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Mrs. Maria DAMANAKI  
Commissioner for Maritime  
Affairs and Fisheries  
European Commission  
1049 Brussels

Brussels, 18<sup>th</sup> July 2014

## Re: Europêche and Copa-Cogeca key points of concern regarding the current fisheries developments in the maritime zones of Svalbard

Dear Commissioner Damanaki,

On behalf of the European catching sector, we would like to inform you about the latest worrying developments concerning fisheries management carried out by Norway in the maritime zones of Svalbard and the Norwegian EEZ.

We had the opportunity to raise this issue with you when we first met at the beginning of your political term on 9/12/2010 and from the letter EP(12)10 dated 7 February 2012 concerning the fishery for Greenland Halibut in Svalbard waters.

### Political & Legislative background

Until the XX century, Svalbard's legal status under international law was that of *terra nullius*. The claim of sovereignty from different states as well as the unsustainable management of the resources in the area led the International community to conclude the Treaty concerning the Archipelago of Spitsbergen, Paris, 9<sup>th</sup> February 1920. The Treaty was signed by 20 out of 28 EU member states. It is to be noted that the EU itself is not a party to the Treaty.

The Treaty recognises in Art. 1 the full sovereignty of Norway over the archipelago subject to the stipulations of the Treaty. The latter directly refers to the **rights of equal access and treatment in relation to fishing** and hunting, i.e. the principle of non-discrimination set out in Art. 2. Further, Art. 3 provides *the equal liberty of access and entry for any reason or object whatever to the waters, fjords*. Finally, the Preamble makes an explicit mention of the desire for an equitable regime.

### Scope of the Treaty

The main dispute concerns the spatial **application of the Svalbard's Treaty to the continental shelf and the 200-mile zone**. Nowadays, it seems that the majority of states concerned by this issue (including the European Commission), have aligned their positions to that of the United Kingdom<sup>1</sup>, which is worth mentioning here:

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<sup>1</sup> *Note verbale*, of 11 March 2006, by the British Government to the Government of Norway

[. . .] *The United Kingdom considers that the Svalbard archipelago, including Bear Island, generates its own maritime zones, separate from those generated by other Norwegian territory, in accordance with the United Nations Convention on the Law of the Sea. It follows therefore that there is a continental shelf and an exclusive economic zone which pertain to Svalbard.*

*Second, the United Kingdom considers that **maritime zones generated by Svalbard are subject to the provisions of the Treaty of Paris**, in particular Article 7, which requires that Svalbard should be open on a footing of equality to all parties to the Treaty and Article 8, which inter alia specifies the tax regime which applies to the exploitation of minerals in Svalbard.*

*The United Kingdom expects that the Norwegian authorities will fully comply with the obligations of Norway under the Treaty of Paris, as set out above.*

Norway, according to a **literal and restrictive interpretation of the Treaty**, has contested this interpretation by stating that the rights in Art. 2 and 3 do not apply beyond the “territorial sea” of Svalbard. Under the contemporary law of the sea “UNCLOS”, the territorial sea is extended to 12 miles from the baseline of the coast (originally Norway claimed a 4-mile territorial sea).

In line with the international mainstream opinion, we believe that the Treaty and its **non-discrimination principle should be applied beyond the territorial sea**, i.e. stretching from the baseline out to 200 nautical miles from its coast. This conclusion is supported by an **evolutionary interpretation** which takes into consideration the *object and purpose of the Treaty*<sup>2</sup>. In fact, international jurisprudence such as the *Aegean Sea and Oil Platforms* cases support the argument that the rights in Art. 2 & 3 should be extended beyond the territorial Sea. Further legal cases, such as the *Costa Rica v. Nicaragua*, *Iron Rhine arbitration* and *Gabcikovo - Nagymaros* suggest that a **treaty is not static**; it shall be adapted to new rules of international law (such as the UNCLOS).

In addition, the **object and purpose of the Treaty will be preferred to the strict application of the Treaty (as stated by Norway)**, which as the Preamble dictates, is *to provide the Svalbard archipelago with an equitable regime, in order to assure its development and peaceful utilisation*. Nevertheless, Norway is unilaterally legislating and enforcing their national laws in the area without any consideration for the Treaty.

### **Current legal status of the Svalbard’s maritime zones**

In 1976 Norway established off its mainland coast a 200-mile EEZ. In contrast, in order to avoid controversy over the spatial application of the Svalbard Treaty beyond the territorial sea (12 miles), Norway established a **200-mile “non-discriminatory” fisheries protection zone (FPZ)** by the Royal Decree of 3 June 1977 which regulates the establishment of quotas, technical measures and reporting of catches. Therefore, instead of claiming the right to establish a regular EZZ as well as a contiguous zone around Svalbard, it preferred not to dispute other state parties’ positions on the scope of application of the Treaty. This directly leads one to think that Norway’s views on the subject are not as clear as they try to make us believe.

In addition, Norway and Russia signed on 15<sup>th</sup> September 2010 the **Murmansk Treaty** on the maritime delimitation and cooperation in the Barents Sea and the Arctic Ocean. Both parties agreed on the introduction of a division line which goes through international waters (the so called Loop Hole) and through the eastern side of the Svalbard’s FPZ.

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<sup>2</sup> The disputed maritime zones around Svalbard - Robin Churchill and Geir Ulfstein; page 575

This Treaty has introduced an unclear legal status for certain areas. Moreover, Norway has apparently transferred the management of certain areas covered by the FPZ to the Russian authorities.

Europêche condemns this unilateral decision taken by Norway's government, which by signing the aforementioned Treaty **completely disregards the rights granted by the Spitsbergen Treaty** to the signatory state parties and constitutes a **flagrant abuse of law**.

### Fisheries management

First of all, it is worth noting that the Svalbard's territorial sea and FPZ are a natural extension of Norway's sovereignty declared by the Spitsbergen Treaty. As stated above, the former legal status of the land was that of *terra nullius*, which means that **Norway exclusively holds the sovereignty over Svalbard thanks to the concession granted by the Treaty**. Accordingly, without this agreement achieved at international level, Norway would not have the right to establish a FPZ in the area.

Furthermore, the sovereignty granted to Norway was conceded with the major purpose **of maintaining a sustainable management of resources on an equal level in those territories**. In fact, the Royal Ministry of Foreign Affairs has declared that the main purpose of the zone was to ensure the protection and sound management of the living resources, since this is one of the most important nursery areas for important fish stocks.<sup>3</sup>

Most of the EU member states are signatory parties of the Spitsbergen Treaty and therefore should be considered as "coastal states" (in the legal sense of the term). With this purpose, Norway should grant equal access to fishing resources to those signatory countries respecting the principle of non-discrimination. However, Norway is in infringement of its primary obligations stemming from the Treaty when it **unilaterally allocates up to 95% of the quotas to its own fishing fleet (alongside with Russia) and decides at its sole discretion on the geographical demarcation of the Barents Sea (Russia, Greenland)**.

In fact, Norway considerably varies the way it allocates the TACs in the maritime zones of Svalbard as well as the approaches applied in its bilateral access agreements with different countries<sup>4</sup> (Icelandic TAC allocation on Norwegian Spring-Spawning Herring); giving priority to its own national interest over an equitable regime ensuring the conservation of the stocks. Further, as detailed below, Norway unilaterally decides not only on the regulation of stocks confined to the FPZ of Svalbard but also on transboundary stocks, disregarding RMFOs recommendations (NEAFC).

It is worth noting that direct access to the FPZ of Svalbard for EU member states is normally established by **historic track records**. This formula raises concerns on its compatibility with the regime of equal access and non-discrimination to the Svalbard Treaty. Nevertheless, the track records must reflect the right reference periods for allocation (preventing past mistakes)<sup>5</sup> as well as the current state and migration patterns of the fish stocks. With this purpose, Europêche advocates for the introduction of other criteria in line with the Spitsbergen Treaty in order to grant fair access to those waters to the EU fishing fleet (non-discrimination, sound scientific advice and respect for all parties' interests).

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<sup>3</sup> Svalbard and the Surrounding Maritime Areas. Background and legal issues – Frequently asked questions

<sup>4</sup> The International Journal of Marine and Coastal Law 27(2012) 3-58 Fisheries Regulation in the Maritime Zones of Svalbard

<sup>5</sup> Written Question P-2160/00 by Carmen Fraga on the regulation of shrimp fishing in the Svalbard

## Particular violations of the international law

From the past recent years we have witnessed growing international cooperation between Norway and Russia within the Joint Norwegian-Russian Fisheries Commission. This body is setting TACs and quotas in the Barents Sea to the clear detriment of EU Member States (signatories of the Svalbard Treaty).

We provide a series of distressing examples below:

1. Concerning the **Greenland halibut**, Norway has issued a general prohibition of catching this species both in the territorial waters of Svalbard (Reg. No 1518) and in its FPZ (Reg. No 1524). However, it contains an exception allowing vessels which have a license to catch this species in the Norwegian EEZ, to fish in the territorial waters and FPZ around the Svalbard in order to complete their quota. These regulations aimed to protect the good state of the stock, yet, at the same time, become a **legal ruse provoking a *de facto* exclusion of the EU fishing fleet from those waters** (even from the territorial waters where there is no controversy on the scope of the Spitsbergen Treaty, i.e. it fully applies); while allowing the Russian and Norwegian fleet to catch up to 96% of the quota available.
2. As for the **haddock**, while Norwegian, Russian and Greenlandic vessels are allowed to directly target this species on the Svalbard maritime zone, **EU vessels are forced by Norwegian regulations to maintain an impracticable 14% by-catch applied to each individual net haul**. Once again, due to illegitimate and discriminatory measures the EU fishing fleets are forced to leave those waters or limit their fishing ground only to areas where abundance of haddock is very low relative to cod.

Another example of Norway's actions in disregard of international law and sound management of fishing resources, is its unilateral measures regarding redfish in ICES Subareas I and II.

3. The NEAFC Commission issued a decision (Recommendation 1:2014) whereby 19.500 tons of **redfish** (*Sebastes mentella*) could be caught in international waters covered by the NEAFC Convention. This decision is totally in line with the advice provided by ICES, which recommends a maximum catch of 24.000 tons. Accordingly, Norway should get the remaining 4.500 tons in its own waters. However, contrary to the NEAFC decision and ICES recommendation, Norway has unilaterally set a TAC of 17.280 tons that can be caught in their own EEZ. **Europêche condemns this behaviour which is completely discriminatory to the EU fishing fleet as well as dangerous for the survival of the species that Norway claims to protect.**

## Commission position

Europêche takes note of past notifications<sup>6</sup> issued by the Commission challenging the restricting and enforcement measures over non-Norwegian vessels adopted by this country in the maritime zone of the Svalbard. However, this position seems to be altered in the recent **Note Verbale 19/11** (in line with the UK's position above) where the European Commission accepts the regulations proposed by Norway subject to:

1. The application of the non-discrimination principle;
2. Based on scientific advice;
3. Respected by all interested Parties.

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<sup>6</sup> Notes Verbales No. 26/04, 32/09

**We are extremely interested to know whether the aforementioned position is indeed the new approach adopted by the European Commission on the subject.**

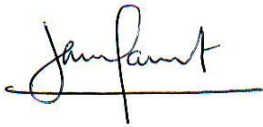
Since there is no compensatory mechanism in place for potential losses incurred by EU vessels in the area, the Commission has stated that **it would welcome informal discussions with Norway in order to ensure that the rights of Member States in the area are preserved and that a fair division of any possible quotas is ensured, including those allocated to the EU<sup>7</sup>.**

In our opinion, the Commission has been negligent and unsuccessful in achieving those targets, as evidenced by the cases stated above. Further, the Commission continuously refuse to explore the utilisation of other persuasive measures to compel the competent authorities of Norway to fully implement the non discriminatory principle of the Svalbard Treaty.

We are sure that we concur on the imperative need to address the relations between the EU and Norway in Svalbard and maritime zones around the archipelago. **Accordingly, Europêche formally request to be fully informed and involved in the talks with Norway which is of crucial importance to the ship owners we represent.**

Therefore, we would very much appreciate the opportunity to discuss this issue with you further and your services in order to find a short-term solution which could be of benefit for both parties (Norway-EU).

Yours sincerely,



Javier Garat  
President of Europêche



Pekka Pesonen  
Secretary General of Copa-Cogeca

CC: Lowri EVANS, Stefaan DEPYPERE, Bernhard FRIESS

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<sup>7</sup> Answer given by Ms Damanaki on behalf of the Commission to the Written Question No E 2979/2011(1).