Annex

Svalbard, the 200-mile Fisheries Protection Zone and Norway's fisheries regulations

This annex sets forth in further detail Norway's response to the Note Verbale No. 02/21 of 26 February 2021 from the Delegation of the European Union to the Royal Ministry of Foreign Affairs regarding regulation of fisheries opportunities in the Fisheries Protection Zone around Svalbard.

1. Norway has full and absolute sovereignty over the Svalbard Archipelago, with all the attributes that flow from such sovereignty

For the sake of good order, Norway recalls that the parties recognize the full and absolute sovereignty of Norway over the archipelago.

The precise wording of the relevant part of Article 1 of the Treaty concerning the Archipelago of Spitsbergen, done at Paris on 9 February 1920, ("the 1920 Treaty") reads, in the two authentic language versions "*undertake to recognise, subject to the stipulations of the present Treaty, the full and absolute sovereignty of Norway over the Archipelago*" and "*sont d'accord pour reconnaître, dans les conditions stipulées par le présent Traité, la pleine et entière souveraineté de la Norvège sur l'archipel*". Norway's sovereignty over the archipelago is thus an ordinary one under international law.

This recognition was combined with stipulations contained in the Treaty. These included provisions of equal treatment of nationals of Contracting Parties as regards specified economic activities on the archipelago and, in some cases, in its territorial waters. These provisions give rise to obligations of a traditional nature under international law, notably as regards the treatment of foreign nationals. The identification of particular legal obligations thus requires a concrete interpretation of the relevant provisions of this and other applicable treaties, on the basis of established rules of interpretation of treaties.

Contrary to what has sometimes been claimed, this is not a conditional sovereignty or a partial sovereignty. This is moreover fully supported by a number of authoritative sources and State practice, including legally binding unilateral declarations by States prior to the conclusion of or the adherence to the 1920 Treaty. An example is provided by the formal unilateral and unconditional recognition over Norwegian sovereignty over the archipelago by the Soviet Union (now the Russian Federation as the continuing State) on 16 February 1924, eleven years prior to becoming a party to the Treaty. It was stated (here with an English language translation) that *"(...) I wish to inform you that as of this moment the Government of the Union recognizes the sovereignty of Norway over Spitsberg, including Bear Island, and that consequently it will in future raise no objections on the subject of the Spitsbergen Treaty of 9 February 1920 or the*

mining regulations appended thereto". This recognition was thereafter again referred to in a later formal communication, in 1926.

Similarly, the interdependence, or equivalent nature, of the two unilateral declarations made in 1919 respectively by Norway and Denmark as regards the Spitsbergen and the Greenland questions, in the context of respective intentions to obtain recognition of sovereignty, has been studied in detail by the Permanent Court of International Justice in its judgment of 5 April 1933 in the Eastern Greenland case (p. 27, at 69-73). Authoritative unilateral assurances of unconditional support to Norwegian sovereignty over the archipelago were also received prior to the conclusion or entry into force of the Treaty.

An example among others of the consequences of normal attributes of territorial sovereignty, including autonomous sovereign powers of decision-making and jurisdiction under international law, is illustrated by the concrete terms in Protocol 40 on Svalbard of the European Economic Area Agreement, where the first paragraph states "*When ratifying the EEA Agreement, the Kingdom of Norway shall have the right to exempt the territory of Svalbard from the application of the Agreement*".

Norway's full and absolute sovereignty over the archipelago has also the consequence that Norway – and only Norway - can exercise the powers granted to coastal States under international law in the maritime zones around the archipelago.

Norway expects the EU and its Member States to fully respect Norway's sovereignty, sovereign rights and jurisdiction in relation to the archipelago.

2. Article 2 of the 1920 Treaty finds no application beyond the territorial waters

The Note Verbale of 26 February 2021 has frequent references to Article 2 of the 1920 Treaty, as the sole basis for claiming the right to set unilateral EU fishing quotas. Intriguingly, this is done without any quotation of the actual terms contained in Article 2, whose first paragraph sets out that "*Ships and nationals of all the High Contracting Parties enjoy equally the rights of fishing and hunting in the territories specified in Article 1 and in their territorial waters*" (emphasis added).

Considering the content of Article 2, as is clear from its wording, this provision applies to the territories of the islands and their territorial waters. The meaning of "territorial waters" was in the context of Svalbard precisely identified in a number of diplomatic exchanges and formal communications prior to the adoption of the Treaty in 1920.

The precise use of the term was clearly linked to the purposes of defence and maritime neutrality, which was the overriding concern on the Norwegian side. It should here also be noted that Norway had, pursuant to a common understanding, proposed the draft text that formed the basis for the negotiations of the Treaty. Other States, and particularly their Admiralties, had thoroughly considered the implications of the use of the term. This had been done against the background of any potential risk of it constituting a precedent elsewhere, with a view of avoiding any departure from established usage of international law for the term territorial waters. A difference was related to the exact extent of the territorial waters, not its

meaning and functions, as the majority of States had embraced a limit of territorial waters of three miles from the low water mark of the coastline, while Norway had a limit of four miles. Moreover, adopting particular rules for fisheries beyond the territorial waters had previously been considered in the context of the archipelago, but were discarded. The choice was deliberately made to link the fisheries rule in Article 2 to the territorial limit to which Admiralties attached great importance from a naval point of view. After alternative options had previously been discussed and discarded, the ultimate formulation chosen must be considered as the outcome of deliberate choices made.

The ordinary meaning and essence of the expression "territorial waters" remains unambiguous today, and has further evolved in tact with the development of relevant rules pertaining to territorial waters. This includes the drawing of straight baselines, and thus the inclusion of internal waters, and the extension of the territorial sea beyond the baselines to the maximum extent of 12 nautical miles in accordance with the United Nations Convention on the Law of the Sea, signed in Montego Bay on 10 December 1982 (UNCLOS). As the coastal State, Norway has in 1970 and then comprehensively in 2001 drawn such straight baselines around the archipelago. Moreover, it extended in 2004 its territorial sea from 4 to 12 nautical miles.

In its Note Verbale of 26 February 2021 the Delegation of the European Union claims that the equal treatment provision in Article 2 applies not only in the territorial waters around the archipelago as is clearly stipulated by the 1920 Treaty, but also in the later maritime zones established under the modern law of the sea. This is claimed without any basis in the ordinary meaning of the terms of the Treaty, and without any legal arguments to support such a claim.

For the sake of good order, it should also be noted that the 1920 Treaty does not have any of the stated objects and purposes contained in the relevant EU treaties, as regards dynamic developments pertaining inter alia to the Common Fisheries Policy, on the basis of a careful consideration of the implications of reciprocity, a customs union and an internal market, as documented by the relevant jurisprudence of the European Court of Justice. The 1920 Treaty does not rely on any similar integrative purposes, symmetrical systems of rights and obligations, nor any reciprocity. On the contrary, the 1920 Treaty is open to adherence by any State, by a simple notification to the depositary power. This had to do with the wish to rapidly promote the broad recognition of Norwegian sovereignty and the advantage of a definitive solution.

The wording in Article 2 was unambiguous in discussions and negotiations that took place prior to the adoption of the 1920 Treaty, based on a draft that the Spitsbergen Commission at the Paris Peace Conference had solicited from the Norwegian side and which constituted the basis for the work in the Commission. The wording remains unambiguous today, when interpreted in the context of the UNCLOS.

In the course of the negotiations in the United Nations Third Conference on the Law of the Sea, which ultimately led to the adoption of UNCLOS, momentous developments led to the development of a whole new concept which is the exclusive economic zone.

The idea of extending the territorial sea to a breadth of 200 nautical miles and making the existing territorial sea regime with its rights and obligations applicable in this area was explicitly rejected during the third United Nations Conference on the Law of the Sea.

Instead, a new legal regime, entirely distinct from territorial waters was developed, cf. UNCLOS Article 55, which refers to the specific legal regime of the exclusive economic zone. Such 200 nautical mile zones at sea, and the codification, clarification and development of a new legal order for the seas and oceans that would take into account the interests of mankind as a whole, were adopted to reconcile divergent interests, while at the same time strengthen peace, security, cooperation and friendly relations among all nations. The establishment of the Fisheries Protection Zone around Svalbard and other 200 nautical mile zones, including those of EU Member States, has to be considered in this light.

The Exclusive Economic Zone and the continental shelf are thus not extensions of the territorial sea, but new concepts developed in the modern law of the sea during the 20th century. For the sake of simplicity, brief reference is made here to the European Court of Justice also recalling that UNCLOS lays down specific legal regimes governing the different maritime areas (i.a. ECJ Case C-308/06 "*Intertanko*" [2008] notably paragraph 57). As illustrated notably by the ECJ Case 111/05 *Aktiebolaget v Skatteverket* [2007] paragraphs 54-61, the 200 nautical mile zone and the continental shelf can simply not be assimilated to territory or territorial waters under international law.

The coastal State's rights in these maritime areas are the products of these developments in the law of the sea, combined with coastal States' sovereignty over land mass generating maritime zones. These developments in the modern law of the sea apply also in the waters around Svalbard as in all other maritime areas, and Norway's sovereignty over the archipelago is, as stated above, an ordinary one under international law. There is no basis under the 1920 Treaty for assuming any limitation to Norway's coastal State rights in its maritime entitlements around Svalbard.

It follows from what is stated above that Norway, as the territorial sovereign, is entitled under international law to establish an exclusive 200-mile economic zone around the archipelago and Norwegian fisheries jurisdiction in the 200-mile zone.

Moreover, as any other coastal State, Norway has *ipso facto* sovereign rights and jurisdiction over the continental shelf areas outside its coast. This is illustrated in Norway's submission in 2006 to the Commission on the Limits of the Continental Shelf and recognized in the unanimous recommendations from the Commission of 2009 pertaining to the outer limits of the continental shelf of Norway in respect of areas in the Arctic Ocean, the Barents Sea and the Norwegian Sea. It is also consistent with the bilateral delimitation agreements with its neighbouring States, concluded respectively on 20 February 2006 with Denmark together with Greenland and on 15 September 2010 with the Russian Federation. The 1920 Treaty finds no application to any part of Norway's continental shelf.

3. Norway is the sole State that can set fishing quotas in the Fisheries Protection Zone around Svalbard

Under international law, Norway is the sole State that can establish fishing quotas within the 200-mile Fisheries Protection Zone around Svalbard. The EU may not establish such quotas without Norway's consent.

This is the case regardless of the interpretation of the 1920 Treaty. It should be noted that even in the areas where the Treaty applies, it follows from Article 2, paragraph 2 of the Treaty that "*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 their territorial waters*". It further follows from the same article that these measures should be non-discriminatory in areas where the Treaty applies.

However, nowhere does it say that a party who holds the opinion that Norwegian regulatory measures are at odds with Norway's obligations under the Treaty may take the law in their own hands and establish their own regulations. That would be no different from an EU Member State holding the position that regulations in another Member State discriminated its citizens in violation of the Treaty of the Functioning of the European Union, could simply adopt its own regulations and apply them in the territory of the latter Member State.

In the said maritime areas, the EU may only distribute internally among its Member States those quotas that Norway has decided to allocate to it. Norway has, as a well-established practice, notified the EU of its annual regulations regarding the fisheries in the Fisheries Protection Zone and in the territorial waters of Svalbard. The Mission of Norway to the European Union's Note Verbale No. 20/2020 of 23 December 2020 is consistent with this practice.

4. Norway's practice of setting quotas for EU vessels in the Fisheries Protection Zone around Svalbard

The EU erroneously portrays that it has "rights" to a fishing quota in the Fisheries Protection Zone around Svalbard. This is not the case, as has been explained on previous occasions, notably in the non-paper delivered to the European Commission on 21 January 2021 and in the Ministry's Note Verbale of 8 February 2021.

When the Fisheries Protection Zone around Svalbard was established in 1977, Norway decided to set a quota for States whose nationals had habitually fished in the area prior to the establishment of the Zone so as not to upset traditional fishing patterns and thereby minimize economic dislocation in those States. This was a sovereign decision of Norway, as the coastal State.

Norway has not allocated quotas for cod in the Fisheries Protection Zone around Svalbard to new entrants that could not show a traditional fishing pattern prior to the establishment of the Zone.

The fishing quota for cod allocated to the EU in the Fisheries Protection Zone around Svalbard in 2020 was based on the fishing activity undertaken by the then 28 EU Member States prior to 1977. When the UK withdrew from the EU, after the expiry of a transitional period on 1 January 2021, fishing activity undertaken by UK flagged vessels prior to 1977 could no longer form part of the basis on which the quota for the EU is calculated. The quota for 2021 is based on the traditional fishing patterns of the now 27 EU Member States in the years preceding 1977.

Norway disagrees with the EU's assertion in its Note Verbale that the quota has been established on an arbitrary basis. The basis for establishing the quota is exactly the same as in

previous years. What has changed is that the UK is no longer a member of the EU. Fishing performed by UK vessels prior to 1977 is, therefore, no longer taken into account when the quota for the EU is established. This is consistent with the approach taken when the EU has expanded with new Member States that originally had been allocated a quota based on their fisheries activity prior to the establishment of the Fisheries Protection Zone around Svalbard. Thus, Norway increased the allocation to the EU with the share of the German Democratic Republic (GDR) after the reunification of Germany in 1990, as the GDR had been allocated a quota. A similar approach was followed when Poland joined the EU in 2004. The calculation of the new quota for the EU was explained to the European Commission in December 2020, in the non-paper delivered to the Commission on 21 January 2021, and in further detail in the Ministry's Note Verbale of 8 February 2021.

Whatever internal re-allocation the EU may have undertaken among its Member States over the years, that may have departed from the fishing patterns of its Member States in the reference period prior to 1977, does not bind Norway. Similarly, Norway did not take part in the negotiations between the EU and the UK as part of their Trade and Cooperation Agreement, and any allocation of quotas there is not binding on Norway.

5. Two external circumstances – Brexit and Russia's closure of the Barents Sea Loophole

Norway has not changed its policies. Rather, it has consistently given priority to the adoption of measures that safeguard the considered legal positions it takes under international law, while using discretion and a prudent approach in adopting responses to changing circumstances and needs.

The two most recent changed circumstances are external.

- The occurrence of snow crab on the continental shelf in the Barents Sea ensued from the introduction or immigration of a new species in that maritime area from eastern areas. It was compounded by the closure of Russian maritime areas, in particular its continental shelf in the Loophole area, to the harvesting of snow crab by foreign flagged vessels on 3 September 2016.

- As regards the current Norwegian cod regulations for the Fisheries Protection Zone around Svalbard, they are the consequence of the withdrawal of the UK from the EU.

It should be noted that Norway, considering the future withdrawal of the UK from the EU and the future expiry of transitional arrangements, in addition to the wish to modernize the 1980 Fisheries Agreement between Norway and the EU, made repeated attempts to start discussions both on renegotiating such an agreement as well as on a trilateral framework agreement with the UK and the EU and, ultimately, to start negotiations during the autumn of 2020 on a fisheries arrangement with the EU for 2021. It is unfortunate that the EU did not find it appropriate to start any such discussions. The negotiations between the UK and the EU continued until 23 December 2020, with the announcement on 24 December by the President of the Commission on the outcome of the EU-UK negotiations. Undoubtedly, the fact that negotiations on fisheries only started in 2021, with the added complexity of having to adapt to a new negotiating structure

due to the UK becoming an independent coastal State in this context, made the consultations on management for 2021 of several fish stocks in different areas more challenging.

Norway welcomes the trilateral agreement reached on 16 March 2021 for the North Sea fisheries and the bilateral agreements with the EU on quota exchange and zonal access for Skagerrak and the North Sea. Norway has not sought to draw unilateral fisheries benefits from Brexit, but simply to avoid becoming a collateral victim of demanding negotiations between the EU and the UK. As regards the Fisheries Protection Zone around Svalbard, Norway's position remains firm and consistent. The EU cannot expect that Norway would accept reneging on its legal positions under international law due to an agreement between the EU and the UK.

6. The EU's non-acceptance of Norway's fishery regulations and its consequences

The Note Verbale of 26 February 2021 states, by reference to the 1920 Treaty, that "*the acceptance by the European Union of fishery regulations proposed by Norway pertaining to the conservation of the maritime zones around Svalbard is conditional on the regulations being (…) respected by all interested Parties*".

Such a statement could be read as an invitation to taking the law in one's own hands, self-help, introducing anarchy, or challenging or attempting to veto the regulatory and law enforcement powers of the coastal State. Moreover, the 1920 Treaty, by virtue of its Article 10, is open to adherence by any State, in addition to the current States Parties, through a simple notification to the depositary of the Treaty. Such a statement, if confirmed, would inevitably, but incorrectly, give rise to almost irresistible expectations that notifying the depositary would provide a right to challenge the coastal State in order to gain a potential fishing quota or other economic benefits.

The said view has been invoked notably by several flag States and trawlers before Norwegian Coast Guard and then domestic courts in the context of fisheries law enforcement in the Fisheries Protection Zone around Svalbard. The Supreme Court of Norway has issued several authoritative judgments since 1996 consistently rebutting the notion that Norway does not have exclusive jurisdiction, legislative authority and enforcement powers as the coastal State in that zone in accordance with international law. These judgments have also dealt with particularly grave cases of illegal or unreported fishing by certain vessels flying the flag of a EU Member State, as for example in 2006 and 2008.

The Norwegian side can incidentally not recall expressions of support or understanding by the EU for Norwegian enforcement action in the Fisheries Protection Zone around Svalbard, in cases of flagrant illegal and unreported fishing.

The biological state of fish stocks in the area, as evidenced by scientific data notably compiled by the International Council for the Exploration of the Sea (ICES), have compared quite favourably to other waters. Norwegian authorities are convinced that legal certainty and predictability ensured by a significant and sustained control effort undertaken by the Norwegian Coast Guard and the competent fisheries authorities have played a decisive role in maintaining and promoting the development of the fish stocks concerned. By their monitoring, and in the relevant cases their law enforcement, the credibility and effectiveness of applicable norms are

ensured. Norway has in this context, furthermore, spear-headed a prohibition against fish discards, also in those waters. The non-registration of fish and the high mortality rates of fish thrown overboard, skews or distorts the value of fish registration statistics and therefore hampers effective fisheries management, in addition to being ecologically and environmentally indefensible.

Experience has also shown that some States have decided to notify the depositary of accession to the 1920 Treaty in the wake of, or in conjunction with, protests against the rightful and legitimate exercise of jurisdiction by the coastal State. One of the latest States to become a party to the Treaty in 2016, (just after the Democratic People's Republic of Korea) was thus Latvia, a Member State of the EU. Latvia adhered to the 1920 Treaty in 2016, at the time when the Russian Federation banned the harvesting of snow crab by EU flagged vessels on the Russian continental shelf in the Loophole area, leading to interest by Latvian vessels for catching snow crab further West, in the Fisheries Protection Zone around Svalbard.

The EU is not the only fisheries actor demonstrating an interest in maintaining or increasing a fisheries presence in these areas. The actions taken by the EU have led to recent indications of interest in fisheries presence in these areas by other States, particularly, non-European States.

It is unfortunate that the EU chooses to highlight diverging views on the interpretation of the Svalbard Treaty in the pursuit of unilateral fishing interests. This sets a precedent for taking the law in one's own hands that undermine responsible resource managemnent and is contrary to our common interest in stability in the Arctic.

7. Snow crab

Snow crab did not exist in harvestable quantities on the Norwegian continental shelf in 1977. It was first recorded in the Russian exclusive economic zone in the Barents Sea in 1996 and the first commercial landing of snow crab in Norway took place as late as in 2012 and consisted of crab harvested on the Russian continental shelf in the Barents Sea.

Continuation of habitual fishing patterns is a criterion that cannot apply to the harvesting of a new species. Consequently, Norway does not allocate country-specific quotas for snow crab.

It is recalled that the coastal State has exclusive and sovereign rights for the exploration and exploitation of the natural resources on its continental shelf. Norway has decided that no quotas for snow crab should be allocated to foreign flagged vessels without a balanced quota exchange agreement. Licenses issued by EU Member States for the harvesting of snow crab on Norway's continental shelf, solely based on EU regulations, are null and void and represent a violation of international law.

Norway has on previous occasions expressed its willingness to include harvesting opportunities for snow crab on Norway's continental shelf, in the yearly bilateral negotiations on a balanced quota exchange. The offer remains open should it prove to be of interest to the EU.

8. Shrimp

The allocation of fishing opportunities for shrimp is based on the same principle of allowing for a continuation of traditional fishing patterns. Norway fails to see how this discriminates among EU Member States, and any claim of discrimination would only be relevant for fishing within the territorial waters of Svalbard. The internal EU allocation of fishing opportunities that Norway has allocated to the EU remains an issue for the EU.

9. Reporting requirements

Reporting requirements do not affect the rights of fishing and are thus not subject to the equal treatment provision of the 1920 Treaty even where that Treaty is applicable. Norway has entered into several bilateral agreements with other States on electronic exchange of catch and fishing activity data when fishing in each other's waters. The requirements applicable to EU vessels when fishing in areas under Norwegian fisheries jurisdiction are fully in line with the Agreed Record of Conclusions of Fisheries Consultations between Norway and the EU on Electronic Exchange of catch and activity data of 14 November 2011.

10. Alleged discriminatory practices

The EU alleges intentional discriminatory practices on the Norwegian side to the benefit of the Russian Federation. That is not the case. Such claims have been made in the past, and have been rejected by the Norwegian Supreme Court, notably in 2006, in a case involving vessels flying the flag of an EU Member State. The Russian Federation and Norway are the two coastal States in the Barents Sea, with their respective 200 nautical mile zones. Cod and other fish stocks straddle their zones, they spawn in certain areas and migrate to the other party's areas of jurisdiction in the course of their life cycle. The total allowable catch is, accordingly, not set for each individual zone, but for the totality of the distribution area. This is done on the basis of yearly negotiations in a joint fisheries commission. Incidentally, the Norwegian side regularly encourages strict respect for closure of areas to avoid spawning grounds or high incidence of juvenile fish, based on sustainability considerations, often leading to fishing in the other party's waters instead.

The joint fisheries commission was established in 1976 by Norway and the Russian Federation, on the basis of the Agreement of 11 April 1975 on cooperation in the fishing industry (UNTS vol. 983, p. 3) and the Agreement of 15 October 1976 concerning mutual relations in the field of fisheries (UNTS vo. 1157, I-18273). These agreements established a legal framework for joint management of the most important fish stocks in the Barents Sea, and was confirmed in Treaty of 15 September 2010 concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean, including in particular its Annex 1 (UN registration #49095, 2011). The Norwegian Supreme Court has assessed that this cooperation is in conformity with Article 63 of the UNCLOS. Furthermore, it has assessed that the systems of control related to Russian vessels is non-discriminatory, notably both in 1996 and in 2006. It should be added that the 1976 Agreement specifically refers to the on-going work of the Third UN Conference on the Law of the Sea, the Norwegian plans to introduce draft legislation to extend Norway's fisheries jurisdiction to cover a zone of 200 nautical miles and the wish to promote the orderly development of the Law of the Sea and to establish rules and conditions for the conduct of their

mutual relations in the field of fisheries. These agreements, unopposed by other States, have constituted over decades the basis for a fisheries cooperation that is fully in conformity with Article 311 of UNCLOS, which is a provision invoked by the EU.

The EU also alleges intentional discriminatory practices in favour of Norwegian fishers. This disregards the fact that also the quotas set for Norwegian fishers are for the whole distribution area, with all catches being counted against the total quota, regardless of where the catch is taken. Control of catch volumes of Russian and Norwegian vessels is thus not linked to the individual zones, but to alternative systems of aggregate measurement and related control measures. Fishers of various nationalities, including from the EU, have before Norwegian courts, including notably in landmark cases before the Supreme Court, claimed discriminatory treatment because of differences in systems, but were sentenced, with the Supreme Court setting out why there was no discrimination. These landmark judgments constitute *res judicata* and represent a settled case-law that has been unopposed over a number of years. As compared to the 1975, 1976 and 2010 agreements just referred to, which were negotiated within the framework of UNCLOS and specifically with the purpose of regulating activities related to the establishment of 200-mile zones, there is nothing to the same effect in the 1920 Treaty. Nor may the latter set aside UNCLOS, which is binding on the EU (see i.a. ECJ Case C-459-03 *Commission v Ireland* [2006] CR I-4635, paragraph 82).