



ROYAL NORWEGIAN MINISTRY
OF FOREIGN AFFAIRS

The Royal Ministry of Foreign Affairs presents its compliments to the Delegation of the European Union and has the honour to refer to the latter's Note Verbale No. 19/11 dated 8 July 2011 concerning the regulations of 11 May 2011 relating to fishing for haddock in the Fisheries Protection Zone around Svalbard in 2011, which were notified by the Mission of Norway to the European Union to the European Commission through Note Verbale No. 13/2011 of 27 May 2011.

As between the parties to the United Nations Convention on the Law of the Sea concluded at Montego Bay on 10 December 1982 (hereinafter referred to as the Convention), the Convention governs the rights and jurisdiction of the coastal State and the rights and freedoms of other States, including in maritime areas around Svalbard. The European Union and all its member States are parties to the Convention. The developments that have occurred in the customary international law in the matter are also reflected in the relevant provisions of the Convention.

As the coastal State, Norway is entitled, in accordance with the Convention and customary international law, to exercise *inter alia* fisheries jurisdiction in a maritime area up to 200 nautical miles from the baselines from which the breadth of the territorial sea around Svalbard is measured. For this purpose, the Fisheries Protection Zone around Svalbard was established in 1977. Under international law, Norway is the sole State that has the powers to establish fishing quotas within the said zone.

As parties to the Convention, the European Union and all its member States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of the Convention and other rules of international law in so far as they are not incompatible with part V of the Convention. Norway expects other States and the European Union to comply with these laws and regulations, in accordance *inter alia* with the rules contained in Articles 58 and 62 of the Convention.

Since reference is made in the Delegation's Note to the Treaty concerning the Archipelago of Spitsbergen, signed at Paris on 9 February 1920 (2 LNTS 8 – hereinafter referred to as the Treaty), it is noted that the European Union is not a party to it. While the European Union and all its member States are parties to the Convention, the same does not apply as regards the Treaty. The Treaty does not accord rights to nationals or legal persons of third States, to third States or to the European Union as such, nor has Norway assented thereto. Accordingly, Norway has not recognized that the Treaty creates any rights for the European Union.

Moreover, Norway reiterates the consistently held view, which is in accordance with the clear terms of the Treaty, that the stipulations contained in certain provisions of the Treaty do not apply beyond the territories of the archipelago or their territorial waters.

References in the Treaty to “the territories specified in Article 1” mean islands great or small and rocks appertaining thereto. Treaty provisions ensuring equal treatment with regard to fishing in Article 2 apply to “the territories specified in Article 1” and to their “territorial waters”. In accordance with international law, the “territorial waters” comprise the internal waters on the landward side of the baseline and the territorial sea. It is noted that the legal regime of the economic zone and other 200-mile zones does not, according to established international law, result from a conversion of prior territorial waters. Instead, it represents a special legal regime that replaced a prior regime of the high seas, under which international cooperation on resource management had not led to satisfactory results, prompting the establishment of coastal State zones.

Moreover, in accordance with established international law, it should be noted that the notion of the 200 mile zone cannot be assimilated to the concept of territory or territorial waters of a State. This has no bearing on the interpretation and application of particular treaties or instruments of the European Union and their spatial scopes of application, because of their declared object and purpose and particular considerations, based on reciprocity between the States parties concerned. The latter include and are not limited to the context of an internal market, and the dynamic processes of creating an ever closer union ensuring that advances in economic integration are accompanied by parallel progress in other fields. No such considerations apply as regards the Treaty of 1920, whose clear terms moreover give rise to no ambiguity.

It is the consistent position of Norway that the provisions contained in Article 2 of the Treaty do not apply in the maritime areas beyond the territorial waters of Svalbard. Consequently, they do not apply to the Fisheries Protection Zone

around Svalbard. Moreover, even if these provisions had been applicable to the Fisheries Protection Zone, they would have applied only to the extent they would have been compatible with the Convention pursuant to Article 311, Paragraph 2 of the latter. Furthermore, as will appear below, Norwegian laws, regulations and measures concerning the Fisheries Protection Zone do incidentally not contain anything that would have constituted different treatment on arbitrary or any other unjustifiable grounds.

Furthermore, as regards the reference made in the Delegation's Note to "conditions placed upon Norway's entitlement to take measures for the conservation of the fisheries resources within these waters under the said Treaty", Norway would like to note that this appears to misrepresent the precise terms of the Treaty. It should briefly be recalled that no State denies that Norway has the sole sovereignty over the archipelago. The Treaty states in its Article 1 that "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 (...)". Accordingly, it was the recognition of Norway's sovereignty over the archipelago by the said States that was subject to the stipulations referred to, while this sovereignty was as such not subjected to any stipulations – it was "full and absolute". As also confirmed in the *travaux préparatoires* of the Treaty, any notion that Norway should for instance become an administering power exercising authority on behalf of other States was firmly rejected. Instead, the full and absolute sovereignty of Norway was recognised. Thus, Norway alone exercises the authority of a territorial sovereign on the archipelago. Norway is moreover fully committed to continue to respect all its legal obligations and fulfil all its responsibilities as the territorial sovereign on the archipelago.

For all the stated reasons, the European Union has no right, under international law, to impose fishing quotas for haddock or any other fish stock in waters under Norwegian coastal State jurisdiction in contravention of Norwegian regulations. Any internal regulations of a domestic legal order of the EU cannot under international law exceed the relevant quotas or rights accorded to EU vessels by Norway as the coastal State.

Norway has previously, on several occasions, expressed the expectation that all the member States of the European Community/Union will act in full compliance with their obligations under international law in Norway's Fisheries Protection Zone around Svalbard as well as in any other area under Norwegian jurisdiction. It has also expressed the expectation that they take the necessary steps to ensure compliance by their vessels with the conservation measures and other terms and conditions established in the laws and regulations enacted by Norway as a coastal State in accordance with

international law. It is moreover recalled that, without prejudice to the responsibility of an international organization, a State member of such an organization may itself incur international responsibility for internationally wrongful acts committed by the organization, notably if it should seek to avoid complying with one of its own international obligations by taking advantage of the fact that the organization has competence in relation to the subject matter of that obligation, thereby prompting the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation.

The stock of Northeast Arctic haddock is a shared fish stock between two coastal States, Norway and the Russian Federation. This fish stock has been managed by the Joint Norwegian-Russian Fisheries Commission since 1976.

The stock of Northeast Arctic haddock is moreover a straddling fish stock that, in its entirety, moves between Norwegian and Russian waters. It has three main spawning areas in Norway's Economic Zone. It has not moved beyond areas of national jurisdiction.

Over the last years, the population of Northeast Arctic haddock has been growing as a consequence of strict long-term management measures applied by Norway and Russia. The two coastal States have consistently adopted a precautionary approach and acted on the basis of advice from the International Council for the Exploration of the Sea (ICES).

The Joint Norwegian-Russian Fisheries Commission set the Total Allowable Catch of Northeast Arctic haddock in 2011 at 303.000 tons, consistent with ICES advice. The historic annual catch levels since 1950 have varied from 21.000 tons to 322.000 tons, with an average of 127.000 tons. The current high levels thus represent a peak in catches. Moreover, they are likely to be reduced in the years to come.

Historically, Northeast Arctic haddock has not been abundant in the Fisheries Protection Zone around Svalbard. Catches have primarily been sporadic by-catches related to the trawl fishery for cod. However, generally increased stock levels since 2009 have temporarily caused a wider area of distribution for this fish stock. As a consequence, haddock has become somewhat more available in parts of the Fisheries Protection Zone around Svalbard. Consistent with its obligations as a coastal State under the Convention, Norway thus adopted in 2011 fishing regulations for haddock also in that zone. To allow an unregulated fishery for haddock there would have had undesirable consequences, and would have been contrary to Norway's international obligations under the Convention.

There are no specific haddock quotas allocated in 2011 for the Fisheries Protection Zone. Instead, quotas are set for the stock regardless of where it is caught. This is in conformity with the consistent management practice followed over the years. Indeed, the harvest control rule adopted by the Joint Norwegian-Russian Fisheries Commission has traditionally not specified a single catch area for Northeast Arctic haddock. The Norwegian and Russian fleets have been permitted to catch haddock within the set quotas in either the Russian Exclusive Economic Zone, Norway's Economic Zone or Norway's Fisheries Protection Zone around Svalbard. Catches in either zone would be counted against the quota set for the vessels and countries concerned.

The overall catch levels for Northeast Arctic haddock for the year 2011 was set at the 39th session of the Joint Norwegian-Russian Fisheries Commission, at 303.000 tons, of which 8.000 tons of the TAC was allocated to scientific purposes. According to annex 4 of the Protocol, the quota set aside for fishing by non-coastal States in the exclusive economic zones of Norway and Russia is respectively 8.700 tons and 5.800 tons. The remaining part of the TAC is divided with equal shares to Norway and Russia respectively. In contrast to the allocation of cod, no haddock quota is set aside for fishing by non-coastal States in the Fisheries Protection Zone around Svalbard. This is a reflection of the traditional fishing patterns, where catches of haddock in this zone have only occurred as sporadic by-catches.

As in previous years, Norwegian and Russian fishing vessels are allocated vessel quotas of haddock from the national quotas as set out by the Joint Norwegian-Russian Fisheries Commission. Regardless of fishing area, all catches are counted against the national quotas. There are thus no specific quotas allocated for fishing in the Fisheries Protection Zone in the year 2011. Quotas are set for the stock regardless of where it is caught.

Greenland has acquired a quota from Norway for the year 2011, which is deducted from Norway's national quota referred to above. Greenlandic vessels may catch their quota in either of the zones, and all catches are counted against the quota that Greenland has acquired from Norway. There is, thus, no specific quota for Greenland in the Fisheries Protection Zone, but an option for their vessels to catch haddock under the acquired quota also there.

Vessels of member States of the European Union have historically not fished for haddock in the Fisheries Protection Zone. Instead, they have fished for haddock in Norway's Economic Zone, within the framework of the Norway – EU bilateral fisheries agreement. Catch statistics and observations from inspections at sea confirm a sudden increase in catches of haddock in the Fisheries Protection Zone by certain EU-vessels in the years of 2009 and 2010,

a fishery not counted against the EU's quota for haddock in Norwegian waters in those years. Reports confirm that this increase coincides with EU fishing vessels attempting to develop a targeted and unregulated fishery for haddock. This trend also appeared to continue in the first months of 2011.

Such an unregulated fishery could not continue. According to the Agreed Record of Fisheries Consultations between Norway and the European Union for 2011, the quota to the EU of Northeast Arctic haddock is 1.350 tons in ICES Areas I and II. At the time Norway introduced its regulation for haddock in the Fisheries Protection Zone, the latter quota clearly appeared to already have been caught by EU vessels – primarily as by-catch in cod fishing. There were thus no extra quantities left for the EU to catch elsewhere, contrary to the situation for Greenland.

Norway could have introduced a hard limit on the catches of haddock by EU vessels in the Fisheries Protection Zone consistent with the fact that the 2011 quota of the EU had already been utilized by the time of the introduction of the regulation. However, that would have meant that the trawl fishery for cod in the Fisheries Protection Zone, where there are traditionally certain levels of by-catch of haddock, would have had to cease with immediate effect. This solution was thus not chosen for the year 2011. Rather, a regulation allowing EU vessels a certain level of by-catch of haddock was introduced on 11 May 2011. Average levels of by-catch of haddock in the cod fishery over the past ten years had been 12, 6 %. The regulations have allowed for catch levels even beyond that, by increasing the level of by-catch of haddock to 15 %.

Consequently, the regulations of 11 May 2011 indirectly *increase* the catch volume of haddock from EU fishing vessels in ICES Areas I and II in 2011. This follows from the by-catches of haddock in the cod fishery in the Fisheries Protection Zone around Svalbard not being counted against the EU quota of 1.350 tons. This is still the only part of the fishery for Northeast Arctic haddock which is not directly counted against any predetermined quota.

Norway, thus, takes issue with the description of the Norwegian regulations as being discriminatory and less favourable to vessels of member States of the European Union. The regulation for 2011 may actually appear to be more generous to vessels of member States of the EU, than to vessels of other States, as the by-catch in the cod fishery in the Fisheries Protection Zone is not deducted against the EU-quota of 1.350 tons. With the EU-quota for cod in the Fisheries Protection Zone set at 25.973 tons, a maximum by-catch of 3.896 tons of haddock has been permitted. This is a generous level of by-catch, by far exceeding the EU-vessels' average annual catches over the last decade. The possibility to conduct a cod fishery regardless of the haddock quota utilization

appears to be a generous regulation, as there is no risk of a stop in the cod fishery as a consequence of an exhausted quota of haddock.

Norway appreciates the very good cooperation with the EU on fisheries related issues. Norway trusts that the generous regulation for the year 2011 is appreciated by the EU and its member States. Haddock has traditionally been a by-catch in the cod fishery of EU member States vessels. The developments in later years have shown that the vessels operating in Norway's Economic Zone are capable of managing a direct fishery of cod with less by-catch of haddock. Also for this reason, the European Union has in later years reduced the volume of the quota of haddock bought from Norway. The situation in 2011 may require Norway and the EU to revisit the issue of the size of the quota that the EU wishes to exchange with Norway for the year 2012.

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



Oslo, 9 August 2011

European Union Delegation to Norway

Oslo