EUROPEAN UNION

DELEGATION TO NORWAY

No. 08/21

The Delegation of the European Union presents its compliments to the Royal Norwegian Ministry of Foreign Affairs and has the honour to refer to the Note Verbale of the Royal Norwegian Ministry of Foreign Affairs of 4 May 2021 and the Annex thereto.

The European Union would like to respond to a number of arguments expressed in the Note Verbale of the Royal Norwegian Ministry of Foreign Affairs of 4 May 2021 and its Annex. The European Union reserves its position on any other aspects not addressed hereinafter.

1. Rights of the Parties to the Treaty of Paris and limits to the sovereignty of Norway over Svalbard

The European Union would like to draw the attention of the Kingdom of Norway to the exact wording of Article 1 of the Treaty of Paris, which reads as follows:

"*The High Contracting Parties undertake to recognise, subject to the stipulations of the present Treaty, the full and absolute sovereignty of Norway over the Archipelago of Spitsbergen, comprising, with Bear Island or Beeren-Eiland, all the islands situated between 10° and 35° longitude East of Greenwich and between 74° and 81° latitude North, especially West Spitsbergen, North-East Land, Barents Island, Edge Island, Wiche Islands, Hope Island or Hopen-Eiland, and Prince Charles Foreland, together with all islands great or small and rocks appertaining thereto.*"

Article 1 in itself makes it clear that full and absolute sovereignty of Norway over Svalbard, as set out in that Article, is qualified by the subsequent provisions of the Treaty. If the Parties to the Treaty were merely to recognise the Sovereignty of Norway over Svalbard without any limits or conditions, they would not have included a reference to "the stipulations of the present Treaty" and would not have set out those limits and conditions in Articles 2-9 of the Treaty.

Articles 2-9 of the Treaty lay down, for a number of activities, a special regime subject to specific provisions of the Treaty of Paris. For example, the right of fishing and hunting is established directly in Article 2 of the Treaty, is not limited in time, is not subject to any compensation to Norway or to any favourable decision by Norway. The same applies to the freedom of access and entry to Svalbard, which is set out in Article 3, as well as other activities addressed by the Treaty. The right of Norway to take measures that may have

an impact on those activities is conditional. In line with Article 2 they must "*be applicable equally to the nationals of all the High Contracting Parties, without any exemption, privilege or favour ... of any of them*", thus including Norwegian nationals. Therefore, the argument of Norway that sovereignty of Norway over Svalbard is not qualified by certain rights and obligations does not find its basis in the Treaty of Paris, because the said Treaty precisely stipulates conditions and limitations. Historically, it was on these precise terms that Norway was granted sovereignty over the long-disputed territory of Svalbard.

The above freedoms, as set out in Articles 2-9, based on the principle of equal treatment, have been established to ensure that Svalbard and its resources are equally accessible to all nationals and vessels of all Parties to the Treaty of Paris, without giving any favour or privilege to any of the Parties. They apply to the whole area covered by Article 1, i.e. the same area over which the sovereignty of Norway is recognised in the Treaty. This is the reason why Article 2 establishing the freedom of fishing in Svalbard and its waters contains the reference "to territories specified in Article 1". In addition, Article 2 specifies that the freedom of fishing also applies to the territorial sea, which was the only maritime zone in regard of which the rights of Coastal States were internationally recognised in 1920.

With the evolution of international law of the sea, islands can now generate an EEZ. It is a well-established principle of the international law of the sea that maritime zones, i.e. the territorial sea, the contiguous zone, the exclusive economic zone and continental shelf do not exist without the land. The sovereignty over land gives a right to the territorial sea, as described in Article 2(1) of UNCLOS: "*the sovereignty of a costal State extends, beyond its land territory and internal waters and [...] to an adjacent belt of the sea, described as the territorial sea*".

Certain sovereign rights of a Coastal State that exist in the territorial sea continue to apply in the exclusive economic zone. Therefore it is defined as an area beyond and adjacent to the territorial sea (Article 55 of UNCLOS). Similarly, the continental shelf is "*the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin*", as defined in Article 76(1) of UNCLOS.

The very origin of the potential fisheries protection zone (FPZ) generated by Svalbard is the Treaty of Paris. As the Treaty of Paris establishes rights and obligations for the land and the territorial sea, then, a fortiori, it does so for the FPZ, where the jurisdiction of a Coastal State is less extensive than the jurisdiction over its territory and its territorial waters.

UNCLOS does not provide for a possibility to acquire rights to the EEZ or the continental shelf without having at least the same rights over the land or the territorial sea. Consequently, given that:

- the rights and freedoms of the Parties to the Treaty of Paris set out in Articles 2-9 of that Treaty of Paris represent a special international regime in which those rights apply on an equal basis for all Parties and as such qualify the sovereignty and sovereign rights of Norway;

- the geographical area of the special international regime for Svalbard concurs with the geographical area over which the sovereignty and sovereign rights of Norway are recognised,

the rights set out in Articles 2-9 of the Treaty continue to apply beyond the land and the territorial sea, to all subsequent maritime zones of Svalbard, in line with the international law of the sea and the above provisions of UNCLOS.

The argument put forward by Norway that the application of Article 2 of the Treaty is limited to the land and to the territorial sea only, would imply the same geographical limits for the sovereignty and sovereign rights of Norway under Article 1. Consequently, the area beyond the territorial waters of Svalbard would be the high seas, to which neither the sovereignty and sovereign rights of Norway nor the rights of the other Parties of the Treaty would apply. It could thus be argued that the High Contracting Parties did not intend to yield more than the very limited territory and a territorial sea pertaining to Svalbard in keeping the rest of the waters as international waters. Although Norway has referred to Russia in its Note Verbale with the aim of supporting the Norwegian views Russia has held that Norway has no right to establish a FPZ beyond the territorial waters of Svalbard, as that area is high seas, and has been acting in accordance with it. If Norway considers that Svalbard generates a FPZ, it cannot do so without taking into account the specific regime of the Treaty of Paris.

In its Note Verbale Norway refers to "Norwegian waters". The European Union does not consider that this term applies to Svalbard waters, including to any of the maritime zones generated by Svalbard. The attributes of the Treaty of Paris, especially the right to fishing, hunting and extracting mineral resources, which applies equally to all Parties to the Treaty, including Norway, make the regime of Svalbard waters distinct from the regime of other Norwegian waters. Therefore, "Svalbard waters" is the term that accurately describes the specific regime of those waters.

2. The conditions for Norway to take conservations measures in Svalbard and its waters

The European Union would draw the attention of Norway to the wording of the second paragraph of Article 2 of the Treaty of Paris:

"*Norway shall be free to maintain, take or decree suitable measures to ensure the preservation and, if necessary, the re-constitution of the fauna and flora of the said regions and in their territorial waters; it being clearly understood that these measures shall always be applicable equally to the nationals of all the High Contracting Parties without any exemption, privilege or favour whatsoever, direct or indirect to the advantage of any of them.*"

From the above wording, it is clear that the right of Norway to take conservation measures in Svalbard and its maritime zones is conditional upon them applying equally to the nationals of all the Parties to the Treaty without any exemption, privilege or favour. The European Union has consistently held the position that Norway has no right to set any measures in Svalbard and its waters that disregard the above provisions. Any measures taken by Norway that are not in compliance with the above provision are in violation of the special regime applicable in Svalbard, go beyond the sovereignty granted to Norway over Svalbard, and thus are in violation of international law and have no legal

effect vis-à-vis the Contracting Parties to the Treaty of Paris. This is the case for Norway's measures regarding Arctic cod and other fisheries mentioned in the Note Verbale 02/21 of 26 February 2021.

In the Note Verbale of 4 May 2021, Norway claims that additional reporting requirements imposed only on vessels of the European Union are not subject to the equal treatment provisions of the Treaty of Paris. Reporting requirements are however fisheries control measures aimed at ensuring preservation of the fisheries resources and as such, it must be *clearly understood that these measures shall always be applicable equally to the nationals of all the Contracting Parties without any exemption, privilege or favour whatsoever, direct or indirect to the advantage of any of them*. Therefore, Norway is not entitled to agree with third parties on different measures in Svalbard waters, including control and enforcement measures such as reporting requirements, unless they are equally applied to all nationals of all Contracting Parties, including Norwegian nationals.

In the absence of measures taken by Norway in full compliance with the second paragraph of Article 2 of the Treaty and in order to avoid that no conservation measures are in force to preserve the sustainability of certain fishing stocks, the European Union has taken internal restrictive measures applicable to its own fleets. This includes the European Union internal quota of Arctic cod, a stock for which all Coastal States and fishing nations currently set their own unilateral quotas. These measures stem from the jurisdiction of the European Union over its own fleet and are not addressed to Norway.

Norway drew comparisons between the legal regime of the European Union and its Member States and the legal regime applicable to Svalbard. The European Union does not consider such a comparison to be relevant, as the regimes are substantially different in their nature. The rights of the Parties of the Treaty of Paris as set out in that Treaty are not subject to a positive decision by Norway, they exist independently whether such a decision is taken or not. The Treaty of Paris does not oblige the European Union to stop exercising its rights under the Treaty of Paris and to comply with Norwegian discriminatory provisions as long as a judicial authority has not annulled them. At the same time, the Treaty explicitly precludes any decision by Norway that is discriminatory. As explained above, the Treaty of Paris granted a right to Norway to take conservation measures only if they are not discriminatory. Therefore, discriminatory provisions adopted by Norway are in violation of international law and have no legal effect for the other Parties of the Treaty of Paris and their enforcement by Norway, if undertaken, would be unlawful.

3. Dividing EU rights between the EU and UK following the UK's withdrawal from the European Union

Norway has decided to grant full access to Russia and Norway to fish full quotas established for their fleets by those countries. Therefore, under Article 2 of the Treaty of Paris, it must likewise allow EU fleets to fish full quotas established by the European Union, and UK fleets to fish full quotas established by the UK, in Svalbard waters. In this situation, as Norway allows fishing full quotas established by one of the Parties to the Treaty, it cannot establish any further limits for the European Union and the UK. Therefore, the European Union and the United Kingdom are entitled to agree on the division of their rights to the quotas in Svalbard waters. The European Union and the United Kingdom have reached that agreement, which divided their commonly established fishing rights.

In the Note Verbale of 4 May 2021, Norway claimed that Norway had not sought to draw unilateral fisheries benefits from the withdrawal of the UK from the European Union. However, the facts contradict that statement. Firstly, the Norwegian actions, if recognised and implemented, would lead to a lower combined access to Svalbard waters separately for the European Union and the UK than the common level of access before the withdrawal of the UK from the European Union. Secondly, confirmed that the quotas to Svalbard waters taken from the European Union and the UK would be distributed as quotas to Norway and Russia.

From the explanations provided by Norway in the technical meeting on 9 June 2021, the European Union understands that Norway used a reference period of 1967-1978 in ICES division 2.b to determine EU rights, while a different period, if any at all, was used for the UK. The European Union disagrees with that method due to the reasons indicated hereinafter. According to the ICES data, during that period of 1967-1978 in division 2b the EU and UK accounted for 23.4% of total catches (Norway accounted for 6.8%). Therefore, if such a method were to be applied, the actual level of access to Svalbard waters to be allocated to the European Union should be significantly higher than that set by Norway and even higher than the quota set unilaterally by the European Union.

4. The obligation of Norway to comply with international law

As regards the fact that Norway and Russia jointly determine quotas for the totality of the stocks' distribution areas, without involving other nations fishing for those stocks in the high seas, the European Union already pointed out in the Note Verbale 02/21 that this practice is contrary to Article 63(2) of UNCLOS. This practice, which is already in breach of international law, in no circumstances justifies giving favourable treatment to either Norway itself or to Russia, which is unconditionally excluded in the second paragraph of Article 2 of the Treaty of Paris ("*without any exemption, privilege or favour whatsoever, direct or indirect to the advantage of any of them*"). Norway cannot set aside this prohibition to adopt discriminatory measures by including Svalbard waters in arrangements that apply also to other maritime zones generated by the Norwegian mainland.

In the Note Verbale of 4 May 2021, Norway argues that, for shared and straddling stocks, the practice by Norway and Russia of granting reciprocal zonal access is not discriminatory. The European Union can only agree with this understanding insofar Svalbard waters are not included in that reciprocal unlimited access, as otherwise it results in favourable treatment to two Parties to the Treaty of Paris and is therefore in breach of Article 2 of that Treaty. Moreover, as regards the Norway's offer for snow crab quotas within Svalbard to the European Union mentioned in the Note Verbale of 4 May 2021, Norway has no right to appropriate this resource in Svalbard to itself to the detriment of the rights of the other Parties to the Treaty and then to offer that resource to third parties in bilateral consultations. Like any other Party to the Treaty of Paris, Norway only has a right to exchange the fishing rights in Svalbard waters to which it is entitled as a Party to that Treaty of Paris, but not to appropriate to itself and negotiate the rights of the other Parties.

As regards the arrangements[1] between Norway and Russia for stocks in the Barents Sea, Norway claimed that they fall under Article 311 of UNCLOS, which would allow

[1] These arrangements are not publicly available.

Norway to derogate from the provisions of the international law of the sea that set out an obligation for the States to cooperate with the aim of ensuring sustainability of fish stocks, reflected in Article 63(2) of UNCLOS and Article 7(1)(a) of the Straddling Fish Stocks Agreement. The European Union would like to refer to paragraph 2 of Article 311 of UNCLOS, in which it is stated that "*this Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention*". The European Union underlines that the arrangements put in place by Norway and Russia are not compatible with UNCLOS and the Straddling Fish Stocks Agreement. Moreover, they affect the enjoyment by other States Parties and by the European Union, of their rights. It is appropriate to remind that Norway is a Party to the Convention on Future Multilateral Cooperation in North-East Atlantic Fisheries, and the stocks in the Barents Sea fall within the scope of that Convention.

It is highly regretful that, by using this bilateral mechanism with Russia, Norway took decisions negatively affecting sustainability of fish stocks. For example, Norway agreed with Russia a bilateral management strategy for Arctic cod and, based on that strategy, set a TAC for Arctic cod above the maximum sustainable yield and above the level of the fishing mortality in line with the precautionary approach. For Greenland halibut, Norway and Russia also established a TAC above the precautionary approach. Moreover, Norway agreed with Russia that unfished quotas by other fishing nations would be allocated to Norway and Russia. This makes any actual or potential efforts by the other nations fishing for those stocks, as well as the European Union, to ensure the sustainability of the stocks, including by setting lower quotas, ineffective. Such lower quotas would simply result in Norway and Russia allocating themselves higher quotas due to lower fishing by the other fishing parties, including the European Union.

The European Union would like to recall that in the Note Verbale 02/21 it has requested Norway to withdraw or amend discriminatory provisions. Moreover, the European Union would like to remind Norway that enforcement actions of discriminatory provisions adopted by Norway in breach of the Treaty of Paris would be unlawful and would constitute international wrongful acts. Such unlawful enforcement actions would entail international responsibility of Norway. As set out in Note Verbale 02/21, the European Union stands ready to take all necessary remedial countermeasures in respect of Norway, in order to safeguard legitimate fishery-related rights and interests of the European Union, which have been unlawfully curtailed.

5. The role of the Norwegian Supreme Court

As to the judgment of the Norwegian Supreme Court, the European Union does not find that its decisions in any way are addressed to or binding on the European Union, its Member States or any other Party to the Treaty of Paris. The Supreme Court of Norway is a national Norwegian institution, whose actions are attributable to the Kingdom of Norway. The European Union does not share the reasoning of the Norwegian Supreme Court in the 2006 judgment that alternative reporting requirements put in place for Russia due to its refusal to comply with Norwegian reporting requirements (as Russia considers the waters beyond the territorial sea of Svalbard as high seas), may be justified by the reporting for the whole area of the stock. There is no justifying reason why such alternative reporting requirements could not be applied to the other Parties to the Treaty.

As indicated above, the European Union considers that Norway is under an obligation to adopt and enforce the same reporting requirements for all Parties.

6. Geopolitical considerations and mutual cooperation

Regarding the criteria for admitting observers to the Arctic Council, especially the requirement of recognition of Arctic States' sovereignty, sovereign rights and jurisdiction in the Arctic and of the extensive legal framework that applies to the Arctic Ocean including, notably, the Law of the Sea, the European Union meets those requirements. The European Union has acted fully in compliance with international law, as explained above, and will continue to do so. At the same time, the European Union regrets that Norway has taken a number of decisions that are not in line with the international law, in particular UNCLOS and the Treaty of Paris.

The European Union values the cooperation with Norway and considers that it has been fruitful and mutually beneficial in a number of areas. The European Union also hopes that this cooperation would be able to continue in the future and considers that the respect of UNCLOS and the Treaty of Paris by all Parties, including Norway, is essential for that reason. The enforcement of discriminatory provisions by Norwegian authorities in respect of EU vessels fishing their legitimate quotas would not contribute to the bilateral cooperation. Those discriminatory provisions may result in an overfishing of the respective fish stocks and, absent cooperation on the Norwegian side, the European Union may need to take appropriate measures, including for the conservation of those exhaustible living resources, consistent with its international law obligations. Therefore, the European Union invites Norway to give due consideration to the applicable legal framework and engage with the European Union in a bilateral dialogue and cooperation.

The Delegation of the European Union avails itself of this opportunity to renew to the Royal Norwegian Ministry of Foreign Affairs the assurances of its highest consideration.

Oslo, 28 June 2021

To the Royal Norwegian Ministry of Foreign Affairs

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