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Ms.
Catherine Day
Secretary General, European Commission
200, Rue de la Loi
1049 Brussels
Belgium

Subj.: Confirmatory application concerning request for information on fisheries access agreements
Ref.: Ares (2011) 522009 of 13 May 2011

Dear Secretary General,

In conformity with Article 7 of Regulation 1049/2001, we hereby introduce a confirmatory application, requesting access to *"all the reports held by the European Commission which provide ex-ante and ex-post evaluations of fisheries access agreements and fisheries partnership agreements (hereafter fisheries agreements)"* with non-EU countries. We also act in the name of those persons and organisations which are listed at the end of this letter.

Antecedents

1. By letter of 11 March 2011, addressed to Ms.Lowri Evans, Director General of the Directorate General for Maritime Affairs and Fisheries (DG MARE) of the European Commission, we had formulated our initial request. On 25 March 2011, Mr.Papaioannou of the same Directorate-General, asked for further clarifications (all the correspondence took place via electronic mail). He wanted in particular to know, to which year the request referred, which period was covered by the request and whether the request also referred to fisheries agreements that were no longer in force, as well as whether it referred to fishing protocols that had not been renewed in the last few years. His letter was answered on 25 March 2011, where it was specified that the request referred to all evaluations, dating back to the first one that was signed, and that the request included fisheries agreements that were no longer in force or had not been renewed.
2. On the 25th of March Mr.Papaioannou responded by asking for further clarification, including the exact dates of these evaluations. This request was responded to on the 8th of April, and a list was provided with the year of the first and last agreement signed for every country that has entered into a fisheries agreement with the European Union. This information was directly obtained from the European Commission website.
3. On 13 April 2011, Mr.Papaioannou answered that the answer given was very useful. However, the amount of documents requested was very big; some of the documents

were in the historical archives of the Commission and it would take time to find them. Furthermore, each document would have to be analyzed to see, if exceptions foreseen in Regulation 1049/2001 applied. This might take time. On 18 and 19 April 2011, reminders were sent to Mr.Papaioannou. On 28 April 2011, Mr.Papaioannou answered that only the clarifications contained in the letter of 8 April – registered with the Commission on 11 April 2011 - was sufficiently precise to allow an answer to be prepared. The period of 15 working days started thus only on 11 April 2011. Furthermore, as many of the requested documents were old and had to be retrieved from the historic archives, the period of 15 working days would be extended by further 15 working days. By letter of 28 April 2011, it was specified that the answer would thus be expected by 11 May 2011.

4. On 13 May 2011, Mr.Papaioannou sent another letter which stated: *"I regret to inform you that we are not in a position to send you today any of the documents that you have asked for. Some documents are in the Historic Archives of the Commission and it will take quite a bit of time to retrieve them, analyse them and eventually send them to you. As regards more recent evaluation reports, you are fully aware that the Commission's decision to classify them as EU Restricted documents and send them to the European Parliament and the Council for information under the procedures foreseen for transmission of classified documents. These documents have been classified because of their sensitive content and for this reason and they have not been made available to the public. Disclosure of these documents could undermine our international relations with third countries and commercial interests of natural and legal persons. The fact that a document is classified does not a priori exclude the possibility to grant partial access to it having eliminated the sensitive parts first. This means that our services will have to examine each document in order to identify and eliminate the sensitive parts contained therein. As you can imagine this represents a huge amount of work for our limited staff resources and may take some time to perform. I am not in a position today to say how much time DG MARE services would need for this exercise nor commit to a specific deadline. I would like to inform you in this regard that the courts have accepted that, in the interests of sound administration, the Commission may invoke the principle of proportionality as regards the effort it has to make to afford partial access to a document. Thus in exceptional cases, where the volume of the document or of the passages to be censored would entail a disproportionate amount of administrative work, the Commission may apply this principle to weigh up the interest served by public access to these fragmentary extracts against the workload involved in producing them. This statement does not prejudge our final position on your request."*

Non-compliance with Article 7(1) of Regulation 1049/2001

5. The treatment of our request for access to information is not in conformity with applicable EU legislation. Article 7 of Regulation 1049/2001 requires that requests for access to documents be handled promptly. Our initial request of 11 March 2011 was sufficiently precise, and there was no reason for DG MARE to delay answering this request. DG-MARE requested dates for all the access agreements it has held with third countries, thereby delaying the request, yet this is information that DG-MARE is clearly aware of.
6. Also, the request for access to documents did not refer to an exceptionally large number of documents. Indeed, we estimate the number of documents which come under our initial request to be about 100. But even, if one were to double this number, this is not yet an exceptionally large number of documents. All documents requested are clearly identifiable. They can thus be very easily retrieved from the different files. There was thus no reason for DG MARE to prolong the delay for answering our request by 15 further working days. This constitutes a breach of Article 7 of Regulation 1049/2001.
7. Most importantly, DG MARE has not yet answered in substance our request for access to information. It has not given any explanation, why it was not possible, between 11

March and 13 May 2011, to give access to one single ex-ante or ex-post evaluation that had been requested. It has not even indicated that it undertook any step to retrieve documents which it claims to be in the historic archives of the Commission. We consider this a serious case of maladministration as well as a breach of the obligations which the Commission has under Regulation 1049/2001, and in particular of its Article 7, according to which requests shall be handled promptly.

Application of the Aarhus Convention as substantive law

8. In substance, our request refers to access to "environmental information", and not to access to documents. It follows from this that the substantive provisions, in particular the exceptions provided for in Article 4 of Regulation 1049/2001, are inapplicable. Rather, the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters applies. This Convention was signed and ratified by the European Union (Decision 2005/370) and is thus, according to Article 216(2) TFEU, binding on the EU institutions and bodies. According to the settled case-law of the EU Court of Justice, a convention which was concluded by the EU in conformity with the provisions of Article 216 TFEU, prevails over EU secondary legislation, such as regulations or directives (Court of Justice, case C-344/04, IATA and ELFAA, with further references). The prevailing force of the Aarhus Convention over Regulation 1049/2001 also follows from Article 2(6) of Regulation 1049/2001 itself which states: "*This Regulation shall be without prejudice to rights of public access to documents held by the institutions which might follow from instruments of international law or acts of the institutions implementing them*".
9. The information which we requested is "environmental information". This term is defined in Article 2 no.3 of the Aarhus Convention and also in Article 2 (1.d) of Regulation 1367/2006, which provides for the application of the Aarhus Convention to EU institutions and bodies. According to these definitions, environmental information is any information on elements of the environment, such as the "*biological diversity and its components*", furthermore "*economic analyses and assumptions used*" in the context of "*policies, legislation or activities*" which are "*affecting or likely to affect*" the elements of the environment. Fish is called, in Article 3(1.d) as belonging to "*marine biological resources*". It is thus an element of the natural environment. Analyses and assumptions concerning the capture of fish therefore constitute "environmental information". Under Regulation 1367/2006, Article 5 (2.b and 2.d), the Commission is even obliged to actively disseminate ex-ante ex-post evaluations of the fisheries agreements. Indeed, these evaluations constitute "*progress reports on the implementation*" of international agreements, as well as "*data or summaries of data derived from the monitoring of activities affecting, or likely to affect, the environment*".
10. Article 4, particularly paragraph 2.b and 2.e of regulation 1367/2006 require the Commission to actively and publically disseminate information on the environment, including *progress reports on the implementation of international agreements*" as well as "*data or summaries of data derived from the monitoring of activities affecting or likely to affect the environment*". Moreover, Article 4 (2.g) of Regulation 1367/2006 requires the EU institutions to actively disseminate "*environmental impact studies and risk assessments concerning environmental elements*". This means that the Commission is obliged to publish information, including ex-ante and ex-post evaluations of the fisheries agreements. Indeed these evaluations constitute impact studies, progress reports, and risk assessments in the sense of Article 4 of Regulation 1367/2006.

International relations are not affected by disclosure

11. The Commission would only be allowed to apply one of the exceptions in Article 4(4) of the Aarhus Convention, when disclosure would adversely affect the international

relations of the EU or of the Commission. It is not enough, as wrongly argued by DG MARE in its letter mentioned in section 4, above, that the exceptions would already apply when the disclosure "*could*" undermine international relations. DG MARE's error follows from the erroneous application of Regulation 1049/2001 to our request. The Aarhus Convention clearly requires that disclosure "would" adversely affect international relations.

12. The international relations of the EU with third countries are not adversely affected by a disclosure of the ex-ante and ex-post evaluations. Ex-ante and ex-post evaluations are foreseen in the different fisheries agreements which the EU has concluded with third countries. As examples, two provisions of such agreements may be quoted:
    (a) Article 3(3) of the Fisheries Partnership Agreement between the European Union and Solomon Islands (OJ 2010, L 190, p.5) states: "*The Parties shall also cooperate in carrying out ex-ante, ongoing and ex-post evaluation, both jointly and unilaterally, of measures, programmes and actions implemented on the basis of this Agreement*".
    (b) Article 3(4) of the Fisheries Partnership Agreement between the European Community and the Republic of Guinea-Bissau for the period of 16 June 2007 to 15 June 2011 (OJ 2007, L 342 p.5) states : "*The Parties shall also cooperate in carrying out ex-ante, ongoing and ex-post evaluation of measures, programmes and actions for the implementation of this Agreement*".
13. These provisions clearly show that evaluations shall be made jointly and in good cooperation. And the first aspect in this regard is that the evaluations are shared between the Contracting Parties; otherwise, cooperation does not make sense. It is therefore very unlikely that the evaluations which were made by the Commission, would contain any information or other aspects which could adversely affect the relations with Solomon Islands, Guinea-Bissau, or any other third country. And DG MARE has not substantiated in any way its argument that this would be the case.
14. As regards ex-ante evaluations, it is almost impossible to consider that disclosure of such evaluations would adversely affect the international relations with the third country with which the respective agreement had been made. Indeed, an ex-ante evaluation is mainly a sort of "photography" of existing fish stocks. It is in the mutual interest of the Contracting Parties to be as correct and precise as possible in this regard, and no element appears to exist to demonstrate that the relations with the third country could be adversely affected by disclosure of such evaluations.
15. The same applies for the ex-post evaluations. These are evaluations which are made at the end of the lifetime of a specific agreement, in order to assess the results. Also as already stated in this regard, the evaluations are to be made in cooperation between the Contracting Parties. It is normal that the results of an agreement are assessed differently by the different partners of an agreement. However, this circumstance does not yet undermine the relations with the country with which the EU had concluded the agreement. First, many of such agreements which are concluded for a specific period of time, are either renewed or prolonged or completed by a Protocol which applies to a future period. Therefore, it is in the interest of a loyal and cooperative practice to assess mutually the successes and failures of an agreement, in order to do better in the future.
16. It must also be remembered that the different fisheries agreements, concluded by the EU since the 1980s, explicitly provide for a *partnership* between the EU and the respective third country; since the beginning of the 21st century, the word "partnership" appears even in the title of the different agreements which underlines the partnership character of the agreement. However, even before, the agreements were embedded in the development policy of the EU which provided for partnership with developing countries. This partnership thinking found its expression in particular in the Lomé Convention later in the Cotonou Agreement which laid down the framework for a real cooperative partnership between the European Union and developing countries.

17. It follows from all this that the fisheries agreements between the EU and third countries are based on mutual trust and partnership thinking. They go thus largely beyond a mere international economic Treaty, in trying to ensure that the individual agreement brings economic, social and environmental advantage to both sides. It is for this reason that the cooperative elaboration of ex-ante and ex-post evaluations were explicitly made part of the different agreements. Indeed, the EU could, at any moment, have made such evaluations unilaterally. Already the fact that the evaluations were made part of the agreements, shows that they intended to give an objective assessment of the status of the fish stocks and other marine resources at the beginning and at the end of the agreement.
18. In view of this, there is no reason to believe that the evaluations, in full or in part, contained any declaration which would seriously undermine the relations of the EU with the third country that was partner of the agreement. Even if some formulations in an evaluation did affect the interests of the third country, this is not yet the same as "adversely affect" the relations between the EU and that country, or even undermine these relations. Partnership means that eventual failures, omissions or other negative results of an agreement are addressed, in order to find a fair solution in a future agreement or in the final discussions of the outgoing agreement.
19. These arguments are in particular relevant for all fisheries agreements which ended in the past, for example before 2005. For such agreements, the evaluations have only a historic value, but would not, in 2011, adversely affect relations with third countries. The Commission would have to explain in detail, why the evaluations concerning an agreement which were made in the 1980s, would – and not only "could" – adversely affect the relations with the third country in question in the year 2011.
20. DG MARE has not specified in the slightest way which aspects of the evaluations and in which agreement would adversely affect the relations with a third country. All its reasoning is limited to hypothetical arguments, is general and does not refer to a specific document. It does not either indicate that it had made any assessment of any specific evaluation between 11 March 2011 and 13 May 2011. The General Court has held in this regard that a "*refusal must be founded on an analysis of facts specific to the content or the context of each report from which it is concluded that, because of specific circumstances, disclosure of such a document would pose a danger to a particular public interest (*case T-211/00, Kuijer v. Council, paragraph 61*).*
21. In conclusion, there is no argument visible, why the disclosure of the ex-ante and ex-post evaluations would adversely affect the international relations between the EU and the different third countries which concluded such agreements with the EU. On the contrary, disclosure of the evaluations would comply with the letter and the spirit of these partnership agreements; disclosure would allow a public discussion on the ways to improve partnership with third countries, of making the EU fisheries policy more sustainable and protect marine biological resources, where necessary.

Legitimate commercial interests are not affected by disclosure

22. DG MARE argued that *"commercial interests of natural and legal persons"* could be undermined by the disclosure of the requested documents. However, Article 4(4.d) of the Aarhus Convention provides that access to environmental information may be refused, if the disclosure would adversely affect *"the confidentiality of commercial and industrial information, where such confidentiality is protected by law, in order to protect a legitimate economic interest"*. DG MARE did not specify in any way the kind of information that would be considered as confidential; nor did it demonstrate how the disclosure would adversely affect commercial interests. It did not either indicate which law of the European Union protects such confidentiality and where the *legitimate* economic interests of commercial operators are specifically protected.

23. As regards catches which were made by the European fishing fleet, there is no provision in EU law, which protects the confidentiality of such information. This circumstance alone demonstrates that the exception of the protection of legitimate commercial interests cannot apply. Indeed, the Convention makes clear that it is a law which has to protect the specific requested commercial information for the exception to apply. The mere fact that Article 4 of Regulation 1049/2001 allows the EU institutions not to disclose documents, because they consider that disclosure "could" undermine the protection the protection of commercial interests and that there is no overriding public interest in disclosure, is not enough to refuse access to environmental information. The Aarhus Convention set out a much more restrictive test than Regulation 1049/2001. This is also confirmed by the interpretation of this provision of the Convention laid down in the Implementing Guide of the Aarhus Convention which states that: "*Under the Convention, public authorities are allowed to withhold certain limited types of commercial and industrial information from the public. For the public authorities to be able to withhold information from the public on the basis of commercial confidentiality, that information must pass several tests. First national law must expressly protect the confidentiality of that information. This means that the national law must explicitly protect the type of information in question as commercial or industrial secrets. Second, the confidentiality must protect a 'legitimate economic interest' "* (Economic Commission for Europe: The Aarhus Convention. An Implementing Guide. New York-Genève *2000*, p.60).
24. It is obvious that in the present case, the information requested is not commercial information which is protected by law, as required by the Convention.
25. Furthermore, the different agreements and their implementing provisions specify in detail, how much fish may be caught by the European fishing fleet. And the different agreements contain provisions on dispute settlement (see, for example, Article 12 of the Agreement with Solomon Islands, Article 13 of the Agreement with Guinea-Bissau), where consultations on any dispute that might appear, are foreseen. Therefore, should the European fishing fleet have caught more fish than allowed under a specific agreement, one would expect that this situation would lead to the launching of the dispute settlement procedure, where the problem would be solved by appropriate means, such as supplementary payment, deductions from later years, pecuniary payment by the responsible fishing vessel etc. In a partnership agreement, where both sides intend to cooperate in a mutually advantageous way, there is thus no reason to consider the catches of the European fishing fleet or similar information as confidential.

Public interest in disclosure

26. Article 4(4) of the Aarhus Convention requires that the exceptions of "international relations" and "commercial interests" be interpreted restrictively, "*taking into account the public interest in disclosure*". In this regard, we can only repeat what was stated in the letter of 11 March 2011: "*the benefits of disclosing ex-ante and ex-post evaluations of fisheries agreements outweigh the benefits of keeping these documents confidential. It is widely reported that numerous forms of fishing adversely affect marine ecosystems in countries where the EU has fisheries agreements. The environmental impact of fishing is threatening long-term bio-diversity, as well as local food security and livelihoods in some countries. European fisheries agreements not only regulate the fishing of surplus stocks by European fishing boats in numerous developing countries, including Low Food Deficient Countries, but they also provide financial assistance for sectoral development in these countries. There is concern, both within host countries and among the international community, that EU fisheries agreements may have contributed to overfishing and that financial assistance provided by the European Union via fisheries agreements has failed to be as effective as it could be.*

    It is our understanding that ex-ante evaluations and ex-post evaluations should contain information on stock assessments, data on catches made by the European fishing fleet and an

assessment of how EU funds have been used in host countries, including their social and economic impact. Such information, if it were made public, will raise awareness of environmental and social matters, allow citizens of countries where the EU has fisheries agreements to better understand the contribution of these agreements to sustainable fishing, and it will enable citizens to participate more effectively in decision-making processes, including holding their governments to account for how money received through fisheries agreements is spent. These interests of millions of people should outweigh the commercial interests of the European fishing industry. Indeed, a continued failure to disclose these documents only adds to public suspicion and frustration over the activities of the European fishing fleet in developing countries, and this sentiment may be based on anecdotal evidence that is not accurate. This also threatens the legitimate interests of the European fishing industry".

The international relations would be adversely affected by the non-disclosure of the requested information. This would give the impression to the citizens of third countries, individually and jointly, that the EU has something to hide and that it does not wish its international partners to know about the impacts of the fishing agreements on their fish stocks, their waters, their environment and their fishing industry.

There is therefore an overriding public interest in disclosing the information requested.

Partial disclosure

27. DG MARE has not examined in detail, whether a partial disclosure of the ex-ante and ex-post evaluations is possible. As stated, neither international relations nor commercial interests would be adversely affected by the disclosure of these evaluations, as such evaluations only contain an assessment of the different situations at the beginning and end of each agreement.

    Moreover, all evaluations made before 2005 could be disclosed without further ado, as it is not visible that their disclosure would adversely affect EU interests that are legitimately protected.

    Also, should really an ex-ante or ex-post evaluation contain a statement or an observation where the disclosure of which would adversely affect a legitimate EU interest, the Commission could, after examining and balancing the different interests at stake in each individual document, take away the specific statement, explaining to us, why disclosure is refused.

28. In conclusion, the Applicants repeat the request, made in section 1 of this confirmatory application, to have access to all ex-ante and ex-post evaluations of fisheries access agreements and fisheries partnership agreements which were made with non-EU countries.

Yours sincerely

A.Standing

J.Thornton

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