

## IV

(Notices)

## NOTICES FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES AND AGENCIES

## EUROPEAN COMMISSION

## COMMISSION DECISION

of 15 November 2012

**on notifying the third countries that the Commission considers as possible of being identified as non-cooperating third countries pursuant to Council Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing**

(2012/C 354/01)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, amending Regulations (EEC) No 2847/93, (EC) No 1936/2001 and (EC) No 601/2004 and repealing Regulations (EC) No 1093/94 and (EC) No 1447/1999<sup>(1)</sup>, and in particular Article 32 thereof,

Whereas:

## 1. INTRODUCTION

- (1) Regulation (EC) No 1005/2008 (the IUU Regulation) establishes a Union system to prevent, deter and eliminate illegal, unreported and unregulated (IUU) fishing.
- (2) Chapter VI of the IUU Regulation lays down the procedure with respect to the identification of non-cooperating third countries, démarches in respect of countries identified as non-cooperating third countries, the establishment of a list of non-cooperating countries, removal from the list of non-cooperating countries, publicity of the list of non-cooperating countries and any emergency measures.

- (3) In accordance with Article 32 of the IUU Regulation, the Commission should notify third countries of the possibility of their being identified as non-cooperating countries. Such notification is of a preliminary nature. The notification of third countries of the possibility of their being identified as non-cooperating countries shall be based on the criteria laid down in Article 31 of the IUU Regulation. The Commission should also take all the démarches set out in Article 32 with respect to those countries. In particular, the Commission should include in the notification information concerning the essential facts and considerations underlying such identification, the opportunity of those countries to respond and provide evidence refuting the identification or, where appropriate, a plan of action to improve and measures taken to rectify the situation. The Commission should give to the third countries concerned adequate time to answer the notification and reasonable time to remedy the situation.

- (4) Pursuant to Article 31 of the IUU Regulation, the European Commission may identify third countries that it considers as non-cooperating countries in fighting IUU fishing. A third country may be identified as a non-cooperating third country if it fails to discharge the duties incumbent upon it under international law as flag, port, coastal or market State, to take action to prevent, deter and eliminate IUU fishing.

- (5) The identification of non-cooperating third countries will be based on the review of all information as set out under Article 31(2) of the IUU Regulation.

<sup>(1)</sup> OJ L 286, 29.10.2008, p. 1.

- (6) In accordance with Article 33 of the IUU Regulation, the Council may establish a list of non-cooperating countries. The measures set out, inter alia, in Article 38 of the IUU Regulation apply to those countries.
- (7) Pursuant to Article 20(1) of the IUU Regulation, third country flag States are requested to notify the Commission of their arrangements for the implementation, control and enforcement of laws, regulations and conservation and management measures which must be complied with by their fishing vessels.
- (8) Pursuant to Article 20(4) of the IUU Regulation, the Commission cooperates administratively with third countries in areas pertaining to the implementation of that Regulation.
- (15) Belize submitted additional written comments on 4 April 2011, 12 July 2011, 14 November 2011 and 27 January 2012.
- (16) Belize is a Contracting Party to the Inter-American Tropical Tuna Commission (IATTC), the International Commission for the Conservation of Atlantic Tuna (ICCAT), the Indian Ocean Tuna Commission (IOTC) and the South Pacific Regional Fisheries Management Organisation (SPRFMO). It is a Cooperative non-Member of the Western and Central Pacific Fisheries Commission (WCPFC). Belize has ratified the United Nations Convention on the Law of the Sea (Unclos) and the United Nations Fish Stocks Agreement (UNFSA). It accepted the 2003 Food and Agriculture Organisation (FAO) Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (FAO Compliance Agreement).

## 2. PROCEDURE WITH RESPECT TO BELIZE

- (9) The notification of Belize as flag State was accepted by the Commission in accordance with Article 20 of the IUU Regulation as of 17 March 2010.
- (10) From 8 to 12 November 2010, the Commission, with the support of the European Fisheries Control Agency (EFCA), carried out a mission to Belize in the context of administrative cooperation provided for in Article 20(4) of the IUU Regulation.
- (11) The mission sought to verify information concerning Belize's arrangements for the implementation, control and enforcement of laws, regulations and conservation and management measures which must be complied with by its fishing vessels, measures taken by Belize in order to implement its obligations in the fight against IUU fishing and to fulfil its requirements and points pertaining to the implementation of the catch certification scheme of the Union.
- (12) The final report of the mission was sent to Belize on 7 February 2011.
- (13) The comments of Belize on the final report of the mission were received on 23 February 2011.
- (14) A subsequent mission of the Commission to Belize to follow up the actions taken in the first mission was conducted from 7 to 10 June 2011.
- (17) In order to evaluate the compliance of Belize with its international obligations as flag, port, coastal or market State<sup>(1)</sup> set out in the international agreements mentioned in recital 16 and established by the Regional Fisheries Management Organisations (RFMOs) mentioned in recitals 16 and 18, the Commission sought and analysed all the information it deemed necessary for the purpose of such an exercise.
- (18) The Commission used information derived from available data published by ICCAT, WCPFC, IOTC, IATTC, the North East Atlantic Fisheries Commission (NEAFC) and the South East Atlantic Fisheries Organisation (SEAFO) either in the form of Compliance Reports or in the form of IUU vessel lists as well as publicly available information retrieved from the United States Department of Commerce Report to Congress Pursuant to Section 403(a) of the Magnuson-Stevens Fisheries Conservation and Management Reauthorisation Act of 2006, January 2011 (the National Marine Fisheries Service (NMFS) report).

## 3. POSSIBILITY OF BELIZE OF BEING IDENTIFICATIED AS A NON-COOPERATING THIRD COUNTRY

- (19) Pursuant to Article 31(3) of the IUU Regulation, the Commission analysed the duties of Belize as flag, port, coastal or market State. For the purpose of this review the Commission took into account the parameters listed in Article 31(4) to (7) of the IUU Regulation.

<sup>(1)</sup> For market State and corresponding measures, see FAO International Plan of Action to prevent, deter and eliminate IUU fishing, paragraphs 65 to 76, and FAO 1995 Code of Conduct for Responsible Fisheries, Article 11.2.

### 3.1. Recurrence of IUU Vessels and IUU trade flows (Article 31(4)(a) of the IUU Regulation)

- (20) The Commission established on the basis of information retrieved from RFMO IUU vessel lists that a number of IUU vessels in these lists that carried the flag of Belize after their inclusion in the RFMO IUU vessel lists<sup>(1)</sup>. Those vessels are *Goidau Ruey No 1*, *Orca*, *Reymar 6*, *Sunny Jane*, *Tching Ye No 6*, *Wen Teng No 688*.
- (21) In this respect it is recalled that, pursuant to Article 18(1) and (2) of the UNFSA, the flag State is responsible vis-à-vis its vessels operating on the high seas. The Commission considers that the existence of IUU vessels in the RFMOs IUU lists that carried the flag of Belize after their inclusion in these lists is a clear indication that Belize has failed to undertake its flag State responsibilities under international law. Indeed, by having the aforementioned number of IUU vessels, Belize has failed to exercise its responsibilities effectively, to comply with RFMO conservation and management measures and to ensure that its vessels do not engage in any activity which undermines the effectiveness of such measures.
- (22) Pursuant to Article 19(1) and (2) of the UNFSA, the flag State is required to ensure compliance by vessels flying its flag with RFMO conservation and management rules. Flag States are also required to conduct expeditious investigations and judicial proceedings. The flag State should also ensure adequate sanctions, discourage repetition of violations and deprive offenders of the benefits accruing from their illegal activities. In this respect it is noted that the existence of a number of IUU vessels in the RFMOs IUU lists that carried the flag of Belize after their inclusion in these lists highlights the failure of Belize to fulfil its obligations under Article 19(1) and (2) of the UNFSA. The failure of Belize to fulfil its compliance and enforcement obligations infringes also Article III (8) of FAO Compliance Agreement stating that each party shall take enforcement measures in respect of fishing vessels entitled to fly its flag which act in contravention of the provisions of the FAO Compliance Agreement, including, where appropriate, making the contravention of such provisions an offence under national legislation. Sanctions applicable in respect of such contraventions shall be of sufficient gravity as to be effective in securing compliance with the requirements of the FAO Compliance Agreement and to deprive offenders of the benefits accruing from their illegal activities.
- (23) The failure of Belize to fulfil its compliance and enforcement obligations under Article 19 of the UNFSA is also confirmed by the information gathered in the course of the mission of 8 to 12 November 2010. That mission revealed that the relevant Belizean authorities were not empowered to require information from and to conduct administrative investigations of operators, registered owners and beneficial owners of the fishing vessels flagged to Belize. Furthermore, that mission revealed malfunctions in the system of authorised observers carrying out verifications of activities of economic operators, in particular with regard to landings outside the Belizean exclusive economic zone (EEZ), since certain authorised observers were at the same time acting as representatives of beneficial owners of vessels flagged to Belize. In this respect it should be noted that the importance of effective actions vis-à-vis beneficial owners is confirmed by relevant FAO and Organisation for Economic Cooperation and Development (OECD) documentation which highlights the importance of information on beneficial owners in order to combat illicit activities<sup>(2)</sup> and the need for records of fishing vessels and beneficial ownership<sup>(3)</sup>.
- (24) In addition, pursuant to Article 20 of the UNFSA, States must cooperate either directly or through RFMOs to ensure compliance with and enforcement of RFMO conservation and management measures. A set of specific requirements provided for in that Article sets out the obligations of States to investigate, cooperate with each other and sanction IUU fishing activities. It is also foreseen that for vessels reported to have engaged in activities undermining the effectiveness of RFMO conservation and management measures, States may have recourse to RFMO procedures to deter such vessels until such time as appropriate action is taken by the flag State. In this respect, it is noted that the existence of a number of vessels in the RFMOs IUU lists that carried the flag of Belize after their inclusion in these lists demonstrates the failure of Belize to fulfil its obligations under international law with respect to international cooperation in enforcement.
- (25) It is also recalled that, in accordance with Article 118 of the Unclos, Belize must cooperate in the conservation and management of living resources in the areas of the high seas. In this respect the existence of a number of IUU vessels in the RFMOs IUU lists that carried the flag of Belize after their inclusion in these lists which are still

<sup>(1)</sup> See Part B of the Annex to Commission Regulation (EU) No 468/2010 of 28 May 2010 establishing the EU list of vessels engaged in illegal, unreported and unregulated fishing (OJ L 131, 29.5.2010, p. 22).

<sup>(2)</sup> OECD, 'Ownership and Control of Ships' Report, retrieved from: <http://www.oecd.org/dataoecd/53/9/17846120.pdf>

<sup>(3)</sup> FAO, 'Comprehensive record of fishing vessels, refrigerated transport vessels, supply vessels and beneficial ownership', Report of a study by the FAO Department of Fisheries, March 2010 (retrieved from: [ftp://ftp.fao.org/FI/DOCUMENT/global\\_record/eims\\_272369.pdf](ftp://ftp.fao.org/FI/DOCUMENT/global_record/eims_272369.pdf)) and FAO International Plan of Action to prevent, deter and eliminate IUU fishing, paragraph 18.

engaged in fishing operations highlights the failure of Belize to fulfil its flag State obligations. Indeed recognised IUU fishing vessels undermine conservation and management of living resources.

- (26) The non-compliance by Belize with respect to IUU vessels in the RFMOs IUU lists that carried the flag of Belize after their inclusion in these lists is also in breach of Article 217 of the Unclos which requires flag States to take specific enforcement actions in order to ensure compliance with international rules, the investigation of presumed violations and the adequate sanctioning of any violation.
- (27) The existence of a number of IUU vessels in the RFMOs IUU lists that carried the flag of Belize after their inclusion in these lists also demonstrates the lack of ability of Belize to follow the recommendations in the FAO International Plan of Action to prevent, deter and eliminate IUU fishing (IPOA IUU). Point 34 of the IPOA IUU recommends that States ensure that fishing vessels entitled to fly their flag do not engage in or support IUU fishing.
- (28) In addition, it is pertinent to note that Belize was mentioned in the NMFS report. According to the NMFS report two Belize-flagged vessels were sighted by the French authorities in the IATTC area. The allegations concerning the IUU fishing by the two vessels were refuted since Belize provided explanatory information. However, Belize was identified as a country 'of interest' by the United States authorities <sup>(1)</sup>.
- (29) In view of the situation explained in this Section of the Decision and on the basis of all the factual elements gathered by the Commission as well as all the statements made by the country, it could be established, pursuant to Article 31(3) and 31(4)(a) of the IUU Regulation, that Belize has failed to discharge the duties incumbent upon it under international law as a flag State in respect of IUU vessels and IUU fishing carried out or supported by fishing vessels flying its flag or by its nationals and has not taken sufficient action to counter documented and recurring IUU fishing by vessels previously flying its flag.

### 3.2. Failure to cooperate and to enforce (Article 31(5)(b), (c) and (d) of the IUU Regulation)

- (30) The Commission analysed whether Belize has taken effective enforcement measures in respect of operators

responsible for IUU fishing and whether sanctions of sufficient severity to deprive the offenders of the benefits accruing from IUU fishing have been applied.

- (31) Available evidence confirms that Belize has not fulfilled its obligations under international law with respect to effective enforcement measures. In this respect it is recalled that there is a number of IUU vessels in the RFMOs IUU lists that carried the flag of Belize after their inclusion in these lists. The existence of such IUU vessels highlights the failure of Belize to honour its responsibilities vis-à-vis its vessels operating on the high seas as set out in Article 18(1) and (2) of the UNFSA. Furthermore, that situation is also a clear indication that Belize is not fulfilling the requirements of Article 19(1) of the UNFSA which sets rules for flag States on compliance and enforcement. The performance of Belize in this matter is also not in accordance with the requirements of Article 19(2) of the UNFSA which stipulates, inter alia, that sanctions should be adequate in severity and deprive offenders of the benefits accruing from their illegal activities.
- (32) By acting in the way described Belize failed to demonstrate that it fulfils the conditions of Article 94(2)(b) of the Unclos which stipulates that a flag State assumes jurisdiction under its internal law over each ship flying its flag and its master, officers and crew. Indeed, the existence of a number of IUU vessels in the RFMOs IUU lists that carried the flag of Belize after their inclusion in these lists constitutes corroborating evidence of the lack of Belize to exercise its full jurisdiction over its fishing vessels.
- (33) Furthermore the performance of Belize with respect to effective enforcement measures is also not in accordance with the recommendations in point 21 of the IPOA IUU which advises States to ensure that sanctions for IUU fishing by vessels and, to the greatest extent possible, nationals under their jurisdiction are of sufficient severity to effectively prevent, deter and eliminate IUU fishing and to deprive offenders of the benefits accruing from such fishing.

- (34) With respect to the history, nature, circumstances, extent and gravity of the manifestations of IUU fishing considered, the Commission has taken into account the recurrent and repetitive IUU fishing activities of Belizean-flagged vessels until 2012.

<sup>(1)</sup> NMFS report, p. 99.

(35) With respect to the existing capacity of the Belizean authorities, it should be noted that, according to the United Nations Human Development Index <sup>(1)</sup>, Belize is considered as a high human development country (93rd in 187 countries). This is also confirmed by Annex II to Regulation (EC) No 1905/2006 of the European Parliament and of the Council of 18 December 2006 establishing a financing instrument for development cooperation <sup>(2)</sup> where Belize is listed in the category of lower middle income countries. Account taken of its position it is not considered necessary to analyse the existing capacity of the Belizean competent authorities. This is because the level of development of Belize, as demonstrated in this recital, cannot be considered as a factor undermining the capacity of the competent authorities to cooperate with other countries and pursue enforcement actions.

(36) Notwithstanding the analysis under recital 35 it is also noted that on the basis of information derived from the mission in November 2010 it cannot be considered that the Belizean authorities are lacking financial resources but rather the necessary legal and administrative environment and empowerments to perform their duties.

(37) In view of the situation explained in this Section of the Decision and on the basis of all the factual elements gathered by the Commission as well as all the statements made by the country, it could be established, pursuant to Article 31(3) and 31(5)(b), (c) and (d) of the IUU Regulation, that Belize has failed to discharge the duties incumbent upon it under international law as flag State in respect of cooperation and enforcement efforts.

### 3.3. Failure to implement international rules (Article 31(6) of the IUU Regulation)

(38) Belize has ratified the Unclos and the UNFSA. It accepted the FAO Compliance Agreement. Furthermore, Belize is a Contracting Party to IATTC, ICCAT, IOTC and SPRFMO. It is a Cooperative non-Member of WCPFC. Until the end of 2011 Belize was also a Cooperative non-Member of NEAFC. However, Belize's status as Cooperative non-Member has not been renewed by NEAFC for the year 2012.

(39) The Commission analysed any information deemed relevant with respect to the status of Belize as Contracting Member of IOTC and ICCAT and as Cooperative non-Member of WCPFC. Since Belize has

been a Cooperative non-Member of NEAFC until the end of 2011 the Commission has also analysed the information deemed relevant as regards that RFMO.

(40) The Commission also analysed any information deemed relevant with respect to the agreement of Belize to apply conservation and management measures adopted by IOTC, ICCAT, WCPFC and NEAFC.

(41) It is recalled that ICCAT issued a letter of Concern to Belize regarding its reporting deficiencies in 2010 <sup>(3)</sup>. Indeed, in that letter, Belize was identified for its failure to fully and effectively comply with its obligation to communicate statistics as set out in ICCAT Recommendation 05-09 to establish a rebuilding programme on North Atlantic albacore. In the same letter, ICCAT highlighted that Belize had not provided all the necessary information and reports such as on Task II (size samples) and that it had submitted the compliance tables after the relevant deadline.

(42) In another letter of Concern ICCAT issued in 2011 <sup>(4)</sup>, Belize was again identified as failing to fully and effectively fulfil its statistical reporting obligations (ICCAT Recommendation 05-09). Furthermore, Belize had not provided within the deadline all the necessary information and reports such as Bigeye Task I (statistics referring to fleet), the internal actions report for vessels longer than 20 m and lists of vessels.

(43) In the letter of Concern ICCAT issued in 2012 <sup>(5)</sup>, Belize was identified as failing to fully and effectively fulfil the obligations in accordance with Recommendation 09-05. Furthermore, it was determined that Belize had overharvested its quota of northern albacore. Belize was requested to provide a management plan for its northern albacore fishery, including a schedule for pay-back of the overharvested amount.

(44) The Commission also analysed information available from ICCAT on the compliance of Belize with ICCAT rules and reporting obligations. For this the Commission used the ICCAT 2010 Compliance Summary Tables <sup>(6)</sup> as well as the ICCAT 2011 Compliance Summary Tables <sup>(7)</sup>.

<sup>(3)</sup> ICCAT letter, 4 March 2010, ICCAT Circular No 672 4.3.2010.

<sup>(4)</sup> ICCAT letter, 18 January 2011, ICCAT Circular No 558, 18.1.2011.

<sup>(5)</sup> ICCAT letter, 21 February 2012, ICCAT Circular No 658 21.2.2012.

<sup>(6)</sup> ICCAT, Compliance Summary Tables, Doc. No COC-308/2010, 10.11.2010.

<sup>(7)</sup> ICCAT, Draft Compliance Summary Tables, Doc. No COC-308/2011.

<sup>(1)</sup> Information retrieved from: <http://hdr.undp.org/en/statistics/>

<sup>(2)</sup> OJ L 378, 27.12.2006, p. 41.

- (45) In particular, according to the available information, Belize did not submit to ICCAT in 2010 the report on internal actions for vessels above 20 m referring to Conservation and Management Measures. Furthermore, in 2010 BET Task I (statistics referring to fleet) data were received after the relevant deadline. Internal actions and the vessel list were provided late.
- (46) In addition, a number of elements were revealed during the mission to Belize in November 2010. With respect to the operational abilities of the Vessel Monitoring System's (VMS) operational abilities, it was revealed that for concrete cases, problems of absence or interruption of VMS signal during fishing campaigns have been detected. The VMS was used in a relatively passive manner and it was not used appropriately to check if catch activities were in conformity with the scope of the fishing licences. With respect to the system of authorised observers, some situations of conflict of interest were detected, where certain observers carrying out verifications of activities of economic operators, in particular landings outside the Belizean EEZ, were at the same time acting as representatives of beneficial owners of vessels flagged to Belize.
- (47) Information available from the WCPFC <sup>(1)</sup> shows that Belize was requested to provide additional missing information as regards the provision of all available operational level (logsheets) data for the years 2009-2011 as well as the provision of the number/type and name of the fishing vessels that would be operating in the WCPFC Convention Area should its Cooperative non-Member status be renewed <sup>(2)</sup>.
- (48) The draft WCPFC Compliance Monitoring Scheme Report for 2010 <sup>(3)</sup> shows that Belize did not provide full information on the VMS. Additional information was requested for the purpose of ensuring that vessels have Automatic Localisation Communicators (ALC) in high seas areas determined by WCPFC rules and comply with the VMS requirements established by WCPFC. Additional information was also requested as regards compliance with the conservation and management measures and the equipment of ALCs referred to in WCPFC (Reg. 2007-2).
- (49) WCPFC also requested additional information from Belize on a number of other points. Further information was requested as regards the current fishing effort by vessels fishing for North Pacific albacore (WCPFC Regulation 2005-3 on North Pacific albacore) as well as full information as regards the number of vessels fishing for striped marlin between 2000-2004 (WCPFC Regulation 2006-4 on striped marlin in the Southwest Pacific). Further clarification was requested as regards the shifting of the fishing effort to areas N of 20S (WCPFC Regulation 2009-3 on South Pacific swordfish). Further additional information was requested on the implementation of the 5 % fin to weight ratio (WCPFC Regulation 2009-4 on sharks). As regards the catch and effort reporting, further additional information was requested on the reporting of number of vessels against annual limit (WCPFC Regulation 2005-02 on South Pacific albacore). Belize was identified as non-compliant with regard to the reporting of catches of North Pacific albacore every six months for the small coastal fisheries (WCPFC Regulation 2005-03 on North Pacific albacore). Additional information was required as regards the reporting of all catches of albacore north of the Equator and all fishing effort directed at albacore north of the Equator annually by gear type (WCPFC Regulation 2005-03 on North Pacific albacore). With respect to the spatial and temporal closures and gear restrictions, additional information was requested from Belize on monitoring as regards the mitigation measures (WCPFC Regulation 2007-04 on seabird mitigation). Finally, as regards driftnets, additional information was required from Belize as regards the prohibition of the use of large-scale driftnets on the high seas in the convention area (WCPFC Regulation 2008-04).
- (50) According to information derived from the IOTC Compliance Report for the year 2010 <sup>(4)</sup>, Belize was identified as non-compliant because it failed to participate in the Scientific Committee meeting and had not submitted its National Report for the 13th Session of the Scientific Committee.
- (51) In addition, Belize was non-compliant or only partially compliant in 2010 as regards several resolutions adopted by IOTC. In particular, as regards Resolution 09/02 and earlier resolutions on the limitation of fishing capacity, eight of the vessels reported as targeting tropical tunas in 2006 were also reported as targeting albacore and swordfish in 2007 (which amounts only to partial compliance). This resulted in a double counting effect. As regards Resolution 07/02 on the IOTC record of vessels authorised to operate in the IOTC area, some information submitted by Belize was not to IOTC standard (partial compliance). As regards Resolution 09/03 on establishing a list of vessels presumed to have carried out IUU fishing in the IOTC area, Belize failed to provide its opinion on IOTC's request to de-register two vessels listed in the 2010 IOTC IUU vessels list (partial compliance). As regards Resolution 08/02 on

<sup>(1)</sup> WCPFC letter to Belize, 8 October 2011.

<sup>(2)</sup> WCPFC letter to Belize, 8 October 2011.

<sup>(3)</sup> WCPFC Draft Compliance Monitoring Scheme Report for 2010 — Belize, WCPFC-TCC7-2011/17-CMR/29.

<sup>(4)</sup> IOTC Compliance Report for Belize, Compliance Committee Session 8, 2011, CoC13.

a regional observer programme to monitor at-sea transhipments vessels, Belize effected two transhipments under the regional observer programme in 2010 but the at-sea transhipments were in partial compliance with the IOTC regional observer programme for monitoring at-sea transhipments. As regards Resolutions 01/02 and 05/07 concerning management standards and controls of fishing vessels Belize, did not provide any information on the level of implementation during 2009. As regards Resolution 10/02 as well as Resolutions 05/05, 09/06 and 10/06 on mandatory statistical requirements, Belize only provided partial information on the by-catch of sharks (partial compliance) and did not submit information on the size frequency, by-catch of marine turtles and by-catch of seabirds (non-compliance). As regards Resolutions 01/06 and 03/03 on the IOTC bigeye tuna Statistical Document Program, Belize did not report to IOTC its assessment of export data versus import data (partial compliance).

- (52) Furthermore, according to the IOTC Compliance Report for 2011 <sup>(1)</sup>, Belize was still not compliant or only partially compliant in 2011 as regards several Resolutions adopted by IOTC. In particular, as regards IOTC Resolution 07/02 on the list of authorised vessels of 24 m in length overall or more, some mandatory information was missing and no information on operating ports was provided (partial compliance). As regards IOTC Resolution 06/03 on the adoption of VMS for all vessels greater than 15 meters in length overall, no information on technical failures was provided (partial compliance). As regards the mandatory statistical requirements and IOTC Resolution 10/02, catch and effort data were not up to the IOTC standard. Data were provided per individual vessel activities rather than aggregated information (partial compliance). Size frequency data were not to IOTC standard as well. Again, data were provided per individual vessel activities rather than aggregated information (partial compliance). As regards the implementation of mitigation measures and bycatch of non-IOTC species, Belize was only partially compliant with IOTC Resolution 05/05 on the submission of data regarding sharks. As regards observers, IOTC Resolution 11/04 on the Regional Observer Scheme and on the mandatory 5 % at sea for the vessels longer than 24 m, Belize had informed in the past that it had observers who were to be deployed on its vessels. However, the current plan is for the programme to start only in 2013. Consequently Belize is non-compliant with the IOTC requirements. In addition as regards observers, Belize is not in compliance with IOTC Resolution 11/04 on the observer reporting obligation. As regards the Statistical Document Program, Belize is not in compliance with IOTC Resolution 01/06 because no information on the annual report has been provided.
- (53) With respect to NEAFC, Belize was a Cooperative non-Member of NEAFC until the end of 2011. However, due

to the lack of compliance with the NEAFC rules, the status of Cooperative non-Member has not been renewed by NEAFC for the year 2012. In particular, the reporting obligations have not been complied with. In addition there have been problems as regards compliance with the VMS requirements. Problems with the inspection system have also been observed. EU inspectors were not provided with the necessary information, including VMS data and transhipment reports. That had a negative effect on the inspection scheme of the NEAFC area. Due to the problems that were identified, the Belizean application for renewal was rejected in a vote taken during the 30th annual meeting of NEAFC <sup>(2)</sup>.

- (54) The failure of Belize to provide to ICCAT the information referred to in recitals 41 to 45 indicates the failure of Belize to fulfil its obligations as flag State laid down in the Unclos and the UNFSA.
- (55) The shortcomings revealed by the mission conducted by the Commission in November 2010 and referred to in recital 46 provide further evidence of the failure of Belize to fulfil its obligations as flag State laid down in the UNFSA.
- (56) Indeed the failure to provide timely information on conservation and management measures, statistics, lists of vessels and compliance tables undermines the ability of Belize to fulfil its obligations under Articles 117 and 118 of the Unclos which stipulate the duties of States to adopt measures for their respective nationals for the conservation of living resources of the high seas and to cooperate on conservation and management measures for living resources in the areas of the high seas.
- (57) The elements mentioned in Section 3.3 of the Decision demonstrate that the performance of Belize is in breach of the requirements of Article 18(3) of the UNFSA.
- (58) On account of its failure to submit information on transhipments to the ICCAT, Belize acts in breach of Article 18(3)(a) of the UNFSA which requires States whose vessels fish on the high seas to take control measures to ensure that those vessels comply with RFMO rules.

<sup>(1)</sup> IOTC Compliance Report for Belize, Compliance Committee Session 9, 2012, COC09-02.

<sup>(2)</sup> Report of the 30th Annual Meeting of the North-East Atlantic Fisheries Commission, 7-11 November 2011, Volume 1.

- (59) Belize does not comply with the recording and timely reporting requirements of Article 18(3)(e) of the UNFSA on account of its failure to submit to ICCAT information on annual reports, Task I (fleet characteristics), Task II (data on size samples), internal action reports for vessels longer than 20 m, compliance tables and lists of vessels.
- (60) Belize does not fulfil the conditions stipulated in Article 18(3)(g) of the UNFSA in view of the information gathered during the mission in November 2010 carried out by the Commission concerning the monitoring, control and surveillance abilities of the Belizean authorities.
- (61) Furthermore, as explained in recitals 47 to 52, information from WCPFC and IOTC indicates that Belize is not fulfilling its obligations pursuant to Article 117 of the Unclos and Article 18 of the UNFSA with respect to management and conservation measures.
- (62) In addition, Belize does not comply with Article 18(3)(f) of the UNFSA on account of the shortcomings identified by the NEAFC that resulted in the rejection of the Cooperative non-Member status of Belize for the year 2012, in particular the failure to report to NEAFC as well as the deficiencies discovered in the observers scheme including the VMS data and the transshipments at sea.
- (63) Furthermore, it was revealed by the mission in November 2010 that Belize keeps an International Merchant Marine Registry responsible for vessel registration which does not ensure that vessels flying the flag of Belize have a genuine link with the country. The lack of such genuine link between that State and the vessels that are registered in its registry is in breach of the conditions set out for the nationality of ships in Article 91 of the Unclos. This conclusion is further confirmed by the International Transport Workers' Federation (ITF) which considers Belize as a flag of convenience <sup>(1)</sup>.
- (64) In view of the situation explained in this Section of the Decision and on the basis of all the factual elements gathered by the Commission as well as all the statements made by the country, it could be established, pursuant to Article 31(3) and (6) of the IUU Regulation, that Belize has failed to discharge the duties incumbent upon it under international law with respect to international rules, regulations and conservation and management measures.

#### 3.4. Specific constraints of developing countries

- (65) It is recalled that, according to the United Nations Human Development Index <sup>(2)</sup>, Belize is considered as a high human development country (93rd in 187 countries). It is also recalled that, according to Regulation (EC) No 1905/2006, Belize is listed in the category of lower middle income countries.
- (66) Account taken of that ranking Belize cannot be considered as a country having specific constraints directly derived from its level of development. No corroborating evidence could be established to suggest that the failure of Belize to discharge the duties incumbent upon it under international law is the result of lacking development. In the same manner, no concrete evidence exists to correlate the revealed shortcomings in respect of the monitoring, control and surveillance of fishing activities with the lack of capacities and infrastructure.
- (67) In view of the situation explained in this Section of the Decision and on the basis of all the factual elements gathered by the Commission as well as all the statements made by the country, it could be established, pursuant to Article 31(7) of the IUU Regulation, that the development status and overall performance of Belize with respect to fisheries are not impaired by its level of development.

#### 4. PROCEDURE WITH RESPECT TO THE KINGDOM OF CAMBODIA

- (68) From 18 to 20 October 2011, the Commission carried out a mission to the Kingdom of Cambodia (Cambodia) in the context of administrative cooperation provided for in Article 20(4) of the IUU Regulation.
- (69) The mission sought to verify information concerning Cambodia's arrangements for the implementation, control and enforcement of laws, regulations and conservation and management measures which must be complied with by its fishing vessels as well as measures taken by Cambodia in order to implement its obligations in the fight against IUU fishing.
- (70) Cambodia agreed to send the Commission a plan of action on the discussed issues, together with a complete list of fishing vessels, including reefers and fishing carrier vessels. Cambodia did not send any reply or follow-up letter to the Commission following its mission.

<sup>(1)</sup> Information retrieved from: <http://www.itfglobal.org/flags-convenience/flags-convenien-183.cfm>

<sup>(2)</sup> Information retrieved from: <http://hdr.undp.org/en/statistics/>



(71) Cambodia did not sign or ratify any of the international agreements governing fisheries, inter alia, the Unclos, the UNFSA, the FAO Compliance Agreement, but it has ratified the 1958 Geneva Convention on the High Seas<sup>(1)</sup> and acceded to the 1958 Convention on the Territorial Sea and the Contiguous Zone<sup>(2)</sup> and it has accepted the Regional Plan of Action to promote responsible fishing practices including combating IUU fishing in the Asia-Pacific Fisheries Committee (APFIC) (APFIC RPOA)<sup>(3)</sup>, as well as the Regional Guidelines for responsible fishing operations in Southeast Asia (RGRFO-SEA)<sup>(4)</sup> issued by the Southeast Asian Fisheries Development Center (Seafdec)<sup>(5)</sup>. APFIC, of which Cambodia is a member, is an advisory body that works to improve understanding, awareness and cooperation in fisheries issues in the Asia-Pacific region. Seafdec, of which Cambodia is a member, is an advisory body promoting sustainable fisheries development.

(72) In order to evaluate the compliance of Cambodia with its international obligations as flag, port, coastal or market State, the Commission considered appropriate to use the Unclos as the primary basic international legal text, namely Articles 91, 94, 117 and 118, setting out obligations of States and established by the relevant RFMOs, together with the framework established by APFIC and Seafdec referred to in recital 71. The provisions of Unclos on the navigation in the high seas (Articles 86-115 of Unclos) have been recognised as customary international law. These provisions codify pre-existing rules of customary international law and take over almost verbatim the wording of the Convention on the High Seas and the Convention on the Territorial Sea and the Contiguous Zone, which Cambodia has respectively ratified and acceded to. For this reason, it is immaterial whether Cambodia has actually ratified Unclos. The Commission sought and analysed all the information it deemed necessary for the purpose of such an exercise.

(73) The Commission used information derived from available data published by RFMOs, in particular ICCAT, the Commission for the Conservation of the Atlantic Marine Living Resources (CCAMLR), WCPFC, NEAFC, NAFO and SEAFO either in the form of Compliance Reports or in the form of IUU vessel lists, as well as publicly available information retrieved from the NMFS report.

<sup>(1)</sup> Information retrieved from: [http://untreaty.un.org/ilc/texts/instruments/english/conventions/8\\_1\\_1958\\_high\\_seas.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/8_1_1958_high_seas.pdf)

<sup>(2)</sup> Information retrieved from: [http://untreaty.un.org/ilc/texts/instruments/english/conventions/8\\_1\\_1958\\_territorial\\_sea.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/8_1_1958_territorial_sea.pdf)

<sup>(3)</sup> Information retrieved from: <http://www.apfic.org/>, RAP PUBLICATION 2007/18.

<sup>(4)</sup> Information retrieved from: <http://www.seafdec.org/>

<sup>(5)</sup> Information retrieved from: <http://www.seafdec.org/>

## 5. POSSIBILITY OF CAMBODIA OF BEING IDENTIFIED AS A NON-COOPERATING THIRD COUNTRY

(74) Pursuant to Article 31(3) of the IUU Regulation, the Commission analysed the duties of Cambodia as flag, port, coastal or market State. For the purpose of this review the Commission took into account the parameters listed in Article 31(4) to (7) of the IUU Regulation.

### 5.1. Recurrence of IUU Vessels and IUU trade flows (Article 31(4)(a) of the IUU Regulation)

(75) The Commission established on the basis of information retrieved from RFMO IUU vessel lists several incidences of IUU activities of vessels flying the Cambodian flag<sup>(6)</sup> or having a Cambodian fishing licence. The fishing vessel *Draco-1* (current name: *Xiong Nu Baru 33*) was sighted fishing illegally in the CCAMLR area in January 2010<sup>(7)</sup> and in April 2010<sup>(8)</sup> while flying the flag of Cambodia. In addition, the fishing vessel *Trosky* (current name: *Yangzi Hua 44*) was sighted fishing illegally in the CCAMLR area in April 2010<sup>(9)</sup> while flying the flag of Cambodia.

(76) Furthermore, in the framework of work conducted with respect to presumed IUU fishing activities, the Commission has gathered factual evidence, through Union catch certificates, of repetitive infringements by a Cambodian vessel of ICCAT conservation and management measures that lead to their being classified as IUU fishing activities. Those infringements referred to a Cambodian carrier vessel that received fish at sea from purse seiners. In accordance with ICCAT Recommendation 06-11, purse seiners are not allowed to tranship tuna species at sea within the ICCAT area. In addition, the Cambodian carrier vessel was not registered under the ICCAT Registry of carrier vessels entitled to operate within the ICCAT area as provided for in Section 3 of ICCAT Recommendation 06-11.

(77) In this respect it is recalled that, pursuant to Article 94(2) b of the Unclos, the flag State assumes jurisdiction under its internal law over each ship flying its flag and its master, officers and crew. This basic principle is reinforced by point 7.1 of the APFIC RPOA and point 8.2.2 of the RGRFO-SEA. The Commission considers that the existence of IUU vessels in the RFMO vessel lists that carried the flag of Cambodia after their inclusion in these lists, as well as the sightings on IUU activities carried out by its vessels in RFMOs, are clear indications that Cambodia has failed to undertake its flag State responsibilities under international law. Indeed, by having a

<sup>(6)</sup> See Part B of the Annex to Regulation (EU) No 468/2010.

<sup>(7)</sup> CCAMLR Document COM CIRC 10/11 dated 2 February 2010.

<sup>(8)</sup> CCAMLR Document COM CIRC 10/45 dated 20 April 2010.

<sup>(9)</sup> CCAMLR Document COM CIRC 10/45 dated 20 April 2010.

number of IUU vessels, Cambodia has failed to exercise its responsibilities effectively, to comply with RFMO conservation and management measures and to ensure that its vessels do not engage in any activity which undermines the effectiveness of such measures.

- (78) It is noted that the flag State has the duty to take, or to cooperate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas. This basic principle is reinforced by points 3.1 and 4.1 of the APFIC RPOA and point 8.1.4 of the RGRFO-SEA. In accordance with Article 94 of the Unclos and read in conjunction with point 7.1 of the APFIC RPOA and point 8.2.7 of the RGRFO-SEA, a flag State is required to ensure that vessels flying its flag comply with RFMO conservation and management rules.
- (79) The existence of IUU vessels in the RFMO vessel lists that carried the flag of Cambodia after their inclusion in these lists also demonstrates the lack of ability of Cambodia to follow the recommendations in the IPOA IUU. Point 34 of the IPOA IUU recommends that States ensure that fishing vessels entitled to fly their flag do not engage in or support IUU fishing. This principle is also present in point 7.1 of the APFIC RPOA.
- (80) In addition, it is pertinent to note that Cambodia was mentioned in the NMFS report. According to the NMFS report, several Cambodian-flagged vessels engaged in fishing activities that violated CCAMLR conservation and management measures<sup>(1)</sup>. The NMFS report does not identify Cambodia as a country with vessels engaged in IUU fishing activity, given the fact that certain actions (de-registration) were taken to address the illegal fishing activities of those Cambodian-flagged vessels. However, the NMFS report expresses concerns about addressing IUU fishing activities by deregistering vessels in lieu of applying other sanctions and consequently Cambodia was identified as a country 'of interest' by the US authorities.
- (81) In view of the situation explained in this Section of the Decision and on the basis of all the factual elements gathered by the Commission as well as all the statements made by the country, it could be established, pursuant to Article 31(3) and 31(4)(a) of the IUU Regulation, that Cambodia has failed to discharge the duties incumbent upon it under international law as a flag State in respect of IUU vessels and IUU fishing carried out or supported

by fishing vessels flying its flag or by its nationals and has not taken sufficient action to counter documented and recurring IUU fishing by vessels flying its flag.

#### **5.2. Failure to cooperate and to enforce (Article 31(5)(b), (c) and (d) of the IUU Regulation)**

- (82) The Commission analysed whether Cambodia has taken effective enforcement measures in respect of operators responsible for IUU fishing and whether sanctions of sufficient severity to deprive the offenders of the benefits accruing from IUU fishing have been applied.
- (83) Available evidence confirms that Cambodia has not fulfilled its obligations under international law with respect to effective enforcement measures. In this respect it is recalled that RFMO IUU vessel lists record IUU vessels that carried the flag of Cambodia after their inclusion in these lists or at the time of listing. The existence of such IUU vessels highlights the failure of Cambodia to honour its responsibilities vis-à-vis its vessels operating on the high seas as set out in Article 94 of the Unclos, read in conjunction with point 7.1 of the APFIC RPOA and point 8.2.7 of the RGRFO-SEA.
- (84) Furthermore, with respect to compliance and enforcement, the mission referred to in recital 68 revealed that Cambodia does not have any specific legislation to address IUU fishing activities. The only measure taken is de-registration of fishing vessels. Nevertheless, such action does not entail the conduct of investigations of illegal fishing activities carried out by vessels or the imposition of sanctions for established infringements. Indeed de-registration of a fishing vessel does not ensure that offenders of infringement are sanctioned for their actions and deprived from the benefits of their actions. This is even more important for the case of Cambodia which, as explained in recital 96, keeps an International Ship Registry responsible for vessel registration which is located outside Cambodia and which does not ensure that vessels flying the flag of Cambodia have a genuine link with the country. The simple administrative decision to remove a fishing vessel from the register without ensuring the possibility to impose other penalties is an act that does not ensure deterrent effects. Such an action also does not ensure flag State control over the fishing vessels as required under Article 94 of the Unclos. In addition, Cambodia's performance with respect to compliance and enforcement is not in accordance with point 18 of the IPOA IUU which stipulates that in the light of the Unclos

<sup>(1)</sup> NMFS report, pp. 101-102.

provisions each State should take measures or cooperate to ensure that nationals subject to their jurisdiction do not support or engage in IUU fishing. Cambodia's performance in this respect is also not in accordance with the recommendations in point 21 of the IPOA IUU which advises States to ensure that sanctions for IUU fishing by vessels and, to the greatest extent possible, nationals under their jurisdiction are of sufficient severity to effectively prevent, deter and eliminate IUU fishing and to deprive offenders of the benefits accruing from their illegal activities. This principle is reiterated in point 8.2.7 of the RGRFO-SEA.

(85) With respect to the history, nature, circumstances, extent and gravity of the manifestations of IUU fishing considered, the Commission has taken into account the recurrent and repetitive IUU fishing activities of Cambodian-flagged vessels until 2012.

(86) With respect to the existing capacity of the Cambodian authorities, it should be noted that, according to the United Nations Human Development Index<sup>(1)</sup>, Cambodia is considered as a medium human development country (139th in 187 countries). On the other hand, Cambodia is listed in Annex II to Regulation (EC) No 1905/2006 in the category of least developed countries. In this respect, the financial and administrative capacity constraints of the competent authorities may be considered as one factor that undermines the ability of Cambodia to fulfil its cooperation and enforcement duties. Nevertheless, it is recalled that shortcomings in cooperation and enforcement are linked with the lack of an adequate legal framework that enables appropriate follow up actions rather than with the existing capacity of the competent authorities.

(87) In view of the situation explained in this Section of the Decision and on the basis of all the factual elements gathered by the Commission as well as all the statements made by the country, it could be established, pursuant to Article 31(3) and 31(5)(b), (c) and (d) of the IUU Regulation, that Cambodia has failed to discharge the duties incumbent upon it under international law as flag State in respect of cooperation and enforcement efforts.

### 5.3. Failure to implement international rules (Article 31(6) of the IUU Regulation)

(88) Cambodia did not sign or ratify any of the international agreements specifically governing fisheries. Cambodia has ratified the 1958 Geneva Convention on the High Seas

and acceded to the 1958 Convention on the Territorial Sea and the Contiguous Zone. Cambodia is a member of two advisory bodies, namely Seafdec for which it accepted the RGRFO-SEA, and APFIC for which it accepted the APFIC RPOA.

(89) From the mission of the Commission to Cambodia it does not result that Cambodia has undertaken any steps towards the implementation of the APFIC RPOA or the recommendations of the RGRFO-SEA.

(90) The Commission analysed information deemed relevant from available data published by RFMOs, in particular ICCAT and CCAMLR.

(91) It is recalled that Cambodia has a long history of letters of Identification issued by ICCAT. The first such letter was issued to Cambodia in 2006. The most recent letter of Identification issued by ICCAT to Cambodia is of 2011<sup>(2)</sup>. That letter continues to express concern regarding possible IUU activities of fishing vessels flying the Cambodian flag. Cambodia did not reply to the additional request for information contained in ICCAT's letters of Identification dated 16 December 2009, 4 October 2010 and 18 January 2011. In the absence of a reply from Cambodia providing the requested additional information, ICCAT decided to maintain Cambodia's identification in 2012. In addition, ICCAT expressed its serious concern about possible transhipment activities by Cambodian purse seiners in the Gulf of Guinea.

(92) At the ICCAT 2012 annual meeting, ICCAT requested detailed information from Cambodia regarding the alleged transhipments in the Gulf of Guinea, any responsive actions taken by Cambodia, Cambodia's monitoring, control and surveillance measures and Cambodia's procedure and rules for vessel registration, with a view to reviewing the situation of Cambodia.

(93) The failure of Cambodia to provide to ICCAT the information referred to in recitals 91 and 92 demonstrates the failure of Cambodia to fulfil any type of flag State obligations relating to management and conservation measures provided for by Unclos. Its performance is also not in conformity with the recommendations of the APFIC RPOA (point 7.1) and of the RGRFO-SEA (point 8.2.7).

<sup>(1)</sup> Information retrieved from: <http://hdr.undp.org/en/statistics/>

<sup>(2)</sup> Report of the 22nd Regular Meeting of the ICCAT, Istanbul, Turkey — 11 to 19 November, 2011, p. 323.

- (94) In addition, during 2010 CCAMLR reported several sightings of Cambodian-flagged vessels. Such communications can be found in CCAMLR circulars transmitted to its members <sup>(1)</sup>, namely COMM CIRC 10/11 Sightings of IUU-listed vessels *Typhoon-1* and *Draco I*, 10/45 Sightings of IUU-listed vessels *Draco I* and *Trosky*.
- (95) By acting in the way described in the above recital Cambodia failed to demonstrate that it fulfils the conditions of Article 94(2)(b) of Unclos which stipulates that a flag State assumes jurisdiction under its internal law over each ship flying its flag and its master, officers and crew. Indeed, de-registration of fishing vessels is not per se a sufficient measure for a flag State to take, as that measure does not address the IUU activity, does not ensure punishment of IUU fishing activities by the application of administrative and/or criminal sanctions established by law and leaves the fishing vessel free to continue operating in breach of internationally established conservation and management measures.
- (96) Furthermore, it was revealed by the mission referred to in recital 68 that Cambodia keeps an International Ship Registry responsible for vessel registration which is located outside Cambodia and which does not ensure that vessels flying the flag of Cambodia have a genuine link with the country. The lack of such genuine link between the State and the vessels that are registered in its registry is in breach of the conditions set out for the nationality of ships under Article 91 of the Unclos. This conclusion is further confirmed by the ITF which considers Cambodia as a flag of convenience <sup>(2)</sup>.
- (97) Finally, it should be noted that, contrary to the recommendations in points 25, 26 and 27 of the IPOA IUU, Cambodia has not developed a national plan of action against IUU fishing.
- (98) In view of the situation explained in this Section of the Decision and on the basis of all the factual elements gathered by the Commission as well as all the statements made by the country, it could be established, pursuant to Article 31(3) and (6) of the IUU Regulation, that Cambodia has failed to discharge the duties incumbent upon it under international law with respect to international rules, regulations and conservation and management measures.

<sup>(1)</sup> Relevant information retrieved from: CCAMLR website <http://www.ccamlr.org/>

<sup>(2)</sup> Information retrieved from: <http://www.itfglobal.org/index.cfm>

#### 5.4. Specific constraints of developing countries

- (99) It is recalled that, according to the United Nations Human Development Index <sup>(3)</sup>, Cambodia is considered as a medium human development country (139th in 187 countries). On the other hand, Cambodia is listed in Annex II to Regulation (EC) No 1905/2006 in the category of least developed countries. Account taken of the ranking of Cambodia the Commission analysed if the information gathered by the Commission could be linked with its specific constraints as a developing country.
- (100) Although specific capacity constraints may exist in general with respect to control and monitoring, the specific constraints of Cambodia derived from its level of development cannot justify an absence of specific provisions in the national legal framework referring to international instruments to combat, deter and eliminate IUU fishing activities. Furthermore, those constraints cannot justify Cambodia's failure to establish a sanctions system for infringements of international management and conservation measures in respect of fishing activities conducted on the high seas.
- (101) In view of the situation explained in this Section of the Decision, and on the basis of all the factual elements gathered by the Commission as well as all the statements made by the country, it could be established, pursuant to Article 31(7) of the IUU Regulation, the development status of Cambodia may be impaired by its level of development. However, account taken of the nature of the established shortcomings of Cambodia, the development level of that country cannot excuse or otherwise justify the overall performance of Cambodia as flag State with respect to fisheries and the insufficiency of its action to prevent, deter and eliminate IUU fishing.

#### 6. PROCEDURE WITH RESPECT TO THE REPUBLIC OF FIJI

- (102) The notification of the Republic of Fiji (Fiji) as flag State was accepted by the Commission in accordance with Article 20 of the IUU Regulation as of 1 January 2010.
- (103) From 16 to 20 January 2012, the Commission, with the support of the EFCA, carried out a mission to Fiji in the context of administrative cooperation provided for in Article 20(4) of the IUU Regulation.

<sup>(3)</sup> Information retrieved from: <http://hdr.undp.org/en/statistics/>

- (104) The mission sought to verify information concerning Fiji's arrangements for the implementation, control and enforcement of laws, regulations and conservation and management measures which must be complied with by its fishing vessels, measures taken by Fiji in order to implement its obligations in the fight against IUU fishing and to fulfil its requirements and points pertaining to the implementation of the catch certification scheme of the Union.
- (105) The final report of the mission was sent to Fiji on 9 February 2012.
- (106) The comments of Fiji to the final report of the mission were received on 8 March 2012.
- (107) Fiji is a member of the WCPFC. Fiji has ratified the Unclos and the UNFSA.
- (108) In order to evaluate the compliance of Fiji with its international obligations as flag, port, coastal or market State set out in the international agreements mentioned in recital 107 and established by the relevant RFMO mentioned in recital 107, the Commission sought and analysed all the information it deemed necessary for the purpose of that exercise.
- (109) The Commission used information derived from available data published by the WCPFC.

#### 7. POSSIBILITY OF FIJI OF BEING IDENTIFIED AS A NON-COOPERATING THIRD COUNTRY

- (110) Pursuant to Article 31(3) of the IUU Regulation, the Commission analysed the duties of Fiji as flag, port, coastal or market State. For the purpose of this review the Commission took into account the parameters listed in Article 31(4) to (7) of the IUU Regulation.

#### 7.1. Recurrence of IUU Vessels and IUU trade flows (Article 31(4)(a) of the IUU Regulation)

- (111) With respect to Fiji flagged IUU vessels it is noted that on the basis of information retrieved from RFMOs vessel lists there are no such vessels in provisional or final IUU lists and no evidence of past cases of Fiji flagged IUU vessels exists that would enable the Commission to analyse the performance of Fiji with respect to recurring IUU fishing activities.

- (112) In the absence of information and evidence as explained in the above recital it is concluded, pursuant to Article 31(3) and 31(4)(a), that it is not necessary to evaluate the compliance of Fiji's action to prevent, deter and eliminate IUU fishing, with its duties under international law as a flag State in respect of IUU vessels and IUU fishing carried out or supported by fishing vessels flying its flag or by its nationals.

#### 7.2. Failure to cooperate and to enforce (Article 31(5)(b) and (d) of the IUU Regulation)

- (113) The Commission analysed whether Fiji has taken effective enforcement measures in respect of operators responsible for IUU fishing and whether sanctions of sufficient severity to deprive the offenders of the benefits accruing from IUU fishing have been applied.
- (114) Available evidence confirms that Fiji has not fulfilled its obligations under international law with respect to effective enforcement measures. Indeed, during the mission referred to in recital 103, the Commission revealed that Fiji has not introduced in its national law ('Marine Spaces Act' and 'Fisheries Act') any specific measure for the management and the control of the Fiji flagged vessels fishing beyond the waters under Fiji jurisdiction.
- (115) During the mission referred to in recital 103, the Commission revealed that there are no specific rules and measures in the legal system of Fiji to specifically address IUU fishing infringements committed on the high seas and to prevent, deter and eliminate IUU fishing activities. It is also clear that no measures are in place in Fiji legislation to sanction not only Fiji flagged vessels but also Fijian nationals involved in IUU fishing activities committed outside the waters under Fiji jurisdiction.
- (116) The lack of specific legal provisions on IUU fishing infringements committed on the high seas is a clear indication that Fiji does not fulfil the conditions of Article 94(2)(b) of the Unclos which stipulates that a flag State assumes jurisdiction under its internal law over each ship flying its flag and its master, officers and crew. Furthermore, the lack of specific legal rules addressing IUU fishing infringements committed on the high seas highlights the failure of Fiji to honour its responsibilities vis-à-vis its vessels operating on the high seas as set out in Article 18(1) of the UNFSA. In addition the absence of a legal framework to enforce and control operations of fishing vessels is in breach of Article 217 of the Unclos which requires flag States to take specific enforcement actions in order to ensure compliance with international rules, the investigation of presumed violations and the adequate sanctioning of any violation.

- (117) Fiji has also failed to demonstrate that it complies with the recommendations in point 18 of the IPOA IUU which stipulates that in the light of the Unclos provisions each State should take measures or cooperate to ensure that nationals subject to their jurisdiction do not support or engage in IUU fishing. Furthermore, Fiji has also failed to demonstrate that it cooperates and coordinates activities with other States in preventing, deterring and eliminating IUU fishing in the manner set out in point 28 of the IPOA IUU.
- (118) Account taken of the situation explained in recitals 113 to 117 it is concluded that the level of sanctions for IUU infringements provided for in Fiji legislation is not in accordance with Article 19(2) of the UNFSA which provides that the sanctions applicable in respect of violations should be adequate in severity to be effective in securing compliance and to discourage violations wherever they occur and should deprive offenders of the benefits accruing from their illegal activities. Furthermore, the performance of Fiji with respect to effective enforcement measures is also not in accordance with the recommendations in point 21 of the IPOA IUU which advises States to ensure that sanctions for IUU fishing by vessels, and to the greatest extent possible, nationals under their jurisdiction are of sufficient severity to effectively prevent, deter and eliminate IUU fishing and to deprive the benefits accruing from such fishing.
- (119) In this respect it is also recalled that, in 2007, when assisting Fiji to elaborate its national plan of action to prevent, deter and eliminate IUU fishing (NPOA IUU), FAO had already urgently invited Fiji to consolidate and update its fisheries management laws and to strengthen its enforcement mechanisms to ensure that conservation and management measures are complied with<sup>(1)</sup>. Despite FAO's request and Fiji's commitment taken in its NPOA IUU adopted in 2009, Fiji legislation has not yet been revised in order to comply with the FAO recommendations.
- (120) With respect to the existing capacity of the Fiji authorities it should be noted that according to the United Nations Human Development Index<sup>(2)</sup>, Fiji is considered as a medium human development country (100th in 187 countries). This is also confirmed by Annex II to Regulation (EC) No 1905/2006 where Fiji is listed in the category of upper middle income countries.
- (121) On the basis of information derived from the mission referred to in recital 103 it cannot be considered that the shortcomings explained in this Section of the Decision are derived from any lack of financing resources since the failures to enforce and consequently cooperate are clearly linked with the lack of the necessary legal and administrative framework.
- (122) Furthermore, it should be highlighted that, in accordance with the recommendations in points 85 and 86 of the IPOA IUU concerning special requirements of developing countries, the Union has already funded a specific technical assistance programme with respect to the fight against IUU fishing<sup>(3)</sup>. Fiji benefited from this programme.
- (123) In view of the situation explained in this Section of the Decision and on the basis of all the factual elements gathered by the Commission as well as all the statements made by the country, it could be established, pursuant to Article 31(3) and 31(5) (b) and (d) of the IUU Regulation, that Fiji has failed to discharge the duties incumbent upon it under international law as flag State in respect of cooperation and enforcement efforts.
- 7.3. Failure to implement international rules (Article 31(6) of the IUU Regulation)**
- (124) Fiji has ratified the Unclos and the UNFSA. Furthermore, Fiji is a Contracting Member of WCPFC.
- (125) The Commission analysed any information deemed relevant with respect to the status of Fiji as Contracting Member of WCPFC.
- (126) The Commission also analysed any information deemed relevant with respect to the agreement of Fiji to apply conservation and management measures adopted by WCPFC.
- (127) In order to evaluate the level of compliance of Fiji with WCPFC conservation and management rules and reporting obligations, the Commission used the draft Compliance Monitoring Scheme Report for 2010<sup>(4)</sup> and the draft Final Compliance Monitoring Report for 2010<sup>(5)</sup>.

<sup>(1)</sup> Draft NPOA IUU for the Republic of the Fiji Islands, Colin Brown, consultant for the FAO Sub-regional Office for the Pacific Islands, Apia, Samoa, October 2007.

<sup>(2)</sup> Information retrieved from: <http://hdr.undp.org/en/statistics/>

<sup>(3)</sup> Accompanying developing countries in complying with the Implementation of Regulation (EC) No 1005/2008 on Illegal, Unreported and Unregulated (IUU) Fishing, EuropeAid/129609/C/SER/Multi.

<sup>(4)</sup> WCPFC-TCC7-2011/17-CMR/07, 5 September 2011.

<sup>(5)</sup> WCPFC8-2011-52, 30 March 2012.

- (128) In particular, according to the available information, Fiji has failed to comply with the requirement to report on the number of vessels fishing for swordfish as provided for in WCPFC Conservation and Management Measure (CMM) 2009-03. It has also failed to comply with the requirement to provide catch and effort data and size composition data for bigeye tuna and yellowfin tuna as provided for in WCPFC Conservation and Management Measure 2008-01. It has also failed to comply with the requirement to report on the implementation of the FAO guidelines and information on interactions with sea turtles as provided for in WCPFC Conservation and Management Measure (CCM) 2008-03. It has also failed to comply with the WCPFC CMM 2007-01 and with the VMS standards, specifications and procedures as defined in points 7.2.2, 7.2.4 and 7.2.3 of the WCPFC VMS Standards Specifications Procedures (SSPs). Finally, Fiji has failed to comply with the requirement on non-national observers provided for in the regional observer programme as defined in WCPFC CMM 2007-01.
- (129) The failure of Fiji to provide to WCPFC the information referred to in recital 128 demonstrates the failure of Fiji to fulfil its obligations as flag State pursuant to the Unclos and the UNFSA.
- (130) Indeed the failure to report catch and effort data as provided for in the WCPFC conservation and management measures, to ensure a correct application of the VMS use rules and to implement correctly a regional observer programme, undermine the ability of Fiji to fulfil its obligations under Articles 117 and 118 of the Unclos which stipulate the duties of States to adopt measures for their respective nationals for the conservation of living resources of the high seas and to cooperate on conservation and management measures for living resources in the areas of the high seas.
- (131) The failure of Fiji to implementing the WCPFC conservation and management measures is in breach of the requirements of Article 18(3) of the UNFSA.
- (132) Indeed Fiji is in breach of Article 18(3)(e) of the UNFSA by failing to transmit vessels positions, catches figures and fishing effort figures of vessels fishing on the high seas in a manner consistent with the rules of a relevant RFMO.
- (133) By failing to implement correctly the regional observer programme of a relevant RFMO, Fiji also acts in breach of Article 18(3)(g)(ii) of the UNFSA.
- (134) In addition, by failing to implement correctly the VMS system of a relevant RFMO, Fiji also acts in breach of Article 18(3)(g)(iii) of the UNFSA.
- (135) Finally, Fiji does not fulfil the conditions stipulated in Article 18(h) of the UNFSA in view of the information gathered during the mission referred to in recital 103 that revealed a complete absence of legal provisions regulating transshipments on the high seas.
- (136) In view of the situation explained in this Section of the Decision and on the basis of all the factual elements gathered by the Commission as well as all the statements made by the country, it could be established, pursuant to Article 31(3) and (6), that Fiji has failed to discharge the duties incumbent upon it under international law with respect to international rules, regulations and conservation and management measures.

#### 7.4. Specific constraints of developing countries

- (137) It is recalled that according to the United Nations Human Development Index <sup>(1)</sup>, Fiji is considered as a medium human development country (100th in 187 countries). This is also confirmed by Annex II to Regulation (EC) No 1905/2006 where Fiji is listed in the category of upper middle income countries.
- (138) Account taken of that ranking Fiji cannot be considered as a country having specific constraints directly derived from its level of development. No corroborating evidence could be established to indicate that the failure of Fiji to discharge the duties incumbent upon it under international law is the result of lacking development. In the same manner, no concrete evidence exists to directly correlate the established shortcomings in respect of the monitoring, control and surveillance of fishing activities with the lack of capacities and infrastructure. In fact for the reasons explained in the above recital there are indications that the failure to comply with international rules is directly linked with lack of proper legal instruments, in particular specific provisions in the national legal framework referring to measures to combat, deter and eliminate IUU fishing activities.
- (139) With respect to control and management capacities it is evident that the significant increase of the Fiji flagged

<sup>(1)</sup> Information retrieved from: <http://hdr.undp.org/en/statistics/>

fleet, as already observed in October 2009 by FAO in its National Fisheries Sector Overview<sup>(1)</sup>, needs to be accompanied with relevant actions to enhance effective monitoring, control and surveillance of fishing activities. Nevertheless, Fiji is an upper middle income country and no corroborating evidence exists to confirm that there are development constraints directly linked with its performance. In fact it should be highlighted that by authorising a significant increase of its registered fishing fleet, without adapting its control system and without adapting its legal framework to the international fisheries legal framework, Fiji has acted in a manner which is not consistent with its international obligations.

(140) It is also pertinent to note that the Union has already funded, in 2012, a specific technical assistance action in Fiji with respect to the fight against IUU fishing<sup>(2)</sup>.

(141) In view of the situation explained in this Section of the Decision, and on the basis of all the factual elements gathered by the Commission as well as all the statements made by the country, it could be established, pursuant to Article 31(7) of the IUU Regulation, that the development status and overall performance of Fiji with respect to fisheries are not impaired by its level of development.

#### 8. PROCEDURE WITH RESPECT TO THE REPUBLIC OF GUINEA

(142) The notification of the Republic of Guinea (Guinea) as flag State was accepted by the Commission in accordance with Article 20 of the IUU Regulation as of 1 January 2010.

(143) From 16 to 20 May 2011, the Commission, with the support of the European Fisheries Control Agency (EFCA), carried out a mission to Guinea in the context of administrative cooperation provided for in Article 20(4) of the IUU Regulation.

(144) The mission sought to verify information notified by Guinea to the Commission concerning Guinea's arrangements for the implementation, control and

enforcement of laws, regulations and conservation and management measures which must be complied with by its fishing vessels, measures taken by Guinea in order to implement its obligations in the fight against IUU fishing and to fulfil its requirements and points pertaining to the implementation of the catch certification scheme of the Union.

(145) The final report of the mission was sent to Guinea on 2 August 2011.

(146) A subsequent mission of the Commission to Guinea was conducted from 27 to 30 September 2011 to follow up the actions taken in the first mission.

(147) The comments of Guinea on the final report of the mission were received on 15 November 2011.

(148) Guinea submitted additional written comments on 21 November 2011, 1 December 2011, 26 March 2012 and 22 May 2012.

(149) Guinea is a Contracting Party to ICCAT and to IOTC. Guinea has ratified the UNCLOS and the UNFSA. Guinea is also a member of the Fishery Committee for the Eastern Central Atlantic (CECAF) which is a sub-regional fisheries advisory body. The purpose of the CECAF is to promote the sustainable utilisation of the living marine resources within its area of competence by the proper management and development of the fisheries and fishing operations.

(150) In order to evaluate the compliance of Guinea with its international obligations as flag, port, coastal or market State set out in the above international agreements mentioned in recital 149 and established by the relevant RFMOs mentioned in recitals 149 and 151, the Commission sought and analysed all the information it deemed necessary for the purpose of such an exercise.

(151) The Commission used information derived from available data published by ICCAT, NEAFC, NAFO and SEAFO either in the form of Compliance Reports or in the form of IUU vessel lists as well as publicly available information retrieved from the NMFS report.

<sup>(1)</sup> FAO National Fishery Sector Overview for Fiji, FID/CP/FIJ October 2009 ([ftp://ftp.fao.org/FI/DOCUMENT/fcp/en/FI\\_CP\\_FJ.pdf](ftp://ftp.fao.org/FI/DOCUMENT/fcp/en/FI_CP_FJ.pdf)).

<sup>(2)</sup> Accompanying developing countries in complying with the Implementation of Regulation (EC) No 1005/2008 on Illegal, Unreported and Unregulated (IUU) Fishing, EuropeAid/129609/C/SER/Multi.



9. POSSIBILITY OF GUINEA OF BEING IDENTIFIED AS A NON-COOPERATING THIRD COUNTRY

(152) Pursuant to Article 31(3) of the IUU Regulation, the Commission analysed the duties of Guinea as flag, port, coastal and market State. For the purpose of this review the Commission took into account the parameters listed in Article 31(4) to (7) of the IUU Regulation.

9.1. Recurrence of IUU Vessels and IUU trade flows (Article 31(4)(a) of the IUU Regulation)

(153) The Commission established on the basis of information retrieved from RFMO IUU vessel lists<sup>(1)</sup> that there are two Guinean-flagged IUU vessels in the relevant IUU lists<sup>(2)</sup>. Those vessels are *Daniaa* (previous name: *Carlos*) and *Maine*.

(154) The Commission established on the basis of information retrieved from RFMO IUU vessel lists<sup>(3)</sup> that one IUU vessel in the relevant IUU lists (*Red*, previously named *Kabou*) carried the flag of Guinea after its inclusion in these lists<sup>(4)</sup>.

(155) Furthermore, three Guinean-flagged purse-seiner vessels were harvesting tuna species from 1 January 2010 to 1 June 2011 within the ICCAT area without holding an international fishing licence delivered by a flag State party to ICCAT. The only fishing licences held by those vessels during that period correspond to fishing licences delivered by Togo for fishing activities within the EEZ of Togo, which is neither a contracting nor a cooperating party to ICCAT. In addition, those vessels were operating within the ICCAT area from 1 January 2010 to 1 June 2011 without VMS devices installed on board in violation of ICCAT Recommendation 03-14. Following official requests notified by the Commission to the Guinean authorities in accordance with Article 26 of the IUU Regulation on 14 March 2011, 26 July 2011 and 20 September 2011, the Guinean authorities applied, in April 2011, an administrative sanction against those vessels for the facts stated in this recital and in accordance with the relevant Guinean legal provisions. Furthermore, according to available information, Vessel Monitoring System (VMS) devices were installed on board those vessels in June 2011. In addition, the three vessels conducted repeated illegal transshipments at sea within the ICCAT area from 1 January 2010 to 29 May 2011 to a carrier vessel which was not

recorded in the ICCAT Registry of carrier vessels<sup>(5)</sup> entitled to operate within the ICCAT area as provided for in ICCAT Recommendation 06-11. In accordance with that Recommendation, purse seiners cannot tranship at sea tuna species within ICCAT area. The Commission found that recurrent transshipments at sea were effected in breach of the ICCAT Recommendation 06-11 from January 2010 to May 2011 with more than 30 such transshipments effected during that period were documented.

(156) In this respect it is recalled that, pursuant to Article 18(1) and (2) of the UNFSA, the flag State is responsible vis-à-vis its vessels operating on the high seas. The Commission considers that the existence of IUU vessels in RFMOs IUU lists currently flagged to Guinea or carried the flag of Guinea after its inclusion in these lists is a clear indication that Guinea has failed to undertake its flag State responsibilities under international law. Indeed, by having the afore-stated number of IUU vessels Guinea has failed to exercise its responsibilities effectively, to comply with RFMO conservation and management measures and to ensure that its vessels do not engage in any activity which undermines the effectiveness of such measures.

(157) Pursuant to Article 19(1) and (2) of the UNFSA, the flag State is required to ensure compliance by vessels flying its flag with RFMO conservation and management rules. Flag States are also required to conduct expeditious investigations and judicial proceedings. The flag State should also ensure adequate sanctions, discourage repetition of violations and deprive offenders of the benefits accruing from their illegal activities. In this respect it is noted that the existence of IUU vessels flagged to Guinea in the RFMO IUU lists highlights the failure of Guinea to fulfil its obligations under Article 19(1) and (2) of the UNFSA.

(158) In addition, pursuant to Article 20 of the UNFSA, States must cooperate either directly or through RFMOs to ensure compliance with and enforcement of RFMO conservation and management measures. A set of specific requirements provided for in that Article sets out the obligations of States to investigate, cooperate with each other and sanction IUU fishing activities. It is also foreseen that for vessels reported to have engaged in activities undermining the effectiveness of RFMO conservation and management measures, States may have recourse to RFMO procedures to deter such vessels until such time as appropriate action is taken by the flag State. In this respect, it is noted that the existence of IUU vessels currently or previously flagged to Guinea

<sup>(1)</sup> The relevant RFMOs are ICCAT, NEAFC, NAFO and SEAFO.

<sup>(2)</sup> See Part B of the Annex to Regulation (EU) No 468/2010.

<sup>(3)</sup> The relevant RFMOs are NEAFC, NAFO and SEAFO.

<sup>(4)</sup> See Commission Implementing Regulation (EU) No 724/2011 (OJ L 194, 26.7.2011, p. 14).

<sup>(5)</sup> Not recorded in the ICCAT Registry of carrier vessels <http://www.iccat.es/en/vesselsrecord.asp>

(following their inclusion in RFMO IUU vessel lists) in RFMO IUU lists still operating demonstrates the failure of Guinea to fulfil its obligations under international law with respect to international cooperation in enforcement.

- (159) It is also recalled that in accordance with Article 118 of the Unclos, States must cooperate in the conservation and management of living resources in the areas of the high seas. In this respect the existence of IUU vessels currently or previously flagged to Guinea (following their inclusion in RFMO IUU vessel lists) in RFMO IUU lists which are still engaged in fishing operations highlights the failure of Guinea to fulfil its flag State obligations. Indeed recognised IUU fishing vessels undermine conservation and management of living resources.
- (160) The non-compliance by Guinea with respect to Guinean-flagged IUU vessels listed in RFMO lists is also in breach of Article 217 of the Unclos which requires flag States to take specific enforcement actions in order to ensure compliance with international rules, the investigation of presumed violations and the adequate sanctioning of any violation.
- (161) The existence of IUU vessels currently or previously (following their inclusion in RFMO IUU vessel lists) flagged to Guinea in RFMO IUU lists also demonstrates the lack of ability of Guinea to follow the recommendations in the IPOA IUU. Point 34 of the IPOA IUU recommends that States ensure that fishing vessels entitled to fly their flag do not engage in or support IUU fishing.
- (162) The failure of Guinea as a flag State to fulfil its compliance and enforcement obligations as laid down in Article 19 of the UNFSA is also confirmed by the information gathered during the mission in May 2011 and by information collected by the Commission in accordance with Article 25 of the IUU Regulation. As explained in recitals 174 and 175, the Commission established that fishing vessels flying its flag were committing recurrent IUU fishing activities. This situation prompted the initiation of procedures under Articles 26 and 27 of the IUU Regulation. The procedures under Article 27 are currently on-going in order to establish if IUU fishing activities are adequately sanctioned in a manner that ensures compliance, discourages violations and deprives offenders of the benefits accruing from their illegal activities.
- (163) On the basis of information collected during the mission it conducted in May 2011, the Commission revealed that Guinea did not take appropriate measures for preventing, detecting and sanctioning recurrent IUU fishing activities carried out by fishing vessels operating in its waters. Indeed, available information confirms that in spite of the availability of sufficient information for notifying

infringements committed by foreign fishing vessels operating within their waters, in particular from observers reports and catch reports, the competent Guinean authorities did not initiate proceedings and did not sanction the vessels concerned. Furthermore, there are indications that the provisions of a State agreement between Guinea and a foreign country are not properly enforced by the Guinean authorities.

- (164) In view of the situation explained in this Section of the Decision and on the basis of all the factual elements gathered by the Commission as well as all the statements made by the country, it could be established, pursuant to Article 31(3) and 31(4)(a) of the IUU Regulation, that Guinea has failed to discharge the duties incumbent upon it under international law as a flag and coastal State in respect of IUU vessels and IUU fishing carried out or supported by fishing vessels flying its flag or operating in its maritime waters or by its nationals and has not taken sufficient action to counter documented and recurring IUU fishing by vessels flying its flag or operating in its maritime waters.

## 9.2. Failure to cooperate and to enforce (Article 31(5) of the IUU Regulation)

- (165) With respect to whether Guinea cooperates effectively with the Commission on investigations of IUU fishing and associated activities it is noted that evidence gathered by the Commission indicates that Guinea failed to fulfil its flag State obligations as set out under international law.
- (166) In this respect the situation with respect the three Guinean-flagged purse-seiner vessels explained in recital 154 is recalled. In this context, it is noted that considering that the Guinean authorities failed to cooperate in the framework of Article 26 of the IUU Regulation, the Commission initiated the procedure of Article 27 of that Regulation vis-à-vis the operator concerned.
- (167) The facts described in recitals 154 and 166 indicates that Guinea failed to take enforcement action in response to such IUU fishing following relevant requests made by the European Commission.
- (168) The facts described in recitals 154 and 166 indicates Guinea failed to fulfil the conditions of Article 94(2)(b) of the Unclos which stipulates that a flag State assumes jurisdiction under its internal law over each ship flying its flag and its master, officers and crew. Furthermore, Guinea does not fulfil its compliance and enforcement obligations as a flag State stipulated in Article 19 of the UNFSA since it has failed to demonstrate that it acted and operated in accordance with the detailed rules laid down in that Article.

- (169) This situation indicates that Guinea also failed to cooperate and coordinate activities with other States in preventing, deterring and eliminating IUU fishing in the manner set out in point 28 of the IPOA IUU. Guinea also failed to take into consideration the recommendations in point 24 of the IPOA IUU which advises flag States to ensure comprehensive and effective monitoring, control and surveillance (MCS) of fishing from its commencement, through the point of landing, to final destination, including by implementing a Vessel Monitoring System (VMS) in accordance with the relevant national, regional and international standards, including the requirement for vessels under its jurisdiction to carry VMS on board. In the same manner, Guinea failed to take into consideration the recommendations in point 45 of the IPOA IUU which advises flag States to ensure that each vessel entitled to fly their flag fishing in waters outside their sovereignty or jurisdiction holds a valid authorisation to fish issued by the flag State concerned.
- (170) The Commission analysed whether Guinea has taken effective enforcement measures in respect of operators responsible for IUU fishing and whether sanctions of sufficient severity to deprive the offenders of the benefits accruing from IUU fishing have been applied.
- (171) It is noted that the available evidence confirms that Guinea has not fulfilled its obligations under international law with respect to effective enforcement measures. In this respect it is recalled that there are vessels in RFMOs IUU lists currently flagged to Guinea or carried the flag of Guinea after its inclusion in these lists. The existence of such IUU vessels highlights the failure of Guinea to honour its responsibilities vis-à-vis its vessels operating on the high seas as set out in Article 18(1) and (2) of the UNFSA. Furthermore, that situation is also an indication that Guinea is not fulfilling the requirements of Article 19(1) of the UNFSA which sets rules for flag States on compliance and enforcement. The performance of Guinea in this matter is also not in accordance with the requirements of Article 19(2) of the UNFSA which stipulates, inter alia, that sanctions should be adequate in severity and deprive offenders of the benefits accruing from their illegal activities.
- (172) Furthermore the performance of Guinea with respect to effective enforcement measures is also not in accordance with the recommendations in point 21 of the IPOA IUU which advise States to ensure that sanctions for IUU fishing by vessels, and to the greatest extent possible, nationals under their jurisdiction are of sufficient severity to effectively prevent, deter and eliminate IUU fishing and to deprive offenders of the benefits accruing from such fishing.
- (173) During the mission it conducted in May 2011, the Commission observed that there is a need to review the applicable sanctions in respect of violations, as provided for in Guinea Decret D/97/017/PRG/SGG' of 19 February 1977. Guinea reformed its sanction system by adopting, on 1 March 2012, a new decree repealing the previous one (mentioned above in this recital) and increasing the levels of sanction in accordance with the requirements of Article 19 of the UNFSA. Nevertheless, up till now, no concrete information exists on the way this new legal framework is applied.
- (174) In this respect, on the basis of documentary evidence collected in accordance with Chapters III and V of the IUU Regulation, it was revealed that the three Guinean-flagged vessels mentioned in recital 166 which were operating within the ICCAT area from 1 January 2010 to 1 June 2011 without VMS devices installed on board in violation of ICCAT Recommendation 03-14 caught at least 8 922 tonnes of tuna species (mainly skipjack tuna) in 2010. This situation prompted the initiation of procedures under Articles 26 and 27 of the IUU Regulation. The procedure under Article 27 is currently on-going.
- (175) In the same manner, on the basis of documentary evidence collected in accordance with Chapter III and V of the IUU Regulation, it was revealed that the three Guinean-flagged vessels mentioned in recital 166 carried out more than 30 transshipments at sea representing 14 200 tonnes of tuna from January 2010 to May 2011 in violation of ICCAT Recommendation 06-11. This situation prompted the initiation of procedures under Articles 26 and 27 of the IUU Regulation. The procedure under Article 27 is currently on-going.
- (176) In the course of the mission it conducted in May 2011, the Commission observed that in spite of the availability of sufficient information for notifying infringements committed by foreign fishing vessels operating within Guinean waters, in particular from observers reports and catch reports, the competent Guinean authorities were failing to undertake prompt action to initiate proceedings and, where appropriate, to sanction the vessels concerned. Pursuant to Article 62 of the Unclos, the coastal State must promote the objective of optimum utilisation of the living resources in the EEZ. In addition, nationals of other States fishing in the EEZ must comply with the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State. In this respect, the administrative practices observed in Guinea are not consistent with the international obligations of coastal States under the Unclos.

(177) Pursuant to Article 20 of the UNSFA, States must cooperate promptly and expeditiously in order to ensure compliance with and enforcement of conservation and management measures and address any alleged violation.

(178) Account taken of the situation in explained in this Section of the Decision, it is considered that the enforcement procedures put in place by Guinea as coastal State are not consistent with the UNSFA. This is because the policy followed by Guinea lacks prompt international cooperation in enforcement and consequently undermines the effectiveness of any enforcement measure in respect of operators responsible for IUU fishing.

(179) With respect to the history, nature, circumstances, extent and gravity of the manifestations of IUU fishing considered, the Commission has taken into account the recurrent and repetitive IUU fishing activities of Guinean-flagged vessels until 2012.

(180) With respect to the existing capacity of Guinea as a developing country, it should be taken into account that, according to the United Nations Human Development Index <sup>(1)</sup>, Guinea is considered as a low human development country (178th in 187 countries). This is also confirmed by Annex II to Regulation (EC) No 1905/2006 where Guinea is listed in the category of least developed countries. In this respect, the financial and administrative capacity constraints of the competent authorities may be considered as one factor that undermines the ability of Guinea to fulfil its cooperation and enforcement duties. Nevertheless, it should be taken into account that the administrative capacity of Guinea has been recently reinforced by Union financial and technical assistance over the three last years in the framework of the Fishing Partnership Agreement which was in force in 2009 <sup>(2)</sup>, and by technical assistance programme with respect to the fight against IUU fishing <sup>(3)</sup>.

(181) In view of the situation explained in this Section of the Decision and on the basis of all the factual elements gathered by the Commission as well as all the statements made by the country, it could be established, pursuant to

Article 31(3) and 31(5) of the IUU Regulation, that Guinea has failed to discharge the duties incumbent upon it under international law as flag State in respect of cooperation and enforcement efforts.

### 9.3. Failure to implement international rules (Article 31(6) of the IUU Regulation)

(182) Guinea has ratified the Unclos and the UNFSA. Furthermore, Guinea is a Contracting Member of IOTC and ICCAT.

(183) The Commission analysed any information deemed relevant with respect to the status of Guinea as Contracting Member of IOTC and ICCAT.

(184) The Commission also analysed any information deemed relevant with respect to the agreement of Guinea to apply conservation and management measures adopted by ICCAT and IOTC.

(185) It is recalled that ICCAT issued a letter of Identification to Guinea concerning its reporting deficiencies in 2010 <sup>(4)</sup>. Indeed in its letter of Identification Guinea has been identified for its failure to comply with its obligation to communicate statistics as set out in ICCAT Recommendation 05-09. In the same letter ICCAT highlighted that Guinea had not provided all the necessary data and information such as the annual report, the compliance tables, data on Task I (statistics referring to fleet) and Task II (catches size), information related to management measures for large-scale longline tuna vessels, the report on internal measures for vessels of more than 20 meters in length, had not been transmitted to the ICCAT Secretariat. The relevant requirements are provided for in the set of ICCAT resolutions and recommendations listed in recitals 188 and 190. It is also pertinent to note that Guinea was identified by ICCAT in 2009, the identification was maintained in 2010 and 2011.

(186) The Commission also analysed information available from ICCAT on the compliance of Guinea with ICCAT rules and reporting obligations. For this the Commission used the ICCAT 2010 Compliance Summary Tables <sup>(5)</sup> as well as the ICCAT 2011 Compliance Summary Tables <sup>(6)</sup>.

<sup>(1)</sup> Information retrieved from: <http://hdr.undp.org/en/statistics/>

<sup>(2)</sup> The Vessel Monitoring System was funded by the Union and a patrol vessel was paid.

<sup>(3)</sup> Accompanying developing countries in complying with the Implementation of Regulation (EC) No 1005/2008 on Illegal, Unreported and Unregulated (IUU) Fishing, EuropeAid/129609/C/SER/Multi.

<sup>(4)</sup> ICCAT letter, 4 March 2010, ICCAT Circular No 567, 4.3.2010.

<sup>(5)</sup> ICCAT, Compliance Summary Tables, Doc. No COC-308/2010, 10.11.2010.

<sup>(6)</sup> ICCAT, Draft Compliance Summary Tables, Doc. No COC-308/2011.

- (187) With respect to 2010, Guinea did not submit: annual reports and statistics, information referring to conservation and management measures and compliance tables. Furthermore Guinea failed to report to ICCAT actions taken with respect to one vessel on the ICCAT IUU list.
- (188) In particular, according to the available information, Guinea did not submit to ICCAT in 2010 information on: annual reports (scientific) (provided for ICCAT Convention, Resolution 01-06 and Reference 04-17), annual reports (ICCAT Commission) (provided for ICCAT Convention, Resolution 01-06 and Reference 04-17), trade measures submission of imports and landing data (provided for Recommendation 06-13), transshipment declarations (at sea) (provided for Recommendation 06-11), transshipment reports (provided for Recommendation 06-11), data on non-compliance (provided for Recommendation 08-09), vessels 20 m internal action reports (provided for Recommendation 02-22/09-08), annual list of albacore vessels (provided for Recommendation 98-08), list of Mediterranean-SWO (swordfish) vessels (provided for Recommendation 09-04/09-08), large scale tuna longline fishing vessels (LSTLV) management standard (provided for Recommendation 01-20), vessel chartering (provided for Recommendation 02-21), vessels involved in IUU fishing (provided for Recommendation 09-10), reports on IUU allegations (provided for Recommendation 09-10), vessel sightings (provided for Res 94-09), port inspection reports (provided for Recommendation 97-10), data from ICCAT Statistical Document Programs (provided for Recommendation 01-21 and Recommendation 01-22), validation seals and signatures for bluefin tuna catch documents (BCD) (provided for Recommendation 08-12/09-11), BCD contacts points (provided for Recommendation 08-12/09-11), BCD legislation (provided for Recommendation 08-12/09-11), BCD tagging summary (provided for Recommendation 08-12/09-11), bluefin catch documents (provided for Recommendation 08-12/09-11), BCD annual report (provided for Recommendation 08-12/09-11), compliance with seasonal closure for med SWO (swordfish) (provided for Recommendation 09-04), internal procedure for compliance with closed areas/season in Gulf of Guinea (provided for Recommendation 09-04), compliance tables (provided for Recommendation 98-14), submission of information on East Atlantic and Mediterranean bluefin tuna (provided for Recommendation 06-07, Recommendation 08/05/EC and 09-11).
- (189) With respect to 2011, Guinea did not submit: the annual report, Task I data related to fleet characteristics and Task II (catches size) data, information referring to conservation and management measures concerning vessels of more than 20 meters in length and compliance tables.
- Furthermore Guinea failed to report to ICCAT actions taken with respect to one vessel on the ICCAT IUU list.
- (190) In particular, according to the available information, Guinea did not submit to ICCAT in 2011 information on: annual reports (scientific) (provided for ICCAT Convention, Resolution 01-06 and Reference 04-17), annual reports (ICCAT Commission) (provided for ICCAT Convention, Resolution 01-06 and Reference 04-17), transshipment declarations (at sea) (provided for Recommendation 06-11), transshipment reports (provided for Recommendation 06-11), transshipment (carrier) vessels (provided for Recommendation 06-11), vessels greater than 20 m (provided for Recommendation 09-08), vessels 20 m internal action reports (provided for Recommendation 02-22/09-08), annual list of albacore vessels (provided for Recommendation 98-08), large scale tuna longline fishing vessels (LSTLV) management standard (provided for Recommendation 01-20), vessel chartering (provided for Recommendation 02-21), alternative scientific monitoring approach (provided for Recommendation 10-10), internal procedure for compliance with closed areas/season in Gulf of Guinea (provided for Recommendation 09-04), compliance tables (provided for Recommendation 98-14), submission of information on East Atlantic and Mediterranean bluefin tuna (provided for Recommendation 06-07, Recommendation 08/05/EC and 09-11).
- (191) Furthermore, a number of elements were revealed during the mission the Commission conducted in Guinea in May 2011. While Vessel Monitoring System (VMS) devices must be installed on board vessels operating within ICCAT area (in accordance with ICCAT Recommendation 03-14), it was revealed during that mission that the VMS in the Guinean Fisheries Monitoring Centre was not functioning. On the basis of concrete cases, it was revealed that only historical data was partly available for 2010. Due to technical problems, VMS could neither be used for monitoring the activities of Guinean vessels operating on the high seas, nor for monitoring the activities of the foreign fishing vessels operating within Guinean waters.
- (192) In the same manner, it was revealed during the mission the Commission conducted in May 2011 that Guinea was not monitoring the transshipment operations at sea of purse seiners flying its flag and operating in the ICCAT area. In this respect recurrent violations of ICCAT Recommendation 06-11 were even authorised by the Guinean authorities who had validated 22 catch certificates which mention transshipments at sea carried out by three Guinean purse seiners operating in the ICCAT area.

- (193) Furthermore, it was observed during the mission the Commission conducted in May 2011 that operational and financial means for conducting surveillance operations at sea were not sufficient for ensuring an efficient monitoring of activities conducted by foreign fishing vessels in their waters. It was also observed that several provisions of the Guinean Fisheries Code were not implemented and enforced by the Guinean authorities. Those provisions, which concern the obligation to communicate fishing log books after each fishing campaign and the obligation to transhipment only at port as provided for in the Guinean 'Plan de pêche', were not implemented and enforced by the Guinean authorities. Consequently, the omission of the Guinean authorities to enforce those provisions has diminished the effectiveness of the applicable laws and regulations.
- (194) During the mission it conducted in May 2011, the Commission also observed that in spite of the monitoring, control and surveillance means, and in spite of relevant scientific advice for determining the allowable catch of living resources in its EEZ (no direct assessment of stocks had been made since 2009), Guinea issued authorisations to fish for more than 60 foreign fishing vessels in 2010 and for 56 such vessels in June 2011. Consequently, the decision of the Guinean authorities to issue those authorisations has have diminished the effectiveness of the applicable laws and regulations.
- (195) The Commission also analysed information available from IOTC on the compliance of Guinea with IOTC rules and reporting obligations. IOTC characterised the general level of implementation of IOTC conservation and management measures from Guinea in 2011 as follows: 'general lack of compliance with IOTC measures and response' and 'no report of implementation and was not present to discuss compliance issue'. For 2012, IOTC characterised the identified non-compliance issue for Guinea as follows: 'general lack of compliance with IOTC measures and response' <sup>(1)</sup>.
- (196) The compliance report <sup>(2)</sup> issued by IOTC for Guinea in 2011 highlighted many points of non-compliance in terms of annual reports, reporting of the list of active vessels targeting tunas and swordfish (Resolution 09/02), monitoring of domestic vessels and reporting of a list of active vessels (Resolution 09/02), VMS in place as no information had been reported (Resolution 06/03), reporting of catch, by-catch and effort data (Resolution 10/02), Regional Observer Scheme as no information had been provided on the level of implementation (Resolution 10/04), recording of catch by fishing vessels as no information had been provided on the level of implementation (Resolution 10/03), reducing of incidental by-catch of sea-birds in logline fisheries as no information had been reported (Resolution 10/06), level of participation in IOTC.
- (197) The compliance report <sup>(3)</sup> issued by IOTC for Guinea in 2012 highlighted many points of non-compliance in terms of annual reports, marking of vessels, marking of gears and logbook on board as no information had been provided on those points (Resolution 01/02), communication of legal and administrative measures to implement the area closure (Resolution 10/01), reporting of list of active vessels (Resolution 10/08), reporting of the list of active vessels targeting tunas and swordfish (Resolution 09/02), monitoring of domestic vessels and reporting of a list of active vessels (Resolution 09/02), implementation of VMS for vessels of more than 15 meters in length as no information had been reported (Resolution 06/03), statistical requirements (Resolution 10/02), implementation of mitigation measures and by-catch of non-IOTC species, regional observers scheme as no information had been provided on the level of implementation (Resolution 10/04).
- (198) The failure of Guinea to provide to ICCAT and IOTC the information referred to in recitals 185 to 197 demonstrates the failure of Guinea to fulfil its obligations as flag State laid down in the Unclos and the UNFSA.
- (199) The shortcomings revealed by the mission in May 2011 and referred to in recitals 191 to 194 provide further evidence of the failure of Guinea to fulfil its obligations as flag State laid down in the UNFSA.
- (200) Indeed the failure to provide information on conservation and management measures, quotas and catch limits and annual reports and statistics undermines the ability of Guinea to fulfil its obligations under Articles 117 and 118 of the Unclos which stipulate the duties of States to adopt measures for their respective nationals for the conservation of living resources of the high seas and to cooperate on conservation and management measures for living resources in the areas of the high seas.
- (201) The performance of Guinea as explained in this Section of the Decision is in breach of the requirements of Article 18(3) of the UNFSA.

<sup>(1)</sup> IOTC Compliance Report for Guinea (report produced on 9.3.2012), IOTC-2012-CoC09- CR08E (Page 4).

<sup>(2)</sup> IOTC Compliance report for Guinea (Compliance Committee Session 8, 2011).

<sup>(3)</sup> IOTC Compliance Report for Guinea (report produced on 9.3.2012), IOTC-2012-CoC09- CR08E.

- (202) On account of its failure to control of vessels in high seas in line with RFMOs rules and of its failure to ensure compliance of the vessels flying its flag with ICCAT recommendations, Guinea acts in breach of Article 18(3)(a) of the UNFSA which requires States whose vessels fish on the high seas to take control measures to ensure that those vessels comply with RFMO rules.
- (203) Guinea does not comply with the recording and timely reporting requirements of Article 18(3)(e) of the UNFSA on account of its failure to submit to ICCAT information on annual reports, Task I (fleet characteristics), internal action reports for vessels longer than 20 m, compliance tables and information related to management measures for large-scale longline tuna vessels.
- (204) In addition, Guinea does not fulfil its obligations pursuant to Article 18(3), (f) and (i) and Article 18(4) of the UNFSA on account of its failure to report to IOTC catch related data, data on national observers programmes, the list of active vessels and catch, by-catch and effort data.
- (205) Guinea does not fulfil the conditions stipulated in Article 18(3)(g) of the UNFSA in view of the information gathered during the mission in May 2011 concerning the monitoring, control and surveillance abilities of the Guinean authorities, the failure of Guinea to report to IOTC on VMS implementation and the observed lack of implementation of ICCAT Recommendation (Resolution 10/02) on VMS surveillance of the vessels operating within the ICCAT area.
- (206) The performance of Guinea as explained in this Section of the Decision is in breach of the Unclos requirements concerning coastal States.
- (207) Pursuant to Article 61 of the Unclos, the coastal State must determine the allowable catch of the living resources in its EEZ. The coastal State, taking into account the best scientific evidence, must ensure through proper conservation and management measures that the maintenance of the living resources in the EEZ is not endangered by over-exploitation. In this respect, the absence of direct assessment of the fisheries stocks in Guinea since 2009, the failure to enforce applicable rules in terms of communication of fishing log books and transshipments at sea, and the failure to initiate proceedings or to take sanctions when infringements are detected, are not consistent with the international obligations of coastal States under the Unclos.
- (208) The lack of effective international cooperation in enforcement actions relating to conservation and management measures, as explained in recital 175, demonstrates that Guinea is failing to comply with the requirements of Articles 61 and 62 of the Unclos. For the same reason, Guinea failed as coastal State to take into consideration the recommendations in point 51 of the IPOA IUU which advises coastal States to implement measures to prevent, deter and eliminate IUU fishing in the EEZ. Among the measures which coastal States should consider are effective monitoring, control and surveillance of fishing activities in the EEZ, ensuring that at-sea transshipment in coastal State waters are authorised by the coastal State, or conducted in conformity with appropriate management regulations, regulation of fishing access to its waters in a manner which will help to prevent, deter and eliminate IUU fishing.
- (209) It should be also noted that, contrary to the recommendations in points 25, 26 and 27 of the IPOA IUU, Guinea has not developed a national plan of action against IUU fishing.
- (210) Finally, during the mission it conducted in May 2011, the Commission observed that Guinean law provides for the possibility to be granted a temporary registration under the Guinean flag with the possibility to renew this temporary registration every six months without limit. In addition, that possibility is not subject to the usual condition of deletion of registration under the previous flag, and does not imply an actual identification of the beneficial owner of the vessel. In fact, the Guinean administration only keeps record of the identity of the Guinean representative of the vessel in Guinea. In this respect it should be noted that the importance of effective actions vis-à-vis beneficial owners is confirmed by relevant FAO and OECD documentation which highlights the importance of information on beneficial owners in order to combat illicit activities<sup>(1)</sup> and the need for records of fishing vessels and beneficial ownership<sup>(2)</sup>. That administrative practice, that could attract IUU operators for registration of IUU vessels, is not in compliance with Article 94 of the Unclos.

<sup>(1)</sup> OECD, 'Ownership and Control of Ships' Report, retrieved from: <http://www.oecd.org/dataoecd/53/9/17846120.pdf>

<sup>(2)</sup> FAO, 'Comprehensive record of fishing vessels, refrigerated transport vessels, supply vessels and beneficial ownership', Report of a Study by the FAO Department of Fisheries, March 2010 (retrieved from: [ftp://ftp.fao.org/FI/DOCUMENT/global\\_record/eims\\_272369.pdf](ftp://ftp.fao.org/FI/DOCUMENT/global_record/eims_272369.pdf)) and IPOA IUU, point 18.

(211) In view of the situation explained in this Section of the Decision and on the basis of all the factual elements gathered by the Commission as well as all the statements made by the country, it could be established, pursuant to Article 31(3) and (6) of the IUU Regulation, that Guinea has failed to discharge the duties incumbent upon it under international law with respect to international rules, regulations and conservation and management measures.

#### 9.4. Specific constraints of developing countries

(212) It is recalled that, according to the United Nations Human Development Index <sup>(1)</sup>, Guinea is considered as a low human development country (178th in 187 countries). This is also confirmed by Annex II to Regulation (EC) No 1905/2006 where Guinea is listed in the category of least developed countries. Account taken of the ranking of Guinea, the Commission analysed if the information gathered could be linked with its specific constraints as a developing country.

(213) It should be noted that the notification of Guinea as flag State was accepted by the Commission in accordance with Article 20 of the IUU Regulation as of 1 January 2010. Guinea consequently confirmed, as Article 20(1) of IUU Regulation states, that it has national arrangements in place for the implementation, control and enforcement of laws, regulations and conservation and management measures which must be complied with by its fishing vessels.

(214) The Commission informed Guinea of the various shortcomings it detected during the two missions it conducted. The Commission sought to achieve cooperation of the Guinean authorities and progress in corrective actions in respect of the shortcomings it detected. Up till now Guinea has failed to take concrete corrective actions and to achieve positive developments in correcting established shortcomings except in respect of the recent revision of its sanctions system (Decree of 1 March 2012) which aims at laying down sanctions in conformity with the requirements of Article 19 of the UNFSA.

(215) Furthermore, the administrative capacity of Guinea has recently been reinforced by Union financial and technical assistance provided in the past years. That assistance concerned the Fishing Partnership Agreement between the Union and Guinea which was implemented for one

year in 2009, and technical assistance provided with respect to the fight against IUU fishing in 2012 <sup>(2)</sup>.

(216) The Commission has therefore taken into consideration the development constraints of Guinea and offered adequate time to Guinea to implement actions in order to remedy its non-compliance with its obligations under international law in a coherent, effective and non-detrimental way.

(217) In view of the situation explained in this Section of the Decision and on the basis of all the factual elements gathered by the Commission as well as all the statements made by the country, it could be established, pursuant to Article 31(7) of the IUU Regulation, that the development status of Guinea may be impaired by its level of development. However, account taken of the nature of the established shortcomings of Guinea, the assistance provided by the Union and actions taken to rectify the situation, the development level of that country cannot fully excuse or otherwise justify the overall performance of Guinea as flag or coastal State with respect to fisheries and the insufficiency of its action to prevent, deter and eliminate IUU fishing.

#### 10. PROCEDURE WITH RESPECT TO THE REPUBLIC OF PANAMA

(218) The notification of by the Republic of Panama (Panama) as flag State was accepted by the Commission in accordance with Article 20 of the IUU Regulation as of 3 February 2010.

(219) From 21 to 25 June 2010, the Commission, with the support of the EFCA, carried out a mission to Panama in the context of administrative cooperation provided for in Article 20(4) of the IUU Regulation.

(220) The mission sought to verify information concerning Panama's arrangements for the implementation, control and enforcement of laws, regulations and conservation and management measures which must be complied with by its fishing vessels, measures taken by Panama in order to implement its obligations in the fight against IUU fishing and to fulfil its requirements and points pertaining to the implementation of the catch certification scheme of the Union.

(221) The final report of the mission was sent to Panama on 29 November 2010.

<sup>(1)</sup> Information retrieved from: <http://hdr.undp.org/en/statistics/>

<sup>(2)</sup> Accompanying developing countries in complying with the Implementation of Regulation (EC) No 1005/2008 on Illegal, Unreported and Unregulated (IUU) Fishing, EuropeAid/129609/C/SER/Multi.



(222) A subsequent mission of the Commission to Panama to follow up the actions taken in the first mission was conducted from 13 to 16 April 2011.

(223) The comments of Panama on the final report of the mission were received on 10 May 2011.

(224) Panama submitted additional written comments on 15 April 2011, 12 November 2011 and 5 January 2012. It also provided replies during meetings that took place in Brussels on 18 July 2011, 21 September 2011, 13 October 2011, 14 October 2011, 23 November 2011, 6 March 2012 and 20 June 2012.

(225) Panama is a Contracting Party to IATTC, ICCAT and it is a Cooperative non-Member of WCPFC. Panama has ratified the Unclos and the UNFSA.

(226) In order to evaluate the compliance of Panama with its international obligations as flag, port, coastal or market State set out in the international agreements mentioned in recital 225 and established by the relevant RFMOs mentioned in recitals 225 and 227, the Commission sought and analysed all the information it deemed necessary for the purpose of such an exercise.

(227) The Commission used information derived from available data published by ICCAT, CCAMLR, WCPFC, NEAFC, NAFO and SEAFO either in the form of Compliance Reports or in the form of IUU vessel lists as well as publicly available information retrieved from the NMFS report.

#### 11. POSSIBILITY OF PANAMA OF BEING IDENTIFIED AS A NON-COOPERATING THIRD COUNTRY

(228) Pursuant to Article 31(3) of the IUU Regulation, the Commission analysed the duties of Panama as flag, port, coastal or market State. For the purpose of this review the Commission took into account the parameters listed in Article 31(4) to (7) of the IUU Regulation.

##### 11.1. Recurrence of IUU Vessels and IUU trade flows (Article 31(4)(a) of the IUU Regulation)

(229) The Commission established on the basis of information retrieved from RFMO IUU vessel lists<sup>(1)</sup> that there is a

number of Panamanian-flagged IUU vessels in the relevant IUU lists<sup>(2)</sup>. Those vessels are *Alboran II* (previous name: *White Enterprise*), *Challenge* (previous names: *Mila/Perseverance*), *Eros Dos* (previous name: *Furabolos*), *Heavy Sea* (previous names: *Duero/Keta*), *Iannis 1*, *Red* (previous name: *Kabou*), *Senta* (previous name: *Shin Takara Maru*) and *Yucatan Basin* (previous names: *Enxembre/Fonte Nova*).

(230) The Commission established on the basis of information retrieved from RFMO IUU vessel lists<sup>(3)</sup> that a number of IUU vessels in the relevant IUU lists that carried the flag of Panama after their inclusion in these lists<sup>(4)</sup>. Those vessels are *Lila No 10*, *Melilla No 101*, *Melilla No 103*, *No 101 Gloria* (previous name: *Golden Lake*), *Sima Qian Baru 22* (previous names: *Corvus/Galaxy*), *Tching Ye No 6*, *Xiong Nu Baru 33* (previous names: *Draco-1*, *Liberty*).

(231) In this respect it is recalled that, pursuant to Article 18(1) and (2) of the UNFSA, the flag State is responsible vis-à-vis its vessels operating on the high seas. The Commission considers that the existence of IUU vessels currently flagged to Panama or carried the flag of Panama after their inclusion in the RFMO IUU lists is a clear indication that Panama has failed to undertake its flag State responsibilities under international law. Indeed, by having the afore-stated number of IUU vessels, Panama has failed to exercise its responsibilities effectively, to comply with RFMO conservation and management measures and to ensure that its vessels do not engage in any activity which undermines the effectiveness of such measures.

(232) Furthermore, one Panamanian-flagged carrier vessel was inspected in one Member State in March 2011. That inspection revealed information indicating the presumed conduct of IUU fishing and associated activities. That vessel did not operate under a valid licence issued by Panama for transport, transshipment and support to fishing activities. The vessel conducted non-authorised transshipments in the EEZ waters of the Republic of Guinea-Bissau (Guinea-Bissau) and received fish caught by vessels in waters for which the Republic of Liberia (Liberia) had imposed specific conservation and management measures in contravention of those measures. The fishing vessels having operated under illegal conditions within Liberian waters and the carrier vessel having collected the related fisheries products were all beneficially owned by the same legal entity. The Panamanian authorities were informed on 21 March 2011 of the fisheries transportation activities by the relevant

<sup>(1)</sup> The relevant RFMOs are NEAFC, NAFO, SEAFO, CCAMLR and WCPFC.

<sup>(2)</sup> See Part B of the Annex to Regulation (EU) No 468/2010.

<sup>(3)</sup> The relevant RFMOs are NEAFC, NAFO, SEAFO, CCAMLR, IATTC and ICCAT.

<sup>(4)</sup> See Part B of the Annex to Regulation (EU) No 468/2010.

Member State authorities and replied on 15 April 2011 that they had not provided a valid licence for transport, transshipment and support to fishing activities and that they were not aware of transshipment authorisations issued for that carrier vessel by Guinea-Bissau, Guinea or Liberia. Despite that acknowledgement, that vessel continued with its normal activities in West Africa throughout 2011 without any specific measure being reported to have been taken by Panama in its regard.

(233) Pursuant to Article 19(1) and (2) of the UNFSA, the flag State is required to ensure compliance by vessels flying its flag with RFMO conservation and management rules. Flag States are also required to conduct expeditious investigations and judicial proceedings. The flag State should also ensure adequate sanctions, discourage repetition of violations and deprive offenders of the benefits accruing from their illegal activities. In this respect it is noted that the existence of a number of IUU vessels flagged to Panama in the RFMO IUU lists highlights the failure of Panama to fulfil its obligations under Article 19(1) and (2) of the UNFSA.

(234) The failure of Panama to fulfil its compliance and enforcement obligations under Article 19 of the UNFSA is also confirmed by the information gathered during the mission in June 2010. The mission revealed that the relevant Panamanian authorities were not empowered to conduct administrative investigations in order to collect essential evidence from legal or natural persons, the actual recovery of fines imposed did not appear to be effective while in cases where operators or beneficial owners were not based in Panama but operated under the legal form of off-shore companies the enforcement of sanction decisions was not properly ensured as there was an absence of appropriate mechanisms of cooperation between Panama and the relevant third countries. In this respect it should be noted that the importance of effective actions vis-à-vis beneficial owners is confirmed by relevant FAO and OECD documentation which highlights the importance of beneficial owners' information in order to combat illicit activities<sup>(1)</sup> and the need for records of fishing vessels and beneficial ownership<sup>(2)</sup>.

(235) In addition, pursuant to Article 20 of the UNFSA, States must cooperate either directly or through RFMOs to ensure compliance with and enforcement of RFMO conservation and management measures. A set of specific requirements provided for in that Article sets

out the obligations of States to investigate, cooperate with each other and sanction IUU fishing activities. It is also foreseen that for vessels reported to have engaged in activities undermining the effectiveness of RFMO conservation and management measures, States may have recourse to RFMO procedures to deter such vessels until such time as appropriate action is taken by the flag State. In this respect, it is noted that the existence of a number of IUU vessels currently flagged to Panama or carried the flag of Panama after their inclusion in the RFMO IUU lists still operating demonstrates the failure of Panama to fulfil its obligations under international law with respect to international cooperation in enforcement.

(236) It is also recalled that, in accordance with Article 118 of the Unclos, States must cooperate in the conservation and management of living resources in the areas of the high seas. In this respect the existence of a number of IUU vessels currently flagged to Panama or carried the flag of Panama after their inclusion in the RFMO IUU lists which are still engaged in fishing operations highlights the failure of Panama to fulfil its flag State obligations. Indeed recognised IUU fishing vessels undermine conservation and management of living resources.

(237) The non-compliance by Panama with respect to Panamanian-flagged IUU vessels listed in RFMO lists is also in breach of Article 217 of the Unclos which requires flag States to take specific enforcement actions in order to ensure compliance with international rules, the investigation of presumed violations and the adequate sanctioning of any violation.

(238) The existence of a number of IUU vessels currently flagged to Panama or carried the flag of Panama after their inclusion in the RFMO IUU lists also demonstrates the lack of ability of Panama to follow the recommendations in the IPOA IUU. Point 34 of the IPOA IUU recommends that States ensure that fishing vessels entitled to fly their flag do not engage in or support IUU fishing.

(239) In addition, it is pertinent to note that Panama was identified in the NMFS report as a country having vessels engaged in IUU fishing activities. According to the NMFS report several Panamanian-flagged vessels engaged in fishing activities that violated IATTC conservation and management measures<sup>(3)</sup>. Furthermore, the

<sup>(1)</sup> OECD, 'Ownership and Control of Ships' Report, retrieved from: <http://www.oecd.org/dataoecd/53/9/17846120.pdf>

<sup>(2)</sup> FAO, 'Comprehensive record of fishing vessels, refrigerated transport vessels, supply vessels and beneficial ownership', Report of a Study by the FAO Department of Fisheries, March 2010 (retrieved from: [ftp://ftp.fao.org/EI/DOCUMENT/global\\_record/eims\\_272369.pdf](ftp://ftp.fao.org/EI/DOCUMENT/global_record/eims_272369.pdf)) and IPOA IUU, point 18.

<sup>(3)</sup> NMFS report, p. 98.

NMFS report highlighted additional information on illegal fishing activities in violation of IATTC rules as well as sightings of Panamanian-flagged vessels on the CCAMLR IUU vessel list operating inside the CCAMLR Convention Area <sup>(1)</sup>. This information corroborates the established facts on the failure of Panama to fulfil its obligations as a flag State with respect to IUU fishing.

- (240) In view of the situation explained in this Section of the Decision and on the basis of all the factual elements gathered by the Commission as well as all the statements made by the country, it could be established, pursuant to Article 31(3) and 31(4)(a) of the IUU Regulation, that Panama has failed to discharge the duties incumbent upon it under international law as a flag State in respect of IUU vessels and IUU fishing carried out or supported by fishing vessels flying its flag or by its nationals and has not taken sufficient action to counter documented and recurring IUU fishing by vessels flying its flag.

#### 11.2. Failure to cooperate and to enforce (Article 31(5) of the IUU Regulation)

- (241) With respect to whether Panama cooperates effectively with the Commission on investigations of IUU fishing and associated activities it is noted that evidence gathered by the Commission indicates that Panama failed to fulfil its flag State obligations as set out under international law.
- (242) With respect to the matter explained in recital 231 it is noted that on 28 October 2011, the Commission notified Panama of an official request for an investigation pursuant to Article 26 of the IUU Regulation. Panama replied on 21 November 2011 that it would investigate the matter by notifying and giving the owner of the vessel concerned a time-limit of 20 days to reply. The Commission sent a reminder about its request on 16 December 2011. The Panamanian authorities replied on 11 January 2012 by simply resubmitting a copy of their letter of 21 November 2011. An additional period of six weeks was provided to Panamanian authorities for receiving a reply. In the absence of any prompt action by or reply from the Panamanian authorities, the Commission initiated the procedure of Article 27 of the IUU Regulation vis-à-vis the operator concerned on 2 March 2012. On 2 May 2012, that is five months after the initial communication from the Commission, the Panamanian authorities informed the Commission that they had imposed a fine that covered only a part of the infringements committed as it only punished the fact that the operator did not hold the appropriate licence for carrying out transportation and transshipments

at sea of fishery products. However, that sanction did not cover the fact of collecting at sea fishery products illegally caught in Liberia in violation of a moratorium in force on industrial fishing activities. As the providing fishing vessels and the collecting carrier vessel were owned by the same legal entity, any presumed *bona fide* argument explaining the behaviour of the economic operator would not be supported by the facts. The procedure under Article 27 is currently on-going but the facts indicate that Panama has failed to provide a prompt response within a more than reasonable amount of time to requests made by the Commission to investigate, provide feedback or follow-up to IUU fishing and associated activities. In addition, the replies provided did not address all the revealed IUU activities.

- (243) By acting in the way described there are indications that Panama does not fulfil the conditions of Article 94(2)(b) of the Unclos which stipulates that a flag State assumes jurisdiction under its internal law over each ship flying its flag and its master, officers and crew. Indeed, the case described in recital 242 demonstrates that Panama is not in a position to know the nature of the activities carried out by vessels flying its flag. In that case, the Panamanian authorities were not aware that the vessel concerned was being engaged for several years in transshipments and transportation of fishery products, which are activities that are subject to specific licences and rules.
- (244) In the case explained in recital 242 there are indications that Panama does not fulfil the recommendations in point 18 of the of IPOA IUU under paragraph 18 which stipulating that in the light of the Unclos provisions each State should take measures or cooperate to ensure that nationals subject to their jurisdiction do not support or engage in IUU fishing. Panama also failed to demonstrate that it cooperates and coordinates activities with other States in preventing, deterring and eliminating IUU fishing in the manner set out in point 28 of the IPOA IUU. Panama also failed to take into consideration the recommendations in point 48 of the IPOA IUU which advise flag States to ensure that transport and support vessels do not support or are not engaged in IUU fishing and in point 49 of the IPOA IUU which, *inter alia*, advises flag States to ensure that transport and support vessels involved in transshipment at sea have a prior authorisation to tranship issued by the flag State.
- (245) The Commission analysed whether Panama has taken effective enforcement measures in respect of operators responsible for IUU fishing and whether sanctions of sufficient severity to deprive the offenders of the benefits accruing from IUU fishing have been applied. It is noted that the available evidence confirms that

<sup>(1)</sup> NMFS report, p. 99.

Panama has not fulfilled its obligations under international law with respect to effective enforcement measures. In this respect it is recalled that there is a number of IUU vessels which are currently flagged to Panama or carried the flag of Panama after their inclusion in the RFMO IUU lists. The existence of such IUU vessels highlights the failure of Panama to honour its responsibilities vis-à-vis its vessels operating on the high seas as set out in Article 18(1) and (2) of the UNFSA.

(246) Furthermore, the situation explained in the above recital is also a clear indication that Panama is not fulfilling the requirements of Article 19(1) of the UNFSA which sets rules for flag States on compliance and enforcement. The performance of Panama in this matter is also not in accordance with the requirements of Article 19(2) of the UNFSA which stipulates, inter alia, that sanctions should be adequate in severity and deprive offenders of the benefits accruing from their illegal activities. Furthermore the performance of Panama with respect to effective enforcement measures is also not in accordance with the recommendations of point 21 of the IPOA IUU which advises States to ensure that sanctions for IUU fishing by vessels and, to the greatest extent possible, nationals under their jurisdiction are of sufficient severity to effectively prevent, deter and eliminate IUU fishing and to deprive offenders of the benefits accruing from such fishing.

(247) With respect to the history, nature, circumstances, extent and gravity of the manifestations of IUU fishing considered, the Commission has taken into account the recurrent and repetitive IUU fishing activities of Panama-flagged vessels until 2012.

(248) With respect to the existing capacity of the Panamanian authorities it should be noted that, according to the United Nations Human Development Index <sup>(1)</sup>, Panama is considered as a high human development country (58th in 187 countries). This is also confirmed by Annex II to Regulation (EC) No 1905/2006 where Panama is listed in the category of upper middle income countries. Account taken of its position it is not considered necessary to analyse the existing capacity of the Panamanian competent authorities. This is because the level of development of Panama, as demonstrated in the current recital, cannot be considered as a factor undermining the capacity of the competent authorities to cooperate with other countries and pursue enforcement actions.

(249) On the basis of information derived from the mission in June 2010 it cannot be considered that the Panamanian

authorities are lacking financial resources but rather the necessary legal and administrative environment and empowerments to perform their duties.

(250) Furthermore, it should be highlighted that, in accordance with the recommendations in points 85 and 86 of the IPOA IUU concerning special requirements of developing countries, the Union has already funded a specific technical assistance programme with respect to the fight against IUU fishing <sup>(2)</sup>. Panama benefited from this programme.

(251) In view of the situation explained in this Section of the Decision and on the basis of all the factual elements gathered by the Commission as well as all the statements made by the country, it could be established, pursuant to Article 31(3) and 31(5) of the IUU Regulation, that Panama has failed to discharge the duties incumbent upon it under international law as flag State in respect of cooperation and enforcement efforts.

### 11.3. Failure to implement international rules (Article 31(6) of the IUU Regulation)

(252) Panama has ratified the Unclos and the UNFSA. Furthermore, Panama is a Contracting Member of IATTC and ICCAT and Cooperative non-Member of WCPFC.

(253) The Commission analysed any information deemed relevant with respect to the status of Panama as Contracting Member of IATTC and ICCAT and Cooperative non-Member of WCPFC.

(254) The Commission also analysed any information deemed relevant with respect to the agreement of Panama to apply conservation and management measures adopted by IATTC, ICCAT and WCPFC.

(255) It is recalled that ICCAT issued a letter of Identification to Panama concerning its reporting deficiencies in 2010 <sup>(3)</sup>. In its letter of Identification Panama has been identified for its failure to comply with its obligation to communicate statistics as set out in ICCAT Recommendation 05-09. In the same letter ICCAT highlighted that

<sup>(1)</sup> Information retrieved from: <http://hdr.undp.org/en/statistics/>

<sup>(2)</sup> Accompanying developing countries in complying with the Implementation of Regulation (EC) No 1005/2008 on Illegal, Unreported and Unregulated (IUU) Fishing, EuropeAid/129609/C/SER/Multi.

<sup>(3)</sup> ICCAT letter, 4 March 2010, ICCAT Circular No 561, 4.3.2010.

Panama had not provided all the necessary data and information such as Annual report, data on Task I (statistics referring to fleet data) had been sent late, data on Task II (catches size data) had either been sent late or had not been sent at all, compliance tables had not been sent, and information related to the large-scale tuna longline vessels management standards had not been submitted to the ICCAT Secretariat. The relevant requirements are provided for in the set of ICCAT resolutions and recommendations listed in recitals 258 and 260. It is also pertinent to note that Panama was identified by ICCAT in 2009, the identification was maintained in 2010 and 2011.

(256) The Commission also analysed information available from ICCAT on the level of compliance of Panama with ICCAT conservation and management rules and reporting obligations. For this the Commission used the ICCAT 2010 Compliance Summary Tables <sup>(1)</sup> as well as the ICCAT 2011 Compliance Summary Tables <sup>(2)</sup>.

(257) With respect to 2010, Panama did not submit: annual reports and statistics, information referring to conservation and management measures and information on quotas and catch limits.

(258) In particular, according to the available information, Panama did not submit to ICCAT in 2010 information on: annual Reports (scientific) (provided for ICCAT Convention, Resolution 01-06 and Reference 04-17), annual reports (ICCAT Commission) (provided for ICCAT Convention, Resolution 01-06 and Ref. 04-17), trade measures submission of imports and landing data (provided for Recommendation 06-13), transshipment declarations (at sea) (provided for Recommendation 06-11), transshipment reports (provided for Recommendation 06-11), data on non-compliance (provided for Recommendation 08-09), vessels 20 m internal action reports (provided for Recommendation 02-22/09-08), annual list of albacore vessels (provided for Recommendation 98-08), transshipment vessels — information submitted only for receiving vessels (provided for Recommendation 06-11), list of Med-SWO (swordfish) vessels (provided for Recommendation 09-04/09-08), large scale tuna longline fishing vessels (LSTLV) management standard (provided for Recommendation 01-20), management standard (provided for Res. 01-20), vessels chartering (provided for Recommendation 02-21), vessels involved in IUU fishing (provided for Recommendation 09-10), reports on IUU allegations (provided for Recommendation 09-10), vessel sightings (provided for Res 94-09), port

inspection reports (provided for Recommendation 97-10), data from ICCAT Statistical Document Programs (provided for Recommendation 01-21 and Recommendation 01-22), validation seals and signatures for bluefin tuna catch documents (BCD), provided for Recommendation 08-12/09-11), BCD contacts points (provided for Recommendation 08-12/09-11), BCD legislation (provided for Recommendation 08-12/09-11), BCD tagging summary (provided for Recommendation 08-12/09-11), bluefin catch documents (provided for Recommendation 08-12/09-11), BCD annual report (provided for Recommendation 08-12/09-11), compliance with seasonal closure for med SWO (swordfish) (provided for Recommendation 09-04), internal procedure for compliance with closed areas/season in Gulf of Guinea (provided for Recommendation 09-04).

(259) With respect to 2011, Panama did not submit: partial information on annual reports and statistics, information referring to conservation and management measures and information on quotas and catch limits.

(260) In particular, according to the available information, Panama did not submit information on: annual Reports (scientific) (provided for ICCAT Convention, Resolution 01-06 and Reference 04-17), annual reports (ICCAT Commission) (provided for ICCAT Convention, Resolution 01-06 and Reference 04-17), compliance tables (Recommendation 98-14), vessels 20 m internal actions report (Recommendation 09-08), large scale tuna longline fishing vessels (LSTLV) management standard (provided for Recommendation 01-20), management standard (Res. 01-20), data from national observer programmes (Recommendation 10-04).

(261) Furthermore, a number of elements were revealed during the mission the Commission conducted in Panama in June 2010. With respect to VMS operational abilities it was revealed that for concrete cases, VMS positions of vessels operating within the ICCAT area were not available to the Panamanian authorities. For other vessels, positions were only available through an online internet access system where data was not available under a visual mapping application and could only be retrieved in respect of the two months preceding the time of the control of the vessel position. With respect to inspection schemes it was also revealed that there were no inspection schemes for vessels operating on the high seas, no templates, guidelines or methodology designed for supporting inspection activities and no air and sea operational means for conducting inspections. With respect to landings it was revealed that there were no means for ensuring supervision of landing in various ports outside Panama's EEZ. With respect to

<sup>(1)</sup> ICCAT, Compliance Summary Tables, Doc. No COC-308/2010, 10.11.2010.

<sup>(2)</sup> ICCAT, Draft Compliance Summary Tables, Doc. No COC-308/2011.

monitoring, control and surveillance several deficiencies were identified. From a number of tests performed on concrete cases it was revealed that certain data were not available for vessels operating within the ICCAT area. Finally with respect to the regulation of transshipments available information submitted by Panama suggests that Panama deleted from its register five support fishing vessels in the Mediterranean Sea because of shortcomings in its capacity to regulate transshipments.

- (262) With respect to WCPFC available information <sup>(1)</sup> shows that Panama has failed to provide information as set out by WCPFC rules. Indeed Panama was requested to provide supplementary information on IUU vessels in accordance with point 3(c) of WCPFC Conservation and Management Measure 2009-11 as well as to provide Part I and Part II Reports for 2011.
- (263) With respect to IATTC available information derived from the NMFS report, as explained under recital 239, and from IATTC <sup>(2)</sup> indicate breaches of conservation and management measures by Panamanian-flagged vessels.
- (264) The failure of Panama to provide to ICCAT the information referred to in recitals 258 to 260 demonstrates the failure of Panama to fulfil its obligations as flag State laid down in the Unclos and the UNFSA.
- (265) The shortcomings revealed by the mission in June 2010 and referred to in recital 261 provide further evidence of the failure of Panama to fulfil its obligations as flag State laid down in the UNFSA.
- (266) Indeed the failure to provide information on conservation and management measures, quotas and catch limits and annual reports and statistics undermines the ability of Panama to fulfil its obligations under Articles 117 and 118 of the Unclos which stipulate the duties of States to adopt national measures for their respective nationals for the conservation of living resources of the high seas and to cooperate on conservation and management measures for living resources in the areas of the high seas.
- (267) The performance of Panama as explained in this Section of the Decision is in breach of the requirements of Article 18(3) of the UNFSA.
- (268) On account of its failure to control of vessels in high seas in line with RFMOs rules, Panama acts in breach of Article 18(3)(a) of the UNFSA which requires States whose vessels fish on the high seas to take control measures to ensure that those vessels comply with RFMO rules.
- (269) Panama does not comply with the recording and timely reporting requirements of Article 18(3)(e) of the UNFSA on account of its failure to submit to ICCAT information on annual reports, Task I (fleet characteristics), internal action reports for vessels longer than 20 m, compliance tables and large scale tuna longline fishing vessels management standards.
- (270) In addition, Panama does not fulfil its obligations pursuant to Article 18(3)(f) of the UNFSA on account of its failure to report to ICCAT catch related data, data on national observers programmes, and information on transshipment related matters, its lack of inspection schemes, its lack of means for ensuring supervision of landings in non-Panamanian ports and its lack of market statistics on imports and landings data.
- (271) Panama does not fulfil the conditions stipulated in Article 18(3)(g) of the UNFSA in view of the information gathered during the mission in June 2010 concerning the monitoring, control and surveillance abilities of the Panamanian authorities.
- (272) Panama does not fulfil its obligations pursuant to Article 23 of the UNFSA on account of the fact that it has not submitted to ICCAT the port inspection report for 2010.
- (273) Furthermore, as explained in recitals 262 and 263, information from WCPFC and IATTC suggests that Panama is not fulfilling its obligations pursuant to Article 117 of the Unclos and Article 18 of the UNFSA with respect to management and conservation measures.

<sup>(1)</sup> WCPFC letter to Panama, 8 October 2011.

<sup>(2)</sup> IATTC Committee for the review of implementation of measures adopted by the Commission, Second meeting, La Jolla, California (USA), 29-30 June 2011, pp. 3-5.

(274) In addition, it was revealed during the mission in June 2010 that the Panama Ship Registry does not ensure that vessels flying the flag of Panama have a genuine link with the country. The lack of such genuine link between that State and the vessels that are registered in its registry is in breach of the conditions set out for the nationality of ships in Article 91 of the Unclos. This conclusion is further confirmed by the ITF which considers Panama as a flag of convenience <sup>(1)</sup>.

(275) Finally, it should be noted that, contrary to the recommendations in points 25, 26 and 27 of the IPOA IUU, Panama has not developed a national plan of action against IUU fishing.

(276) In view of the situation explained in this Section of the Decision and on the basis of all the factual elements gathered by the Commission as well as all the statements made by the country, it could be established, pursuant to Article 31(3) and (6) of the IUU Regulation, that Panama has failed to discharge the duties incumbent upon it under international law with respect to international rules, regulations and conservation and management measures.

#### 11.4. Specific constraints of developing countries

(277) It is recalled that, according to the United Nations Human Development Index <sup>(2)</sup>, Panama is considered as a high human development country (58th in 187 countries). It is also recalled that, according to Annex II to Regulation (EC) No 1905/2006, Panama is listed in the category of upper middle income countries.

(278) Account taken of those rankings Panama cannot be considered as a country having specific constraints directly derived from its level of development. No corroborating evidence could be established to suggest that the failure of Panama to discharge the duties incumbent upon it under international law is the result of lacking development. In the same manner, no concrete evidence exists to correlate the established shortcomings in respect of monitoring, control and surveillance of fishing activities with the lack of capacities and infrastructure.

(279) It is also pertinent to note that the Union has already funded a specific technical assistance action in Panama

with respect to the fight against IUU fishing <sup>(3)</sup>. No evidence exists that Panama has either taken into consideration the advice provided in order to rectify the shortcomings concerned or requested any follow up action from the Union in order to achieve capacity building.

(280) In view of the situation explained in this Section of the Decision and on the basis of all the factual elements gathered by the Commission as well as all the statements made by the country, it could be established, pursuant to Article 31(7) of the IUU Regulation, that the development status and overall performance of Panama with respect to fisheries are not impaired by its level of development.

#### 12. PROCEDURE WITH RESPECT TO THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

(281) The notification of the Democratic Socialist Republic of Sri Lanka (Sri Lanka) as flag State was accepted by the Commission in accordance with Article 20 of the IUU Regulation as of 1 January 2010.

(282) From 29 November to 3 December 2010, the Commission, with the support of the EFCA, carried out a mission to Sri Lanka in the context of administrative cooperation provided for in Article 20(4) of the IUU Regulation.

(283) The mission sought to verify information concerning Sri Lanka's arrangements for the implementation, control and enforcement of laws, regulations and conservation and management measures which must be complied with by its fishing vessels, measures taken by Sri Lanka in order to implement its obligations in the fight against IUU fishing and to fulfil its requirements and points pertaining to the implementation of the catch certification scheme of the Union.

(284) The final report of the mission was sent to Sri Lanka on 3 February 2011. As Sri Lanka had not informed the Commission of the change of Director-General of the Department of Fisheries and Aquatic Resources, the report did not reach its addressee and was subsequently resent on 7 April 2011.

<sup>(1)</sup> Information retrieved from: <http://www.itfglobal.org/flags-convenience/flags-convenien-183.cfm>

<sup>(2)</sup> Information retrieved from: <http://hdr.undp.org/en/statistics/>

<sup>(3)</sup> Accompanying developing countries in complying with the Implementation of Regulation (EC) No 1005/2008 on Illegal, Unreported and Unregulated (IUU) Fishing, EuropeAid/129609/C/SER/Multi.

(285) The comments of Sri Lanka to the final report of the mission were received on 12 May 2011.

(286) A subsequent mission of the Commission to Sri Lanka to follow up any actions taken by Sri Lanka subsequent to the first mission was conducted from 5 to 7 October 2011.

(287) Sri Lanka submitted additional written comments on 15 November 2011.

(288) Sri Lanka is a Member of IOTC. Sri Lanka has ratified the Unclos and the UNFSA and acceded the FAO Agreement on Port State Measures.

(289) In order to evaluate the compliance of Sri Lanka with its international obligations as flag, port, coastal or market State set out in the international agreements mentioned in recital 288 and established by IOTC, the Commission sought and analysed all the information it deemed necessary for the purpose of such an exercise.

(290) The Commission used information derived from available data published by IOTC as well as the missions conducted by the Commission in Sri Lanka.

### 13. POSSIBILITY OF SRI LANKA OF BEING IDENTIFIED AS A NON-COOPERATING THIRD COUNTRY

(291) Pursuant to Article 31(3) of the IUU Regulation, the Commission analysed the duties of Sri Lanka as flag, port, coastal or market State. For the purpose of this review the Commission took into account the parameters listed in Article 31(4) to (7) of the IUU Regulation.

#### 13.1. Recurrence of IUU Vessels and IUU trade flows (Article 31(4)(a) of the IUU Regulation)

(292) During its missions as well as through information retrieved through IOTC, it was revealed that Sri Lanka has no legislation providing for the licensing of high seas fisheries<sup>(1)</sup>. This in effect implies that all 3 307 vessels, listed by Sri Lanka in the IOTC record of authorised vessels, are fishing illegally when the fishing activities are taking place in the IOTC Convention Area, outside the Sri Lankan EEZ. In this respect it is recalled that, pursuant to Article 18(3)(b)(ii) of the UNFSA, a flag

State must take measures to prohibit fishing on the high seas by its vessels which are not duly licensed or authorised to fish. The listing by Sri Lanka of more than 3 000 vessels in the IOTC record of authorised vessels without having legislation to provide those vessels with a legal licence, clearly demonstrates that Sri Lanka is not acting in accordance with its responsibilities as a flag State.

(293) In addition, the Commission established on the basis of information retrieved from IOTC<sup>(2)</sup> that a number of Sri Lankan-flagged vessels had been caught and fined by certain coastal States for fishing illegally in the IOTC Convention Area. Those fishing vessels are *Lek Sauro*, *Madu Kumari 2*, *Anuska Putha 1*, *Sudeesa Marine 5*, *Rashmi*, *Chmale*, *Shehani Duwa*, *Dory II*, *Randika Putah 1* and *Vissopa Matha* in 2010, *Sudharma*, *Speed Bird 7*, *Pradeepa 2*, *Kasun Putha 1*, *Win Marine 1*, *Speed Bird 3*, *Muthu Kumari* and *Little Moonshine* in 2011 and *Helga Siril* in 2012.

(294) In this respect it is recalled that, pursuant to Article 18(1) and (2) of the UNFSA, the flag State is responsible vis-à-vis its vessels operating on the high seas. The Commission considers that the continued presence of vessels flagged to Sri Lanka fishing illegally in the IOTC Convention Area is a clear indication that Sri Lanka has failed to undertake its flag State responsibilities under international law. Indeed, by having the afore-stated number of vessels fishing without a licence and therefore illegally, Sri Lanka has failed to exercise its responsibilities effectively, to comply with RFMO conservation and management measures and to ensure that its vessels do not engage in any activity which undermines the effectiveness of such measures.

(295) Pursuant to Article 19(1) and (2) of the UNFSA, the flag State is required to ensure compliance by vessels flying its flag with RFMO conservation and management rules. Flag States are also required to conduct expeditious investigations and judicial proceedings. The flag State should also ensure adequate sanctions, discourage repetition of violations and deprive offenders of the benefits accruing from illegal activities. In this respect it is noted that there is no legislation in Sri Lanka that provides for the granting of fishing licences for Sri Lankan flagged vessels to operate outside the Sri Lankan EEZ. The listing by Sri Lanka of more than 3 000 fishing vessels in the IOTC record of authorised vessels clearly demonstrates that Sri Lanka allows its vessels to fish on high seas in contravention of the rules of the IOTC, since Sri Lanka has not legislation providing for granting of licences for fishing activities on the high seas. This clearly highlights the failure of Sri Lanka to fulfil its obligations under Article 19(1) and (2) of the UNFSA.

<sup>(1)</sup> Information retrieved from: <http://iotc.org/English/index.php>

<sup>(2)</sup> Information retrieved from: <http://iotc.org/English/index.php>



(296) In addition, pursuant to Article 20 of the UNFSA, States must cooperate either directly or through RFMOs to ensure compliance with and enforcement of RFMO conservation and management measures. A set of specific requirements provided for in that Article sets out the obligations of States to investigate, cooperate with each other and sanction IUU fishing activities. In this context, it should be recalled that Sri Lanka had 13 vessels listed in the draft IUU vessel list for the IOTC annual meeting held in March 2011<sup>(1)</sup>. The IOTC agreed, despite lack of consensus, not to list those vessels. However, the IOTC requested Sri Lanka to report on a monthly basis on the whereabouts of those vessels as well as on the final decision by the Sri Lankan courts with respect to each vessel. It is noted that Sri Lanka has failed to fulfil its obligations under international law with respect to international cooperation in enforcement by only reporting to IOTC in respect of four out of 12 months despite the request from IOTC.

(297) It is also recalled that, in accordance with Article 118 of the Unclos, States must cooperate in the conservation and management of living resources in the areas of the high seas. In this respect, the presence of a number of Sri Lankan-flagged vessels fishing illegally in the IOTC Convention Area highlights the failure of Sri Lanka to fulfil its flag State obligations. Indeed fishing vessels caught fishing illegally undermine conservation and management of living resources.

(298) The non-compliance by Sri Lanka with respect to Sri Lankan-flagged vessels fishing illegally in the IOTC Convention Area is also in breach of Article 217 of the Unclos which requires flag States to take specific enforcement actions in order to ensure compliance with international rules, investigation of presumed violations and adequate sanctioning of any violation.

(299) The existence of a number of Sri Lankan-flagged vessels fishing illegally in the IOTC Convention Area also demonstrates the lack of ability of Sri Lanka to follow the advice of the IPOA IUU. Point 34 of the IPOA IUU advises States to ensure that fishing vessels entitled to fly their flag do not engage in or support IUU fishing.

(300) In view of the situation explained in this Section of the Decision and on the basis of all the factual elements gathered by the Commission as well as the statements made by the country, it could be established, pursuant to Article 31(3) and 31(4)(a) of the IUU Regulation, that Sri

Lanka has failed to discharge the duties incumbent upon it under international law as a flag State in respect of IUU vessels and IUU fishing carried out or supported by fishing vessels flying its flag or by its nationals and has not taken sufficient action to counter documented and recurring IUU fishing by vessels flying its flag.

### 13.2. Failure to cooperate and to enforce (Article 31(5) of the IUU Regulation)

(301) With respect to whether Sri Lanka cooperates effectively with the Commission on investigations of IUU fishing and associated activities it is noted that evidence gathered by the Commission indicates that Sri Lanka failed to fulfil its flag State obligations as set out under international law.

(302) As mentioned in recital 296, Sri Lanka had 13 vessels listed in the draft IUU vessel list for the annual meeting in March 2011. The IOTC agreed, despite lack of consensus, not to list the vessels. However, the IOTC did request Sri Lanka to report on a monthly basis on the whereabouts of those vessels as well as on the final decision by the Sri Lankan courts with respect to each vessel. Nevertheless, Sri Lanka only reported to IOTC in respect of four out of 12 months despite the request from IOTC.

(303) By acting in the way described in the above recital Sri Lanka failed to demonstrate that it fulfils the conditions of Article 94(2)(b) of the Unclos which stipulates that a flag State assumes jurisdiction under its internal law over each ship flying its flag and its master, officers and crew.

(304) Sri Lanka has also failed to demonstrate that it fulfils the recommendations in point 18 of the IPOA IUU which stipulates that in the light of the Unclos provisions each State should take measures or cooperate to ensure that nationals subject to their jurisdiction do not support or engage in IUU fishing. Furthermore, Sri Lanka has also failed to demonstrate that it cooperates and coordinates activities with other States in preventing, deterring and eliminating IUU fishing in the manner set out in point 28 of the IPOA IUU.

(305) The Commission analysed whether Sri Lanka has taken effective enforcement measures in respect of operators responsible for IUU fishing and whether sanctions of sufficient severity to deprive the offenders of the benefits accruing from IUU fishing have been applied.

<sup>(1)</sup> IOTC Circular 2011/18 of 28 February 2011.

- (306) It is noted that the available evidence confirms that Sri Lanka has not fulfilled its obligations under international law with respect to effective enforcement measures. In this respect information retrieved from boarding reports <sup>(1)</sup> from certain coastal State authorities on the Sri Lankan flagged vessels fishing illegally outside the Sri Lankan EEZ shows that vessel markings, the requirement to carry documentation on board, including log books, are not enforced by Sri Lanka. The presence of the Sri Lankan vessels in the IOTC Convention Area without proper marking and without documentation on board highlights the failure of Sri Lanka to honour its responsibilities vis-à-vis its vessels operating on the high seas as set out in Article 18(1), (2) and (3) of the UNFSA.
- (307) Furthermore, the continued presence of Sri Lankan flagged vessels fishing illegally in the IOTC Convention Area is also a clear indication that Sri Lanka is not fulfilling the requirements of Article 19(1) of the UNFSA which sets rules for flag States on compliance and enforcement. The performance of Sri Lanka in this matter is also not in accordance with the requirements of Article 19(1) of the UNFSA which stipulates, inter alia, that sanctions should be adequate in severity and deprive offenders of the benefits accruing from their illegal activities. Furthermore the performance of Sri Lanka with respect to effective enforcement measures is also not in accordance with the recommendations of point 21 of the IPOA IUU which advises States to ensure that sanctions for IUU fishing by vessels, and to the greatest extent possible, nationals under their jurisdiction are of sufficient severity to effectively prevent, deter and eliminate IUU fishing and to deprive offenders of the benefits accruing from such fishing.
- (308) With respect to the history, nature, circumstances, extent and gravity of the manifestations of IUU fishing considered, the Commission has taken into account the recurrent and repetitive IUU fishing activities of Sri Lanka-flagged vessels until 2012.
- (309) With respect to the existing capacity of the Sri Lankan authorities it should be noted that, according to the United Nations Human Development Index <sup>(2)</sup>, Sri Lanka is considered as a medium human development country (97th in 187 countries). This is also confirmed by Annex II to Regulation (EC) No 1905/2006 where Sri Lanka is listed in the category of lower middle income countries.
- (310) On the basis of information derived from the first mission it cannot be considered that the Sri Lankan authorities are lacking financial resources but rather the necessary legal and administrative environment as well as human resources to perform their duties.
- (311) Furthermore, it should be highlighted, in accordance with the recommendations in points 85 and 86 of the IPOA IUU concerning special requirements of developing countries, the Union has already funded a specific technical assistance programme with respect to the fight against IUU fishing <sup>(3)</sup>.
- (312) In view of the situation explained in this Section of the Decision and on the basis of all factual elements gathered by the Commission as well as the statements made by the country, it could be established, pursuant to Article 31(3) and 31(5) of the IUU Regulation, that Sri Lanka has failed to discharge its duties incumbent upon it under international law as flag State in respect of cooperation and enforcement efforts.

### 13.3. Failure to implement international rules (Article 31(6) of the IUU Regulation)

- (313) Sri Lanka has ratified the Unclos and the UNFSA. Furthermore, Sri Lanka is a Member of IOTC.
- (314) The Commission analysed any information deemed relevant with respect to the status of Sri Lanka as Member of IOTC.
- (315) The Commission also analysed any information deemed relevant with respect to the agreement of Sri Lanka to apply conservation and management measures adopted by IOTC.
- (316) It is recalled that IOTC issued a letter of Concern to Sri Lanka on 22 March 2011 <sup>(4)</sup> regarding its 2011 Compliance Report. The main concerns raised in that letter were tardiness in submitting the report of implementation, the level of compliance by Sri Lankan vessels

<sup>(1)</sup> Information retrieved from: <http://iotc.org/English/index.php>

<sup>(2)</sup> Information retrieved from: <http://hdr.undp.org/en/statistics/>

<sup>(3)</sup> Accompanying developing countries in complying with the Implementation of Regulation (EC) No 1005/2008 on Illegal, Unreported and Unregulated (IUU) Fishing, EuropeAid/129609/C/SER/Multi.

<sup>(4)</sup> Information retrieved from: [http://www.iotc.org/English/meetings/comm/history/doc\\_meeting\\_CO9.php](http://www.iotc.org/English/meetings/comm/history/doc_meeting_CO9.php) => Compliance Reports => Response to Letters of Feedback => Sri Lanka\_16-05-11.

with respect to VMS and observer schemes, inconsistencies in the Fleet Development Plan, lack of reporting on by-catches of turtles and sea birds, lack of information on landings by third country vessels in Sri Lankan ports and partial compliance on statistical reporting requirement.

- (317) Further to the situation explained in the above recital the Commission analysed information available from IOTC on the compliance of Sri Lanka with IOTC conservation and management rules and reporting obligations. For this the Commission used the IOTC 2011 Compliance Report <sup>(1)</sup> as well as the IOTC 2012 Compliance Report <sup>(2)</sup>.
- (318) With respect to the Compliance Report for 2011, Sri Lanka did not submit: annual reports and statistics, information referring to conservation and management measures and information on quotas and catch limits.
- (319) In particular, according to the available information, Sri Lanka did not submit to IOTC in 2010 information on: the report of implementation and the National Report to the Scientific Committee; the fleet development plan, the list of active vessels targeting tropical tunas during 2006, the list of active vessels targeting swordfish and albacore during 2007 (provided for in Resolution 09/02); a list of active vessels (provided for in Resolution 10/08); the draft IUU vessel list despite having had 13 of its own vessels on this list (foreseen by resolution 09/03); by-catches of turtles and seabirds (provided for in Resolution 10/02); recoding of catches by fishing vessels (provided for in Resolution 10/03); designated ports (provided for in Resolution 10/11).
- (320) With respect to the Compliance Report for 2012, Sri Lanka did not submit: all required information on statistics, information referring to conservation and management measures and information on quotas and catch limits.
- (321) With respect to 2011, according to the available information, Sri Lanka submitted no or partial information on: adopting VMS for all vessels greater than 15 meters in length and a summary of VMS records (provided for in Resolutions 06/03 and 10/01); the fleet development plan (provided for in Resolution 09/02); a list of active vessels (provided for in Resolution 10/08); the prohibition of fishing for thresher sharks of all species and the sea turtles report (provided for in

Resolutions 10/12 and 09/06); regional observer schemes (provided for in Resolution 11/04); a designated competent authority and inspection reports with regard to port inspections (provided for in Resolution 10/11); vessels and nationals identified as involved in IUU fishing (provided for in Resolutions 11/03 and 07/01).

- (322) In addition, a number of elements were revealed during the first mission in Sri Lanka. Sri Lankan fishing vessels operating in the IOTC Convention Area, outside the Sri Lankan EEZ, could not be monitored due the lack of VMS. Sri Lanka had no legislation providing for catch reporting. No guidelines or methodology existed for landings by third country vessels, in particular in cases of denials of landings which are not notified to the flag State of the vessel. That mission clearly identified several deficiencies with respect to monitoring, control and surveillance.
- (323) The failure of Sri Lanka to provide to IOTC the information referred to in recitals 316 to 321 demonstrates the failure of Sri Lanka to fulfil its obligations as flag State laid down in the Unclos and the UNFSA.
- (324) The shortcomings revealed by the first mission and referred to in recital 322 provide further evidence of the failure of Sri Lanka to fulfil its obligations as flag State laid down in the UNFSA.
- (325) Indeed the failure to provide information on conservation and management measures, quotas and catch limits and annual reports and statistics undermines the ability of Sri Lanka to fulfil its obligations under Articles 117 and 118 of the Unclos which stipulate the duties of States to adopt national measures for their respective nationals for the conservation of living resources of the high seas and to cooperate on conservation and management measures for living resources in the areas of the high seas.
- (326) Sri Lanka, contrary to provisions of Article 18(3)(a) of UNFSA lacks control of vessels in high seas. Sri Lanka has submitted a list of more than 3 000 authorised vessels to the IOTC record despite having no legislation to provide these vessels with legitimate fishing licenses. This means that the part of the Sri Lankan fleet was equipped with a licence authorising to stay at sea for more than one day is fishing illegally in the IOTC Convention Area, outside the Sri Lankan EEZ.

<sup>(1)</sup> IOTC Compliance Report for Sri Lanka, Doc. No IOTC-2011-S15-CoC26rev1.

<sup>(2)</sup> IOTC Compliance Report for Sri Lanka, Doc. No IOTC-2012-CoC09-CR25\_Rev2.

- (327) Sri Lanka does not fulfil its obligations pursuant to Article 18(3)(b) of the UNFSA as it lacks legislation on the licensing and operation of vessels flying its flag that fish on the high seas.
- (328) Sri Lanka does not comply with the recording and timely reporting requirements of Article 18(3)(e) of the UNFSA on account of its failure to submit to IOTC information on the fleet development plan, a list of active vessels and the sea turtles report.
- (329) In addition, Sri Lanka does not fulfil its obligations pursuant to Article 18(3)(f) of the UNFSA on account of its non-conformity with IOTC requirements on VMS for its vessels, its lack of inspection schemes and its lack of means for ensuring supervision of landings in non-Sri Lankan ports.
- (330) Sri Lanka does not fulfil the conditions stipulated in Article 18(3)(g) of the UNFSA on account of the lack of observer schemes in accordance with IOTC requirements and the information gathered during the first mission concerning the monitoring, control and surveillance abilities of the Sri Lankan authorities.
- (331) The analysis of recitals 326 to 330 clearly shows that the performance of Sri Lanka is in breach of Article 18(3) of the UNFSA.
- (332) Sri Lanka does not fulfil its obligations pursuant to Article 23 of the UNFSA on account of the fact that it has not submitted to IOTC the port inspection programme.
- (333) Furthermore, as explained in recitals 316 to 321, information from IOTC indicates that Sri Lanka is not fulfilling its obligations pursuant to Article 117 of the Unclos and Article 18 of the UNFSA with respect to management and conservation measures.
- (334) Finally, it should be noted that, contrary to the recommendations in points 25, 26 and 27 of the IPOA IUU, Sri Lanka has not developed a national plan of action against IUU fishing.
- (335) In view of the situation explained in this Section of the Decision and on the basis of all the factual elements

gathered by the Commission as well as the statements made by the country, it could be established, pursuant to Article 31(3) and (6) of the IUU Regulation, that Sri Lanka has failed to discharge the duties incumbent upon it under international law with respect to international rules, regulations and conservation and management measures.

#### 13.4. Specific constraints of developing countries

- (336) It is recalled that, according to the United Nations Human Development Index <sup>(1)</sup>, Sri Lanka is considered as a medium human development country (97th in 187 countries). This is also confirmed by Annex II to Regulation (EC) No 1905/2006 where Sri Lanka is listed in the category of lower middle income countries.
- (337) Account taken of that ranking Sri Lanka cannot be considered as a country having specific constraints directly derived from its level of development. No corroborating evidence could be established to suggest that the failure of Sri Lanka to discharge the duties incumbent upon it under international law is the result of lacking development. In the same manner, no concrete evidence exists to correlate the established shortcomings in respect of monitoring, control and surveillance of fishing activities with the lack of capacities and infrastructure. In fact for the reasons explained in the above recital it appears that the failure to comply with international rules is directly linked with lack of proper legal instruments and reluctance to undertake effective actions.
- (338) It is also pertinent to note that the Union has already funded, in 2012, a specific technical assistance action in Sri Lanka with respect to the fight against IUU fishing <sup>(2)</sup>.
- (339) In view of all the situation explained in this Section and on the basis of all factual elements gathered by the Commission as well as all the statements made by the country, it could be established, pursuant to Article 31(7) of the IUU Regulation, that the development status and overall performance of Sri Lanka with respect to fisheries are not impaired by its level of development.

<sup>(1)</sup> Information retrieved from: <http://hdr.undp.org/en/statistics/>

<sup>(2)</sup> Accompanying developing countries in complying with the Implementation of Regulation (EC) No 1005/2008 on Illegal, Unreported and Unregulated (IUU) Fishing, EuropeAid/129609/C/SER/Multi.

#### 14. PROCEDURE WITH RESPECT TO THE TOGOLESE REPUBLIC

- (340) From 29 March to 1 April 2011, the Commission, with the support of the EFCA, carried out a mission to the Togolese Republic (Togo) in the context of administrative cooperation provided for in Article 20(4) of the IUU Regulation.
- (341) The mission sought to verify information concerning Togo's arrangements for the implementation, control and enforcement of laws, regulations and conservation and management measures which must be complied with by its fishing vessels, measures taken by Togo in order to implement its obligations in the fight against IUU fishing and to fulfil its requirements and points pertaining to the implementation of the catch certification scheme of the Union.
- (342) The Commission requested written clarifications from Togo on 11 May 2011 and 5 July 2011 as a follow-up to the mission.
- (343) Togo submitted written comments and information on 17 May 2011, 14 July 2011, 19 July 2011 and 26 July 2011.
- (344) Togo is not a Contracting Party to or a Cooperative non-Member of any RFMO. Togo is a member of the Fishery Committee for the Eastern Central Atlantic (CECAF) and the Fishery Committee of the West Central Gulf of Guinea (FCWC), which are sub-regional fisheries advisory bodies. The purpose of the CECAF is to promote the sustainable utilisation of the living marine resources within its area of competence by the proper management and development of the fisheries and fishing operations. Similarly, the purpose of FCWC is to promote cooperation among the contracting parties with a view to ensuring, through appropriate management, the conservation and optimum utilisation of the living marine resources covered by the FCWC Convention and encouraging sustainable development of fisheries based on such resources.
- (345) Togo has ratified the Unclos.
- (346) In order to evaluate the compliance of Togo with its international obligations as flag, port, coastal or market State set out in the international agreement mentioned in the above recital and established by the relevant RFMOs mentioned in recital 347, the Commission sought and

analysed all the information it deemed necessary for the purpose of such an exercise.

- (347) The Commission used information derived from available data published by RFMOs, in particular ICCAT, CCAMLR, WCPFC, NEAFC, NAFO and SEAFO either in the form of Compliance Reports or in the form of IUU vessel lists, as well as publicly available information retrieved from the NMFS report and the Final Technical Report providing 'Support to the implementation of the FCWC regional plan of action on IUU fishing' published by the FCWC.

#### 15. POSSIBILITY OF TOGO OF BEING IDENTIFIED AS A NON-COOPERATING THIRD COUNTRY

- (348) Pursuant to Article 31(3) of the IUU Regulation, the Commission analysed the responsibilities of Togo as flag, port, or coastal or market State. For the purpose of this review the Commission took into account the parameters listed in Article 31(4) to (7) of the IUU Regulation.

##### 15.1. Recurrence of IUU Vessels and IUU trade flows (Article 31(4)(a) of the IUU Regulation)

- (349) The Commission established on the basis of information retrieved from RFMO IUU vessel lists that a number of IUU vessels in these lists carried the flag of Togo after their inclusion in the RFMO IUU vessels lists<sup>(1)</sup>. Those vessels are *Aldabra* (listed whilst under Togolese flag), *Amorinn*, *Cherne*, *Kuko* (listed whilst under Togolese flag), *Lana*, *Limpopo*, *Murtosa* (listed whilst under Togolese flag), *Pion*, *Seabull 22*, *Tchaw* (listed whilst under Togolese flag), *Xiong Nu Baru 33* (listed whilst under Togolese flag).
- (350) In this respect it is recalled that, pursuant to Article 94(1) and (2) of the Unclos, every State shall effectively exercise its jurisdiction and control over ships flying its flag. The Commission considers that the existence of IUU vessels in the RFMOs IUU lists that carried the flag of Togo after their inclusion in these lists is a clear indication that Togo has failed to undertake its flag State responsibilities under international law. Indeed, by having the aforementioned number of recurring IUU vessels, Togo has failed to exercise its responsibilities effectively, to comply with RFMO conservation and management measures and to ensure that its vessels do not engage in any activity which undermines the effectiveness of such measures.

<sup>(1)</sup> See Part B of the Annex to Regulation (EU) No 468/2010.

- (351) Pursuant to Article 94 of the Unclos, a flag State is required to ensure compliance by vessels flying its flag and assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew. Furthermore, pursuant to Article 117 of the Unclos, the flag State has the duty to take, or to cooperate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas. In this respect it is noted that the existence over time of a number of IUU vessels that carried the flag of Togo after their inclusion in the RFMO IUU vessels lists highlights the failure of Togo to fulfil its obligations under the Unclos.
- (352) It is also recalled that, in accordance with Article 118 of the Unclos, States must cooperate in the conservation and management of living resources in the areas of the high seas. In this respect the existence of a number of vessels in the RFMOs IUU lists that carried the flag of Togo after their inclusion in these lists which are still engaged in fishing operations highlights the failure of Togo to fulfil its flag State obligations. Indeed recognised IUU fishing vessels undermine the conservation and management of living resources.
- (353) The existence of a number of vessels in the RFMOs IUU lists that carried the flag of Togo after their inclusion in these lists is also in breach of Article 217 of the Unclos which requires flag States to take specific enforcement actions in order to ensure compliance with international rules, the investigation of presumed violations and the adequate sanctioning of any violation.
- (354) The existence of a number of IUU vessels in the RFMOs IUU lists that carried the flag of Togo after their inclusion in these lists also demonstrates the lack of ability of Togo to follow the advice of the IPOA IUU. Point 34 of the IPOA IUU advises States to ensure that fishing vessels entitled to fly their flag do not engage in or support IUU fishing.
- (355) In addition, it is pertinent to note that Togo was included in the NMFS report. According to the NMFS report, several Togolese-flagged vessels engaged in fishing activities that violated CCAMLR conservation and management measures<sup>(1)</sup>. The NMFS report does not identify Togo as a country with vessels engaged in IUU fishing activity, given the fact that certain actions (de-registration) were taken to address the illegal fishing activities of those Togolese-flagged vessels. However,
- the NMFS report expresses concerns about addressing IUU fishing activities by deregistering vessels in lieu of applying other sanctions.
- (356) In view of the situation explained in this Section of the Decision and on the basis of all the factual elements gathered by the Commission as well as all the elements made by the country, it could be established, pursuant to Article 31(3) and 31(4)(a) of the IUU Regulation, that Togo has failed to discharge the duties incumbent upon it under international law as a flag State in respect of IUU vessels and IUU fishing carried out or supported by fishing vessels flying its flag or by its nationals and has not taken sufficient action to counter documented and recurring IUU fishing by vessels previously flying its flag.
- 15.2. Failure to cooperate and to enforce (Article 31(5) of the IUU Regulation)**
- (357) With respect to whether Togo cooperates effectively with the Commission on investigations of IUU fishing and associated activities it is noted that evidence gathered by the Commission indicates that Togo failed to fulfil its flag State obligations as set out under international law.
- (358) On several occasions, the Commission had requested Togo to taking the necessary corrective measures in respect of Togo flagged vessels operating in CCAMLR Convention Area and listed in the CCAMLR IUU vessel list. It was only after three reminder letters had been sent by the Commission that Togo issued de-registration certificates for nine of its IUU vessels, indicating the letters of the Commission in the recitals of those certificates. Two other Togolese IUU fishing vessels were also de-registered after several clarifications requested by the Commission on their status. Nevertheless, apart from these de-registrations from the vessels register, Togo has failed to undertake any other action in order to address the established and recurring IUU fishing.
- (359) By acting in the manner described in the above recital Togo failed to demonstrate that it fulfils the conditions of Article 94(2)(b) of the Unclos which stipulates that a flag State assumes jurisdiction under its internal law over each ship flying its flag and its master, officers and crew.
- (360) The Commission analysed whether Togo has taken effective enforcement measures in respect of operators responsible for IUU fishing and whether sanctions of sufficient severity to deprive the offenders of the benefits accruing from IUU fishing have been applied.

<sup>(1)</sup> NMFS report, pp. 107-108.

- (361) Available evidence confirms that Togo has not fulfilled its obligations under international law with respect to effective enforcement measures. In this respect it is recalled that there is a significant number of IUU vessels in the RFMOs IUU lists that carried the flag of Togo after their inclusion in these lists. The existence of such IUU vessels highlights the failure of Togo to honour its responsibilities vis-à-vis its vessels operating on the high seas as set out in Article 94 of the Unclos.
- (362) Furthermore, with respect to compliance and enforcement, the mission revealed that Togo does not have any specific legislation to address IUU fishing activities. The only measure taken is de-registration of fishing vessels. Nevertheless, such action does not entail either investigations on illegal fishing activities carried out by vessels or imposition of sanction on established infringements. Indeed de-registration of a fishing vessel does not ensure that offenders of infringement are sanctioned for their actions and deprived from the benefits of their actions. The simple administrative decision to remove a fishing vessel from the register without ensuring the possibility to impose other penalties is an act that does not ensure deterrent effects. Such an action does not ensure flag State control over the fishing vessels as required under Article 94 of Unclos. In addition, Togo performance with respect to compliance and enforcement is not in accordance with point 18 of the IPOA IUU which stipulates that in the light of Unclos provisions each State should take measures or cooperate to ensure that nationals subject to their jurisdiction do not support or engage in IUU fishing. Togo performance in this respect is also not in accordance with the recommendations of point 21 of the IPOA IUU which advises States to ensure that sanctions for IUU fishing by vessels and, to the greatest extent possible, nationals under its jurisdiction are of sufficient severity to effectively prevent, deter and eliminate IUU fishing and deprive offenders of the benefits accruing from their illegal activities.
- (363) The failure of Togo to fulfil its enforcement obligations is also confirmed by the correspondence exchanged between the Commission and Togo, as well as the discussions carried out during the Commission mission to Togo. Togo stated on several occasions that its legislation does not provide for sanctions for IUU fishing offenders.
- (364) With respect to the history, nature, circumstances, extent and gravity of the manifestations of IUU fishing considered, the Commission has taken into account the recurrent and repetitive IUU fishing activities of Togo-flagged vessels until 2012.
- (365) With respect to the existing capacity of the Togolese authorities, it should be noted that, according to the United Nations Human Development Index <sup>(1)</sup>, Togo is considered as a low human development country (162nd in 187 countries). This is also confirmed by Annex II to Regulation (EC) No 1905/2006 where Togo is listed in the category of least developed countries. In this respect, the financial and administrative capacity constraints of the competent authorities may be considered as one factor that undermines the ability of Togo to fulfil its cooperation and enforcement duties. Nevertheless, it is recalled that shortcomings in cooperation and enforcement are linked with the lack of an adequate legal framework that enables the appropriate follow up actions rather than with the existing capacity of the competent authorities.
- (366) Furthermore, it should be highlighted that, in accordance with the recommendations in points 85 and 86 of the IPOA IUU concerning special requirements of developing countries, the Union assisted Togo in the application of the IUU Regulation through a specific technical assistance programme financed by the Commission <sup>(2)</sup>.
- (367) In view of the situation explained in this Section of the Decision and on the basis of all factual elements gathered by the Commission as well as all the statements made by the country, it could be established, pursuant to Article 31(3) and 31(5) of the IUU Regulation, that Togo has failed to discharge its duties incumbent upon it under international law as flag State in respect of cooperation and enforcement efforts.
- 15.3. Failure to implement international rules (Article 31(6) of the IUU Regulation)**
- (368) Togo has only ratified the Unclos and is not a Contracting Party to or a Cooperative non-Member of any RFMO.
- (369) The Commission analysed any information deemed relevant with respect to Togo derived from FCWC and CCAMLR.
- (370) In this respect it is noted that Togo is a member of the FCWC which is a sub-regional fisheries advisory body. The third Session of the Ministerial Conference of FCWC met in December 2009 and adopted the FCWC's Regional Plan Action on IUU fishing in the maritime

<sup>(1)</sup> Information retrieved from: <http://hdr.undp.org/en/statistics/>

<sup>(2)</sup> Accompanying developing countries in complying with the Implementation of Regulation (EC) No 1005/2008 on Illegal, Unreported and Unregulated (IUU) Fishing, EuropeAid/129609/C/SER/Multi.

zones of the FCWC Member countries (FCWC RPOA). The Ministers mandated the Chair of the Ministerial Conference and the Secretary-General of the FCWC 'to take all the necessary measures for the implementation of the regional plan' <sup>(1)</sup>. The first meeting of the working group on the fight against Illegal, Unreported and Unregulated fishing of FCWC took place in Ghana between 28 and 30 April 2010. The meeting recommended and agreed on a working schedule which includes certain deliverable actions (methods to register vessels, cooperation between FCWC member countries to raise awareness, an agreement on measures of port States and the establishment of a list of industrial vessels authorised in each FCWC member country to be taken at national level <sup>(2)</sup>).

(371) With respect to the situation explained in the above recital it is noted that from the correspondence and the mission of the Commission to Togo it does not result that Togo has undertaken any steps towards the implementation of the FCWC RPOA or the recommendations of the first meeting of the IUU working group of FCWC.

(372) In addition, during 2010 and 2011, CCAMLR reported several sightings of Togolese-flagged IUU vessels or of IUU vessels in the RFMOs IUU lists that carried the flag of Togo after their inclusion in these lists. Examples of such communications can be found in CCAMLR circulars transmitted to its members <sup>(3)</sup>: Document COMM CIRC 10/11 Sightings of IUU-listed vessels *Typhoon-1* and *Draco I*, Document 10/23 Sightings of IUU-listed vessels *Typhoon-1* and *Draco I*, Document 10/37 Sighting of the IUU-listed vessel *Bigaro*, Document 10/38 Update to the NCP IUU Vessel List — *Triton I* (changed name — *Zeus* and flag — Togo), Document 10/72 Sighting of IUU-listed vessel *Bigaro*, Document 10/133 Sighting of IUU-listed vessel *Kuko* (ex-*Typhoon 1*), Document 11/03 Sighting of IUU listed vessels and updates to the NCP-IUU vessel list — *Typhoon-1*, *Zeus* and *Bigaro*.

(373) CCAMLR also considered information that, during 2010, Togo had reportedly de-flagged the vessels *Bigaro*, *Carmela*, *Typhoon-1*, *Chu Lim*, *Rex* and *Zeus*, all of which were included on the non-contracting parties-IUU vessel list. However, several subsequent sighting reports

indicated that a number of the vessels concerned were still claiming Togolese flag (as stated in CCAMLR Document SCIC-10/4) <sup>(4)</sup>.

(374) In addition, the mission conducted by the Commission revealed that the Togolese authorities are lacking the legal framework and the necessary monitoring and surveillance capacities to perform their duties as a flag State.

(375) By acting in the manner described in this Section of the Decision Togo failed to demonstrate that it fulfils the conditions of Article 94(2)(b) of the Unclos which stipulates that a flag State assumes jurisdiction under its internal law over each ship flying its flag and its master, officers and crew. Indeed, de-registration of fishing vessels is not per se a sufficient measure for a flag State to take, as that measure does not address the IUU activity, it does not ensure punishment of IUU fishing activities by the application of administrative and/or criminal sanctions established by law and leaves the fishing vessel free to continue operating in breach of internationally established conservation and management measures.

(376) Furthermore, the mission conducted by the Commission revealed that Togolese procedures for vessel registration do not take into account any history of IUU activities vessels may have. This administrative practice, that could attract IUU operators for registration of IUU vessels, is not compliant with Article 94 of the Unclos.

(377) Finally, it should be noted that, contrary to the recommendations in points 25, 26 and 27 of the IPOA IUU, Togo has not developed a national plan of action against IUU fishing.

(378) In view of the situation explained in this Section of the Decision and on the basis of all the factual elements gathered by the Commission as well as the statements made by the country, it could be established, pursuant to Article 31(3) and (6) of the IUU Regulation, that Togo has failed to discharge the duties incumbent upon it under international law with respect to international rules, regulations and conservation and management measures.

<sup>(1)</sup> Relevant information retrieved from: FCWC website <http://www.fcwc-fish.org/>

<sup>(2)</sup> Relevant information retrieved from: FCWC website <http://www.fcwc-fish.org/>

<sup>(3)</sup> Relevant information retrieved from: CCMLAR website <http://www.ccamlr.org/>

<sup>(4)</sup> Relevant information retrieved from: CCMLAR website <http://www.ccamlr.org/>



#### 15.4. Specific constraints of developing countries

- (379) It is recalled that, according to the United Nations Human Development Index <sup>(1)</sup>, Togo is considered as a low human development country (162nd in 187 countries). This is also confirmed by Annex II to Regulation (EC) No 1905/2006 where Togo is listed in the category of least developed countries. Account taken of the ranking of Togo the Commission analysed if the information gathered could be linked with its specific constraints as a developing country.
- (380) Although specific capacity constraints may exist in general with respect to control and monitoring, the specific constraints of Togo derived from its level of development cannot justify an absence of specific provisions in the national legal framework referring to international instruments to combat, deter and eliminate IUU fishing activities. Furthermore, those constraints cannot justify Togo's failure to establish a sanctions system for infringements of international management and conservation measures in respect of fishing activities conducted on the high seas.
- (381) Togo has requested Union assistance in the fight against IUU fishing. In this respect it is noted that the Union has already funded a specific technical assistance action Review and update of the fisheries law regulation of 1998 and its implementing regulations in the Republic of Togo <sup>(2)</sup> as well as a specific technical assistance action in Togo with respect to the fight against IUU fishing <sup>(3)</sup>.
- (382) After the mission of the Commission, Togo announced certain measures to be imposed on its vessels belonging to foreign companies. However, to date, no clear legal framework has been introduced or enforced. Therefore, it is concluded that Togo cannot invoke a lack of administrative capacity to evade its international obligations, as the Commission has taken into consideration the development constraints of Togo and offered adequate assistance.
- (383) In view of the situation explained in this Section of the Decision and on the basis of all factual elements gathered by the Commission as well as the statements made by the country, it could be established, pursuant to Article 31(7) of the IUU Regulation, the development

status of Togo may be impaired by its level of development. However, account taken of the nature of the established shortcomings of Togo, assistance provided by the Union and actions taken to rectify the situation, the development level of that country cannot fully excuse or otherwise justify the overall performance of Togo as flag or coastal State with respect to fisheries and the insufficiency of its action to prevent, deter and eliminate IUU fishing.

#### 16. PROCEDURE WITH RESPECT TO THE REPUBLIC OF VANUATU

- (384) From 23 to 25 January 2012, the Commission, with the support of the EFCA, carried out a mission to the Republic of Vanuatu (Vanuatu) in the context of administrative cooperation provided for in Article 20(4) of the IUU Regulation.
- (385) The mission sought to verify information concerning Vanuatu's arrangements for the implementation, control and enforcement of laws, regulations and conservation and management measures which must be complied with by its fishing vessels, measures taken by Vanuatu in order to implement its obligations in the fight against IUU fishing and to fulfil its requirements and points pertaining to the implementation of the catch certification scheme of the Union.
- (386) The final report of the mission was sent to Vanuatu on 14 February 2012.
- (387) The comments of Vanuatu on the final report of the mission were received on the 11 May 2012.
- (388) Vanuatu is a Contracting Party to IATTC, ICCAT, WCPFC and IOTC. Vanuatu is a cooperating non-Contracting Party to CCAMLR. Vanuatu has ratified the Unclos and has signed the UNFSA.
- (389) In order to evaluate the compliance of Vanuatu with its international obligations as flag, port, coastal or market State set out in the international agreements mentioned in recital 388 and established by the relevant RFMOs mentioned in recital 388, the Commission sought and analysed all the information it deemed necessary for the purpose of such an exercise.

<sup>(1)</sup> Information retrieved from: <http://hdr.undp.org/en/statistics/>

<sup>(2)</sup> Review and update of the fisheries law regulation of 1998 and its implementing regulations in the Republic of Togo (ACP FISH II Programme). Relevant information retrieved from: FCWC website <http://www.fcwc-fish.org/>

<sup>(3)</sup> Accompanying developing countries in complying with the Implementation of Regulation (EC) No 1005/2008 on Illegal, Unreported and Unregulated (IUU) Fishing, EuropeAid/129609/C/SER/Multi.

- (390) The Commission used information derived from available data published by ICCAT, IOTC and WCPFC.

#### 17. POSSIBILITY OF VANUATU OF BEING IDENTIFIED AS A NON-COOPERATING THIRD COUNTRY

- (391) Pursuant to Article 31(3) of the IUU Regulation, the Commission analysed the duties of Vanuatu as flag, port, coastal or market State. For the purpose of this review the Commission took into account the parameters listed in Article 31(4) to (7) of the IUU Regulation.

##### 17.1. Recurrence of IUU Vessels and IUU trade flows (Article 31(4)(a) of the IUU Regulation)

- (392) The Commission established on the basis of information retrieved from RFMO IUU vessel lists that one Vanuatu flagged vessel had been put on the IOTC IUU vessels list in 2010 <sup>(1)</sup>. That vessel was *Jupiter No 1*. Subsequently, IOTC decided during the 14th session of the IOTC to remove that vessel from the IUU list in view of the commitment undertaken by Vanuatu to deregister that vessel from Vanuatu's ship register and to inform the WCPFC of the situation of the vessel <sup>(2)</sup>.
- (393) The Commission also established on the basis of information retrieved from RFMO IUU vessel lists that one vessel named *Balena* <sup>(3)</sup>, previously registered in Vanuatu and involved in IUU fishing activities in South African waters, had been included in the IOTC IUU list in 2010 but was subsequently removed from that list following the presentation by Vanuatu of a scrapping certificate with respect to that vessel <sup>(4)</sup>.
- (394) That vessel had also been put on the Union IUU vessel list in 2010 <sup>(5)</sup> but was removed from that list in 2011.
- (395) In this respect it is recalled that, pursuant to Article 18(1) and (2) of the UNFSA, the flag State is responsible vis-à-vis its vessels operating on the high seas. The Commission considers that the presence of vessels flagged to Vanuatu fishing illegally in the IOTC Convention Area is a clear indication that Vanuatu has

failed to exercise its responsibilities effectively, to comply with RFMO conservation and management measures and to ensure that its vessels do not engage in any activity which undermines the effectiveness of such measures.

- (396) Pursuant to Article 19(1) and (2) of the UNFSA, the flag State is required to ensure compliance by vessels flying its flag with RFMO conservation and management rules. Flag States are also required to conduct expeditious investigations and judicial proceedings. The flag State should also ensure adequate sanctions, discourage repetition of violations and deprive offenders of the benefits accruing from illegal activities. In this respect it is noted that the existence of IUU vessels flagged to Vanuatu in one RFMO IUU list highlights the failure of Vanuatu to fulfil its obligations under Article 19(1) and (2) of the UNFSA. Indeed Vanuatu's actions appear to be focused only on RFMO related corrective measures and not on a complete set of adequate sanctions for the infringements committed.

- (397) The failure of Vanuatu to fulfil its compliance and enforcement obligations under Article 19 of the UNFSA is also confirmed by the information gathered during the mission conducted by the Commission. As explained in detail in recitals 402 and 403, that mission revealed that the relevant Vanuatu authorities were acting in breach of all the requirements provided for in Article 19(1) and (2) of the UNFSA and were thus undermining Vanuatu's responsibility as flag State to address any IUU fishing activity carried out by vessels flying its flag.

- (398) In view of the situation explained in this Section of the Decision and on the basis of all factual elements gathered by the Commission as well as the statements made by the country, it could be established, pursuant to Article 31(3) and 31(4)(a), that Vanuatu has failed to discharge the duties incumbent upon it under international law as a flag State in respect of IUU vessels and IUU fishing carried out or supported by fishing vessels flying its flag or by its nationals and has not taken sufficient action to counter documented and recurring IUU fishing by vessels previously flying its flag.

##### 17.2. Failure to cooperate and to enforce (Article 31(5)(b) and (d) of the IUU Regulation)

- (399) The Commission analysed whether Vanuatu has taken effective enforcement measures in respect of operators responsible for IUU fishing and whether sanctions of sufficient severity to deprive the offenders of the benefits accruing from IUU fishing have been applied.

<sup>(1)</sup> Vessel *Jupiter No 1*, IOTC circular 2010/17 of 15 February 2010.

<sup>(2)</sup> Report of the 14th Session of the Indian Ocean Tuna Commission, Busan, IOTC-2010-S14-R[E].

<sup>(3)</sup> Vessel *Balena*, IOTC Circular 2010/23 of 9 March 2010.

<sup>(4)</sup> Report of the 14th Session of the Indian Ocean Tuna Commission, Busan, IOTC-2010-S14-R[E].

<sup>(5)</sup> See Part B of the Annex to Regulation (EU) No 468/2010.

- (400) It is noted that Vanuatu has failed to comply with IOTC Resolution 09/03 concerning the establishment of a list of vessels presumed to have carried out IUU fishing activities in the IOTC area. Vanuatu has not fulfilled the obligation imposed by IOTC to submit its opinion to IOTC on the removal of some IUU vessels from different countries from the IOTC IUU vessels list for 2011 <sup>(1)</sup>.
- (401) By acting in the way described in the above recital Vanuatu failed to demonstrate that it fulfils the conditions of Article 20 of the UNFSA which stipulates rules and procedures that States must follow with respect to international cooperation in enforcement to ensure compliance with and enforcement of sub-regional and regional conservation and management measures.
- (402) With respect to the enforcement measures put in place by Vanuatu, the mission conducted by the Commission in Vanuatu revealed that in spite of the fact that Vanuatu flagged vessels authorised to fish in international waters have to comply with international obligations, there are no specific rules and measures in the legal system of Vanuatu designed to specifically address IUU fishing infringements committed on the high seas and to prevent, deter and eliminate IUU fishing activities. From the information collected by that mission, it appears that sanctions are never applied against Vanuatu flagged vessels fishing outside waters under Vanuatu jurisdiction. Furthermore, in spite of the fact that Vanuatu has signed the UNFSA, which constitutes the major international recognised legal instrument for the management of straddling stocks and the management of fishing activities occurring in international waters, Vanuatu has failed to implement that agreement in its legal system.
- (403) The lack of specific legal provisions on IUU fishing infringements committed on the high seas is a clear indication that Vanuatu does not fulfil the conditions of Article 94(2)(b) of the Unclos which stipulates that a flag State assumes jurisdiction under its internal law over each ship flying its flag and its master, officers and crew. Furthermore, the lack of specific legal rules addressing IUU fishing infringements in high seas highlights the failure of Vanuatu to honour its responsibilities vis-à-vis its vessels operating in high seas as set out in Article 18(1) of the UNFSA.
- (404) Vanuatu has also failed to demonstrate that it fulfils the recommendations in point 18 of the IPOA IUU which stipulates that in the light of the Unclos provisions each State should take measures or cooperate to ensure that nationals subject to their jurisdiction do not support or engage in IUU fishing. Furthermore, Vanuatu has not adopted a national plan of action to deter, prevent and eliminate IUU fishing. It has also failed to demonstrate that it cooperates and coordinates activities with other States in preventing, deterring and eliminating IUU fishing in the manner set out in point 28 of the IPOA IUU.
- (405) It was also revealed that Vanuatu does not have administrative sanctions to financially penalise fishing operators carrying out illegal fishing activities. In addition, the criminal sanctions provided for in the legal system of Vanuatu are minimal. The mission conducted by the Commission revealed that, in spite of the fact that Vanuatu legislation sets a general maximum limit for fines at VUV 100 000 000 (approximately EUR 830 000) for infringements of the conditions applicable to international authorisations to fish <sup>(2)</sup>, no vessels has never been applied a sanction corresponding to that maximum fine for illegal operations conducted on the high seas. Furthermore, that maximum limit for fines is not applicable to a set of the most serious and frequent infringements of international obligations such as the failure to communicate catch data or the failure to comply with investigations. In all those cases the fines provided for are established at a very low level and are limited to a maximum of VUV 1 000 000 (approximately EUR 830 000) <sup>(3)</sup>. The level of such sanctions is manifestly inadequate and is clearly not proportionate to the seriousness of the infringements at stake, to the potential impact of the infringements and to the potential benefit that could derive from such illegal actions.
- (406) Account taken of the situation explained in the above recital it is concluded that the level of sanctions for IUU infringements provided for in Vanuatu legislation is not in accordance with Article 19(2) of the UNFSA which provides that the sanctions applicable in respect of violations be adequate in severity to be effective in securing compliance and to discourage violations wherever they occur and should deprive offenders of the benefits accruing from their illegal activities. Furthermore, the performance of Vanuatu with respect to effective enforcement measures is also not in accordance with the recommendations in point 21 of the IPOA IUU which advises States to ensure that sanctions for IUU fishing by vessels, and to the greatest extent possible, nationals under their jurisdiction are of sufficient severity to effectively prevent, deter and eliminate IUU fishing and to deprive the benefits accruing from such fishing.

<sup>(1)</sup> IOTC Compliance report for Vanuatu (Compliance Committee Session 8, 2011), IOTC-2011-S15-Coc43 and IOTC Circular 2010/23 of 9 March 2010.

<sup>(2)</sup> CAP 135 part 5, Articles 14 and 15 of the Laws of the Republic of Vanuatu.

<sup>(3)</sup> CAP 135 Part 5, Articles 16, 17 and 20 of the Laws of the Republic of Vanuatu.

- (407) With respect to the existing capacity of the Vanuatu authorities it should be noted that according to the United Nations Human Development Index <sup>(1)</sup>, Vanuatu is considered as a medium human development country (125th in 187 countries). On the other hand Vanuatu is listed in Annex II to Regulation (EC) No 1905/2006 as a country falling within the category of least developed countries.
- (408) On the basis of information derived from the mission conducted by the Commission it cannot be considered that the shortcomings explained are derived from any lack of financing resources since the failures to enforce and consequently cooperate are clearly linked with the lack of the necessary legal and administrative framework.
- (409) Furthermore, it should be highlighted that, in accordance with the recommendations in points 85 and 86 of the IPOA IUU concerning special requirements of developing countries, the Union has already funded a specific technical assistance programme with respect to the fight against IUU fishing <sup>(2)</sup>.
- (410) In view of the situation explained in this Section of the Decision and on the basis of all the factual elements gathered by the Commission as well as the statements made by the country, it could be established, pursuant to Article 31(3) and 31(5) (b) and (d) of the IUU Regulation, that Vanuatu has failed to discharge the duties incumbent upon it under international law as flag State in respect of cooperation and enforcement efforts.
- 17.3. Failure to implement international rules (Article 31(6) of the IUU Regulation)**
- (411) Vanuatu has ratified the Unclos and the UNFSA. Furthermore, Vanuatu is a Contracting Member of IATTC, WCPFC, IOTC and ICCAT and a cooperating non-Contracting Party to CCAMLR.
- (412) The Commission analysed any information deemed relevant with respect to the status of Vanuatu as Contracting Member of IATTC, WCPFC, IOTC, ICCAT and cooperating non-Contracting Party to CCAMLR.
- (413) The Commission also analysed any information deemed relevant with respect the agreement of Vanuatu to apply conservation and management measures adopted by IATTC, WCPFC, IOTC and ICCAT.
- (414) It is recalled that ICCAT issued a letter of Identification of Vanuatu concerning its reporting deficiencies <sup>(3)</sup>. In its letter of Identification Vanuatu has been identified for its failure to comply with its obligation to communicate statistics as set out in ICCAT Recommendation 05-09. In the same letter ICCAT highlighted that Vanuatu had not provided all the necessary data and information such as Annual report, data on Task I (statistics referring to fleet), data on Task II (catches size), Compliance tables and some transshipment declarations or reports as provided for in ICCAT Recommendation 06-11.
- (415) The Commission analysed information available from ICCAT on the compliance of Vanuatu with ICCAT conservation and management rules and reporting obligations. For this the Commission used the Compliance Tables annexed to the ICCAT Commission reports for 2010 <sup>(4)</sup> and 2011 <sup>(5)</sup>.
- (416) With respect to 2010 Vanuatu did not submit to ICCAT certain elements requested in the framework of the Annual Report (provided for in ICCAT Convention, Resolution 01-06 and Reference 04-17) and statistics referring to fleet data (Task I) and to catches size data (Task II) as provided for in ICCAT Recommendation 05-09.
- (417) In particular, according to the available information, Vanuatu did not submit to ICCAT in 2010 information on fleet data, catches size data (provided for in ICCAT Recommendation 05-09), compliance (provided for in ICCAT Recommendation 08-09), internal actions report for vessels greater than 20 meters in length and on the management standard for large scale tuna longline vessels (provided for in ICCAT Recommendation 02-22/09-08) <sup>(6)</sup>.
- (418) With respect to 2011 Vanuatu did not submit to ICCAT certain elements requested in the framework of the Annual Report (provided for in ICCAT Recommendation 01-06 and Reference 04-17) and statistics referring to fleet data (Task I) and to catches size data (Task II) as provided for in ICCAT Recommendation 05-09. In addition, Vanuatu did not provide compliance tables with regard to quotas and catch limits (provided for in ICCAT Recommendation 98-14) and failed to submit transshipment declarations (provided for in ICCAT Recommendation 06-11) <sup>(7)</sup>.

<sup>(1)</sup> Information retrieved from: <http://hdr.undp.org/en/statistics/>

<sup>(2)</sup> Accompanying developing countries in complying with the Implementation of Regulation (EC) No 1005/2008 on Illegal, Unreported and Unregulated (IUU) Fishing, EuropeAid/129609/C/SER/Multi.

<sup>(3)</sup> ICCAT letter of identification, 21 February 2012.

<sup>(4)</sup> ICCAT, Compliance Summary Tables, Doc. No COC-308/2010, 10.11.2010.

<sup>(5)</sup> ICCAT, Draft Compliance Summary Tables, Doc. No COC-308/2011.

<sup>(6)</sup> ICCAT letter of identification to Vanuatu No 166, 18 January 2011.

<sup>(7)</sup> ICCAT letter of identification to Vanuatu No 623, 21 February 2012.

- (419) With respect to WCPFC, it is noted that Vanuatu has not complied with a certain number of conservation and management measures (CMM) adopted by that regional organisation. In order to evaluate the level of compliance of Vanuatu with WCPFC conservation and management rules and reporting obligations, the Commission used the draft compliance monitoring scheme report established by that regional organisation in advance of its 2012 annual meeting <sup>(1)</sup>.
- (420) With respect to 2010, Vanuatu failed to comply with: a WCPFC CMM on sharks imposing the implementation of a weight ratio for sharks fins (CMM 2009-4(7)), a WCPFC CMM on South Pacific albacore imposing the obligation to submit a report on the number of vessels fishing for this species (CMM 2005-02), a sea birds mitigation WCPFC CMM aiming at reporting interactions and by-catches of sea birds (CMM 2007-04 (9)), a number of WCPFC CMM for bigeye (BET) and yellowfin tuna providing for the obligation to submit an annual report of catches by species from landings and transshipments, providing for the implementation of measures to reduce BET mortality caused by purse-seiners and providing for closures of high sea pockets for purse seiners (CMM 2008-01 (18), (22) and (43)), and a WCPFC CMM on fishes aggregating devices (FADs) and catch retention which provides for the obligation to submit a systematic report of discards with a hard copy transmitted to WCPFC (CMM 2009-02 (12) and (13)). Vanuatu also failed to comply with a WCPFC CMM on driftnets providing for the obligation to submit a summary of MCS actions related to the use of large driftnets on the high seas (CMM 2008-04 (5)).
- (421) With respect to IOTC, it is recalled that Vanuatu has been identified for its failure to comply with some of the measures adopted by that regional organisation. In order to evaluate the level of compliance of Vanuatu with IOTC conservation and management rules and reporting obligations, the Commission used the IOTC Compliance report established during the eighth session of the IOTC Compliance Committee in 2011 <sup>(2)</sup>.
- (422) With respect to 2011, Vanuatu has failed to comply with the obligation to report on the implementation of the IOTC conservation and management measures. Vanuatu has also not participated in any IOTC Scientific Committee meeting, has not submitted its national report to the IOTC Scientific Committee and has not submitted its Compliance questionnaire. In addition,
- regarding the resolutions adopted by IOTC on control of fishing capacity and flag State responsibility, Vanuatu has failed to transmit some mandatory information under the IOTC 07/02 Resolution on the recording of the vessels authorised to operate in the IOTC area.
- (423) Furthermore, it was revealed during the mission conducted by the Commission that the conservation and management measures adopted by the RFMOs in which Vanuatu participates have not been in any way transposed into Vanuatu legislation.
- (424) In addition, with respect to the management of Vanuatu's fishing fleet, it was revealed during the mission conducted by the Commission that Vanuatu procedures for vessel registration do not take into account any history of IUU activities vessels requesting the Vanuatu flag may have. Vanuatu also has no specific rules to ensure that the fishing vessels registered under its flag could comply with the capacity management provisions of the relevant regional organisations of which it is a Contracting Member or to which it is a cooperating non-Contracting Party. The mission conducted by the Commission also revealed that Vanuatu has not implemented measures to ensure supervision of landings of Vanuatu flagged vessels in non-Vanuatu ports.
- (425) The failure of Vanuatu to provide to IOTC, WCPFC and ICCAT the information referred to in recitals 414 to 423 demonstrates the failure of Vanuatu to fulfil its obligations as flag State laid down in the Unclos and the UNFSA.
- (426) Indeed the failure to provide information on conservation and management measures, quotas and catch limits and annual reports and statistics undermines the ability of Vanuatu to fulfil its obligations under Articles 117 and 118 of the Unclos which stipulate the duties of States to adopt measures for their respective nationals for the conservation of living resources of the high seas and to cooperate on conservation and management measures for living resources in the areas of the high seas.
- (427) The performance of Vanuatu is in breach of the requirements of Article 18(1) and (2) of the UNFSA since, for the reasons explained in recital 424, that country is not ensuring that it is able to exercise its responsibilities effectively in respect to vessels registered under its flag.

<sup>(1)</sup> WCPFC-TCC7-2011/17-CMR/28, 12 October 2011.

<sup>(2)</sup> IOTC Compliance report for Vanuatu (Compliance Committee Session 8, 2011) IOTC-2011-S15-Coc43.

(428) The performance of Vanuatu is also in breach of the requirements of Article 18(3) of the UNFSA.

(429) Vanuatu does not comply with the requirements of the control of its vessels in the high seas in line with the RFMOs rules set in Article 18(3)(a) of UNFSA on account of its failure to submit to ICCAT information on transshipments.

(430) Vanuatu does not comply with the recording and timely reporting requirements of Article 18(3)(e) of the UNFSA on account of its failure to submit to ICCAT information on annual reports, Task I (fleet characteristics), internal action reports for vessels longer than 20 m, compliance tables and management standards for large-scale tuna longline vessels (LSTLV).

(431) In addition, Vanuatu does not comply with Article 18(3)(f) of the UNFSA on account of its failure to report of catch related data to ICCAT, WCPFC and IOTC, its failure to report information to ICCAT on transshipment related matters and the lack of means for ensuring supervision of landings in non-Vanuatu ports, as observed during the mission conducted by the Commission.

(432) Furthermore, it was revealed by the mission conducted by the Commission that the Vanuatu Ship Registry is located outside Vanuatu and does not ensure that vessels flying the flag of Vanuatu have a genuine link with the country. The lack of such genuine link between that State and the ships that are registered in its registry is in breach of the conditions set out for the nationality of ships in Article 91 of the Unclos. This conclusion is further confirmed by the ITF which considers Vanuatu as a flag of convenience <sup>(1)</sup>.

(433) Finally, it should be noted that, contrary to the recommendations in points 25, 26 and 27 of the IPOA IUU, Vanuatu has not developed a national plan of action against IUU fishing.

(434) In view of the situation explained in this Section of the Decision and on the basis of all the factual elements gathered by the Commission as well as the statements made by the country, it could be established, pursuant to Article 31(3) and (6) of the IUU Regulation, that Vanuatu has failed to discharge the duties incumbent upon it

under international law with respect to international rules, regulations and conservation and management measures.

#### 17.4. Specific constraints of developing countries

(435) It is recalled that, according to the United Nations Human Development Index <sup>(2)</sup>, Vanuatu is considered as a medium human development country (125th in 187 countries). On the other hand, Vanuatu is listed in Annex II to Regulation (EC) No 1905/2006 as a country falling within the category of least developed countries. Account taken of that ranking of Vanuatu the Commission analysed if the information gathered by the Commission could be linked with its specific constraints as a developing country.

(436) In this respect it is noted that failure to comply with obligations under international law is primarily linked with the absence of specific provisions in the national legal framework referring to measures to combat, deter and eliminate IUU fishing activities as well as with the non-satisfactory level of compliance with RFMO rules. In fact it appears that it is the voluminous number of vessels registered under the Vanuatu flag and operating on the high seas that undermines the existence of effective monitoring, control and surveillance of fishing activities. Indeed the absence of any limitation in the registration of vessels is not consistent with the resources allocated by Vanuatu for the development of control, monitoring and surveillance actions and means in accordance with the international responsibilities of a flag State. Consequently, although Vanuatu may have development constraints, the policies followed by that country for the development of its fishing industry do not tally with the allocated resources and country priorities with respect to fisheries management.

(437) It is also pertinent to note that the Union has already funded, in 2012, a specific technical assistance action in Vanuatu with respect to the fight against IUU fishing <sup>(3)</sup>.

(438) In view of the situation explained in this Section of the Decision and on the basis of all factual elements gathered by the Commission as well as the statements made by the country, it could be established, pursuant to Article 31(7) of the IUU Regulation, that the development status and overall performance of Vanuatu with respect to fisheries are not impaired by its level of development.

<sup>(1)</sup> Information retrieved from: <http://www.itfglobal.org/flags-convenience/flags-convenien-183.cfm>

<sup>(2)</sup> Information retrieved from: <http://hdr.undp.org/en/statistics/>

<sup>(3)</sup> Accompanying developing countries in complying with the Implementation of Regulation (EC) No 1005/2008 on Illegal, Unreported and Unregulated (IUU) Fishing, EuropeAid/129609/C/SER/Multi.

18. CONCLUSION ON THE POSSIBILITY OF IDENTIFICATION OF NON-COOPERATING THIRD COUNTRIES

- (439) In view of the conclusions reached above with regard to the failure of Belize, Cambodia, Fiji, Guinea, Panama, Sri Lanka, Togo and Vanuatu to discharge the duties incumbent upon them under international law as flag, port, coastal or market State and to take action to prevent, deter and eliminate IUU fishing, those countries should be notified, in accordance with Article 32 of the IUU Regulation, of the possibility of being identified as countries the Commission considers to be non-cooperating third countries in fighting IUU fishing.
- (440) In accordance with Article 32(1) of the IUU Regulation, the Commission should notify Belize, Cambodia, Fiji, Guinea, Panama, Sri Lanka, Togo and Vanuatu of the possibility of their being identified as non-cooperating third countries. The Commission should also take all the demarches set out in Article 32 of the IUU Regulation with respect to Belize, Cambodia, Fiji, Guinea, Panama, Sri Lanka, Togo and Vanuatu. In the interest of sound administration, a period should be fixed within which those countries may respond in writing to the notification and rectify the situation.
- (441) Furthermore, it should be stated that the notification to Belize, Cambodia, Fiji, Guinea, Panama, Sri Lanka, Togo

and Vanuatu of the possibility of being identified as countries the Commission considers to be non-cooperating for the purposes of this Decision does neither preclude nor automatically entail any subsequent step taken by the Commission or the Council for the purpose of the identification and the establishment of a list of non-cooperating countries,

HAS DECIDED AS FOLLOWS:

*Sole Article*

Belize, the Kingdom of Cambodia, the Republic of Fiji, the Republic of Guinea, the Republic of Panama, the Democratic Socialist Republic of Sri Lanka, the Togolese Republic and the Republic of Vanuatu are notified of the possibility of being identified as third countries that the Commission considers as non-cooperating third countries in fighting illegal, unreported and unregulated fishing.

Done at Brussels, 15 November 2012.

*For the Commission*

Maria DAMANAKI

*Member of the Commission*

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