals for decisions by the IWC", and proceeds to set out that position.

### **3.1 Denmark invokes Declaration 25**

An EU joint position requires the support of all Member States. However, Denmark has invoked Declaration 25, allowing it to depart from the EU position as necessary to defend the interests of the Faroe Islands and Greenland.

It is not clear what the repercussions might be of not adhering to an agreed joint position, but failure to do so would be in breach of the Council decision, which is legally binding. The Member State could therefore run the risk of being taken to the European Court of Justice (ECJ), with the possibility of sanctions being taken.

Although Member States appear to have remained tolerant of the spirit of Declaration 25 and are wary of challenging it, it is not legally binding. That said, at CITES in 2000 Denmark exercised what was reported as its "rights" under Declaration 25 TEU in abstaining from the vote on whaling off Greenland.<sup>13</sup> At the International Whaling Commission's 61<sup>st</sup> meeting in June 2009, Denmark did not specifically invoke the Declaration; rather, as the Chair report stated:

Noting that the European Union (EU) had again adopted a common position for IWC/61 on a number of IWC matters, Denmark, in agreement with the Czech Republic who held the Presidency of the EU, clarified its position in relation to that common position. It informed the meeting that while as an EU Member State, Denmark is bound by the EU common position, because Denmark has overseas territories that are not part of the EU (Greenland and the Faroe Islands) it indicated that it may, in specific cases where the interests of Greenland and the Faroe Islands diverge from those of the EU, need to deviate from the common EU position. It therefore informed the meeting that when Denmark made an intervention, it would be to pursue the interests of its overseas territories and of Greenland in particular.<sup>14</sup>

It should be noted that Declaration 25 emphasises that any deviation from the common position is limited to "exceptional circumstances".

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<sup>12</sup> COM(2008) 711 final at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008PC0711:EN:HTML>

<sup>13</sup> CITES 9<sup>th</sup> Session, 17 April 2000

<sup>14</sup> Chair's Report of the 61<sup>st</sup> Annual Meeting, June 2009

### 3.2 Can Denmark rely on Declaration 25?

Views on the legal status of the 1992 Declaration vary. Below is *ClientEarth's*<sup>15</sup> legal analysis of the Danish reliance on Declaration 25:

It should also be noted that Denmark's justification which previously exempted it from having to comply with the EU Common Position (see Annex II of Common Position), is no longer valid, as this exemption was based on Declaration no. 25 annexed to the Final Act of the Maastricht Treaty. However, Declaration 25 is not annexed to the Lisbon Treaty, and therefore is no longer valid.

The Lisbon Treaty is very specific in setting out how the provisions of the new Treaty amend the old TEU. Many of the old declarations annexed to the Maastricht Treaty are now clearly no longer relevant, and many are specifically dealt with by provisions in the Treaty itself. It is not possible to argue that some of the declarations have been replaced by Treaty provisions, but others have not. This means that all of these declarations have been superseded. This is confirmed by the fact that in relation to the protocols attached to the Lisbon Treaty, old protocols that already existed under the Maastricht Treaty have in fact been re-annexed to the Lisbon Treaty (for example what is now Protocol 17 on Denmark) and, where necessary, amended to reflect the change from a European Community to a European Union (a change specifically and expressly made in relation to all relevant provisions throughout the TEU, the TFEU and the Protocols).

All of this shows clearly that there is no intention for the old Maastricht Treaty declarations still to apply. Had this been the intention, they would have been re-annexed with the necessary amendments to their wording.

In any case, it should be noted that the declarations annexed to the Treaty are not binding in their effect.

Therefore, Denmark is now not only under a duty to vote in accordance with the Common Position on whaling, but if Denmark's proposal in relation to the Greenland humpback quota still stands, and it does not fulfil the conditions of the Common Position and EU environmental law, then Denmark's proposal would bring Denmark into conflict with EU law.<sup>16</sup>

For another commentator Declaration 25 *is* valid but is limited in its sphere of application. In a footnote to a report called "Negotiating and voting on whale protection within the International Whaling Commission (IWC)", Professor Dr. Ludwig Krämer comments: "... in accordance with Declaration 25 annexed to the Final Act of the Maastricht Treaty, Denmark however, is allowed to take a different position on behalf of its overseas territories of Greenland (and Faeroe Islands), *but only as far as aboriginal subsistence whaling is concerned.*"<sup>17</sup>

Another commentary on the issue by Jan Wouters, Sijbren de Jong, Axel Marx and Philip De Man noted:

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<sup>15</sup> A non-profit law firm founded in 2008 with offices in London, Brussels and Paris

<sup>16</sup> *Client Earth* "The proposed reform of the International Whaling Convention and EU voting rules", Annex: Detailed legal analysis, Sandy Luk, Senior Lawyer, Marine Programme, ClientEarth, 20 May 2010

<sup>17</sup> *International Fund for Animal Welfare*, 26 April 2010, "Negotiating and voting on whale protection within the International Whaling Commission (IWC)"

A specific issue pertaining to the duty of loyal cooperation in international maritime fora concerns the representation of the interests of the overseas territories of EU Member States (FN 252). Declaration 25 annexed to the Final Act of the 1992 Maastricht Treaty and the FAO inter-institutional agreement in principle allow for separate action by a Member State if it proves impossible to reach agreement between the interests of its overseas territories and the EU. However, Declaration 25 stresses that this is limited to 'exceptional circumstances' and the duty of loyal cooperation in any case remains fully applicable.

FN 252: See the practice at IWC, FAO and ICCAT<sup>18</sup>

#### 4 Further reading

- Client Earth at <http://www.clientearth.org/reports/100520-marine-protection-eu-voting-and-iwc-f.pdf>
- International Fund for Animal Welfare, "[Negotiating and voting on whale protection within the International Whaling Commission \(IWC\)](#)", 26 April 2010, Prof. Dr. Ludwig Krämer, Derecho y Medio Ambiente
- "[The Faroes and the EU - possibilities and challenges in a future relationship](#)", Expert Committee, May 2010.
- House of Commons European Scrutiny Committee, Ninth Report of Session 2008–09, "[The EU and the Arctic Region](#)", 25 February 2009

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<sup>18</sup> "[Study for the Assessment of the EU's Role in International Maritime Organisations](#)" Final Report Prof. Dr. Jan Wouters, Sijbren de Jong, Axel Marx, Philip De Man, April 2009