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EUROPEAN UNION – MEASURES ON ATLANTO-SCANDIAN HERRING

REQUEST FOR CONSULTATIONS BY DENMARK IN RESPECT OF THE FAROE ISLANDS

The following communication, dated 4 November 2013, from the delegation of Denmark in respect of the Faroe Islands to the delegation of the European Union and to the Chairperson of the Dispute Settlement Body, is circulated in accordance with Article 4.4 of the DSU.

1. On behalf of the Kingdom of Denmark in respect of the Faroe Islands ("Faroe Islands"), the authorities of the Faroe Islands have instructed me to request consultations with the European Union pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Article XXIII:1 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") with regard to the use of coercive economic measures in relation to Atlanto-Scandian herring (*Clupea Harengus*).

I. BACKGROUND

2. The Faroe Islands is a self-governing territory of the Kingdom of Denmark that falls within the territorial scope of the latter's acceptance of the *Marrakesh Agreement Establishing the World Trade Organization* ("WTO").

3. The Faroe Islands does not fall within the territorial scope of the European Union.

4. This request for consultations ("Request") is made by the Kingdom of Denmark in respect of the Faroe Islands.

5. The Faroe Islands is vested with sovereign rights in a zone beyond and adjacent to its territorial sea. Consistent with established principles of international law as reflected in relevant provisions of the *United Nations Convention on the Law of the Sea* ("UNCLOS"), within this zone, the Faroe Islands exercises sovereign rights for the purpose of exploiting, conserving and managing, *inter alia*, living marine resources.

6. The Atlanto-Scandian herring is shared between the respective exclusive zones of five coastal States, namely the Faroe Islands, Iceland, Norway, the Russian Federation, and, to some extent, the European Union. Proper management, therefore, requires, consistent with the relevant provisions of UNCLOS, joint management and mutual efforts on the part of the relevant coastal States in order to seek to agree upon the measures necessary to coordinate and ensure the conservation and development of this shared stock.

7. The Faroe Islands has a strong record for managing the Atlanto-Scandian herring in accordance with the requirements of the UNCLOS, ensuring, through proper conservation and management measures, that the maintenance of the stock is not endangered by over-exploitation.¹

¹ With this Request, the Kingdom of Denmark in respect of the Faroe Islands reserves all of its rights under the UNCLOS. This Request is thus without prejudice to actions the Kingdom of Denmark in respect of the Faroe Islands has taken, or may take, under the UNCLOS.

8. To that end, each year, the Faroe Islands and the other four coastal States undertake negotiations with a view to agreeing an allocation key for dividing the Total Allowable Catch ("TAC") recommended in advice from the International Council for the Exploration of the Sea ("ICES"), based on a fish mortality rate set pursuant to a long-term management plan agreed between the five coastal States.

9. Unfortunately, the five coastal States were unable to agree on an allocation key for the TAC for Atlanto-Scandian herring for 2013. On 26 March 2013, based on available scientific evidence, the Faroe Islands set a catch limit of 105 230 tonnes for the stock. The catch limit is determined as 17 per cent of the TAC recommended by ICES.

10. The Faroe Islands understands the position of the European Union to be that the Faroe Islands should restrict the exercise of its sovereign rights by setting its catch limit at 5.16 per cent of the TAC for Atlanto-Scandian herring, which represents approximately 31 000 tonnes for 2013.

II. IDENTIFICATION OF THE MEASURES AT ISSUE

11. In response to the Faroe Islands' decision to set a catch limit of 105 230 tonnes for Atlanto-Scandian herring, the European Union has adopted coercive economic measures against the Faroe Islands. It has prohibited the introduction into the territory of the Union of certain products of Atlanto-Scandian herring and Northeast Atlantic mackerel (*Scomber scombrus*) caught under the control of the Faroe Islands; and it has prohibited from EU ports any vessels flying the flag of the Faroe Islands that fish for Atlanto-Scandian herring or mackerel and any vessels transporting fish or fish products stemming from Atlanto-Scandian herring or mackerel that have been caught either by vessels flying the flag of the Faroe Islands or by other vessels authorized by the Faroe Islands while flying the flag of a third country.

12. On 21 August 2013, the European Union published, in the Official Journal of the European Union, Commission Implementing Regulation (EU) No. 793/2013 of 20 August 2013 establishing measures in respect of the Faeroe Islands to ensure the conservation of the Atlanto-Scandian herring stock (the "Implementing Regulation").²

13. The Implementing Regulation asserts that the "Faeroe Islands shall be identified as a country allowing non-sustainable fishing" of the Atlanto-Scandian herring stock³, in the sense of Article 4(1)(i) of Regulation (EU) No. 1026/2012 of the European Parliament and of the Council of 25 October 2012 on certain measures for the purpose of conservation of fish stocks in relation to countries allowing non-sustainable fishing (the "Basic Regulation").⁴

14. Pursuant to powers accorded to the Commission under the Basic Regulation, paragraphs 1 and 2 of Article 5 of the Implementing Regulation further specify that:

1. It shall be prohibited to introduce into the territory of the Union, including for transshipment purposes at ports, fish or fishery products set out in Annex which consist of, are made of, or contain Atlanto-Scandian herring or mackerel caught under the control of the Faeroe Islands.

2. The use of Union ports by vessels flying the flag of the Faeroe Islands that fish for Atlanto-Scandian herring or mackerel and by vessels transporting the fish or the fishery products stemming from Atlanto-Scandian herring or mackerel that have been caught either by vessels flying the flag of that country or by vessels authorised by it while flying another flag shall be prohibited. This prohibition shall not apply in cases of *force majeure* or distress within the meaning of Article 18 of the 1982 United Nations Convention on the Law of the Sea for services strictly necessary to remedy those situations.⁵

² Official Journal of the European Union, L 223, 21 August 2013, p. 1.

³ Implementing Regulation, Article 4.

⁴ Official Journal of the European Union, L 316, 14 November 2012, p. 34.

⁵ Implementing Regulation, Article 5. The Annex referred to in paragraph 1 of Article 5 sets forth a detailed list of fish and fishery products whose introduction into the territory of the Union is prohibited.

15. The Implementing Regulation entered into force on the seventh day following its publication in the Official Journal of the European Union⁶, that is, 28 August 2013.

16. The Faroe Islands understands that the European Union has adopted, pursuant to the Implementing Regulation, an indicative list of vessels that are prohibited from using EU ports, including vessels flying the flags of Belize, China, the Faroe Islands, and Saint Kitts and Nevis.

17. The measures at issue include the Basic Regulation, the Implementing Regulation, as well as any related measures adopted by the European Union or its Member States, including measures that guide, amend, support, supplement, replace, and/or implement the provisions set forth in the Basic Regulation or Implementing Regulation.

III. LEGAL BASIS OF THE COMPLAINT

18. The Faroe Islands is concerned that the measures of the European Union described above are inconsistent with obligations of the European Union under the covered agreements. In particular, it appears that the measures contravene:

(a) Article I:1 of the GATT 1994, because, through the prohibitions on:

- introduction of specified Atlanto-Scandian herring and Northeast Atlantic mackerel products into the territory of the European Union, set forth in Article 5(1) of the Implementing Regulation; and,
- use of Union ports by certain vessels flying the flag of the Faroe Islands and certain third-country vessels transporting specified fish or fishery products, set forth in Article 5(2) of the Implementing Regulation,

the European Union fails to accord immediately and unconditionally to like products originating in the Faroe Islands relevant advantages, favours, privileges or immunities that are granted by the European Union to Atlanto-Scandian herring and Northeast Atlantic mackerel products originating in other countries;

(b) Article V:2 of the GATT 1994, because, through the prohibition on introduction to the territory of the European Union of specified Atlanto-Scandian herring and Northeast Atlantic mackerel products:

- set forth under Article 5(1) of the Implementing Regulation; and,
- arising through denial of access to EU ports for certain vessels flying the flag of the Faroe Islands and certain third-country vessels transporting specified fish or fisheries products, set forth in Article 5(2) of the Implementing Regulation,

the European Union denies freedom of transit through the territory of the European Union, and each of its Member States, via the routes most convenient for international transit, for traffic in transit to or from the territory of other WTO Members, and makes distinctions based on the flag of vessels, the place of origin, departure, entry, exit or destination or on circumstances relating to the ownership of goods, of vessels or of other means of transport; and,

(c) Article XI:1 of the GATT 1994, because, through the prohibitions on:

- introduction of specified Atlanto-Scandian herring and Northeast Atlantic mackerel products into the territory of the European Union, set forth in Article 5(1) of the Implementing Regulation; and,
- use of Union ports by certain vessels flying the flag of the Faroe Islands and certain third-country vessels transporting specified fish or fishery products, set forth in Article 5(2) of the Implementing Regulation,

⁶ Implementing Regulation, Article 7.

the European Union institutes or maintains prohibitions or restrictions, other than duties, taxes or other charges, on the importation of certain products of the territory of the Faroe Islands.

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19. I look forward to receiving your reply, in accordance with Article 4.3 of the DSU, within 10 days from the date of receipt of this Request.
