

COMMISSION DECISION**of 23 October 2017****notifying the Socialist Republic of Vietnam of the possibility of being identified as a non-cooperating third country in fighting illegal, unreported and unregulated fishing**

(2017/C 364/03)

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⁽¹⁾, 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 to identify non-cooperating third countries, the *démarches* in respect of such countries, the establishment of a list of such countries, the removal from that list, the publicity of that list and any emergency measures.
- (3) Pursuant to Article 31 of the IUU Regulation, the Commission is to identify third countries that it considers as non-cooperating countries in the fight against IUU fishing. A third country is to be identified as non-cooperating 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.
- (4) Prior to identifying third countries as non-cooperating under Article 31 of the IUU Regulation, the Commission is to first notify third countries of the possibility of being identified as non-cooperating countries in accordance with Article 32 of that Regulation. Such notification is of a preliminary nature. The notification is to be based on the criteria laid down in Article 31 of the IUU Regulation. The Commission is also to take into account all the *démarches* set out in Article 32 of that Regulation with respect to the notified third countries. In particular, the Commission is to include in the notification information concerning the essential facts and considerations underlying such identification, provide those countries with the opportunity 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 is to give to the notified third countries adequate time to answer the notification and reasonable time to remedy the situation.
- (5) The identification of non-cooperating third countries under Article 31 of the IUU Regulation is to be based on the review of all information as set out under Article 31(2) of that Regulation.
- (6) In accordance with Article 33 of the IUU Regulation, the Council is to establish a list of non-cooperating third 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, the acceptance of validated catch certificates from third country flag States is subject to a notification from the flag state concerned to the Commission of the arrangements for the implementation, control and enforcement of laws, regulations and conservation and management measures which must be complied with by its fishing vessels.
- (8) In accordance with Article 20(4) of the IUU Regulation, the Commission is to cooperate administratively with third countries in areas pertaining to the implementation of the provisions of that Regulation relating to catch certification.

⁽¹⁾ OJ L 286, 29.10.2008, p. 1.

2. PROCEDURE WITH RESPECT TO THE SOCIALIST REPUBLIC OF VIETNAM

- (9) The notification of the Socialist Republic of Vietnam (hereafter 'Vietnam') as flag State was received by the Commission in accordance with Article 20 of the IUU Regulation on 27 October 2009.
- (10) Following this notification, the Commission initiated a process of administrative cooperation with the authorities of Vietnam as provided for in Article 20(4) of the IUU Regulation. This cooperation covered issues pertaining to the national arrangements in place for the verification of catch certificates and the implementation, control and enforcement of laws, regulations and conservation and management measures which must be complied with by Vietnamese fishing vessels. It entailed exchange of oral and written comments as well as four visits to Vietnam between 17 and 21 September 2012, between 26 and 30 November 2012, between 21 and 24 June 2016, and between 15 and 19 May 2017, where the Commission sought and verified all information deemed necessary concerning the measures taken by Vietnam in order to implement its obligations in the fight against IUU fishing.
- (11) Vietnam is a Cooperating Non-Member of the Western and Central Pacific Fisheries (WCPFC). Vietnam has ratified the 1982 United Nations Convention on the Law of the Sea (UNCLOS) ⁽¹⁾.
- (12) In order to evaluate the compliance of Vietnam with its international obligations as flag, port, coastal or market State as set out in the international agreements referred to in recital (11) and established by the relevant Regional Fisheries Management Organisations (RFMOs), the Commission sought, collected and analysed all necessary information required for the purpose of this exercise.

3. POSSIBILITY OF VIETNAM BEING IDENTIFIED AS A NON-COOPERATING THIRD COUNTRY

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

3.1. Measures taken in respect of recurrence of IUU fishing activities and IUU trade flows (Article 31(4) of the IUU Regulation)

- (14) In accordance with Article 31(4)(a), the Commission analysed the measures taken by Vietnam with respect to any recurrent IUU fishing carried out or supported by fishing vessels flying its flag or by its nationals, or by fishing vessels operating in its maritime waters or using its ports.
- (15) On the basis of information retrieved from written confirmations by the third coastal States concerned, the Commission established that, during the period of 2015 to 2017, at least eight Vietnamese-flagged vessels committed serious IUU infringements within the Economic Exclusive Zone of neighbouring countries and the archipelagic waters of Small Islands Developing States in the Central and Western Pacific area.
- (16) Based on the retrieved evidence, these Vietnamese-flagged vessels are considered to have committed the following serious infringements contrary to the conservation and management measures put in place by the concerned coastal States within the fishing areas in waters under their national jurisdiction. The Vietnamese-flagged vessels have fished without a valid licence, authorisation or permit issued by the flag State and the relevant coastal State, obstructed the work of coastal State officials in the exercise of their duties in inspecting for compliance with the applicable conservation and management measures, including with respect to species that are subject to a complete harvesting ban such as sea cucumber and reef fish. While the concerned coastal States timely reported the illegal activities conducted by Vietnamese vessels to the authorities of Vietnam, the latter did not provide any support to prosecute the cases and deal with the Vietnamese nationals arrested. All of the retrieved evidence was presented to Vietnamese authorities during the visit of 15 to 19 May 2017.
- (17) The environmental value of the species targeted and the special protection provided by coastal States conservation and management measures by means of harvesting prohibitions for these species are additional indications of the seriousness of the committed infringements.
- (18) The lack of compliance with the legal requirements of coastal States for enforcing moratorium periods of prohibition to fish sea cucumbers is particularly harmful for the sustainability of the fisheries resources in the developing coastal States concerned, and is damaging the livelihood of local populations.

⁽¹⁾ <https://treaties.un.org/>

- (19) The Commission considered that the behavioural pattern of these Vietnamese-flagged vessels should be taken into account for establishing the particular gravity of the facts. In this respect, the continuous non-cooperative behaviour of the Vietnamese vessels reinforced the gravity of the infringements committed.
- (20) On the basis of information collected, the Commission concluded that Vietnam failed to uphold its responsibilities as a flag State to prevent its fleet from engaging in IUU activities in high seas or waters of third countries. This is in breach of Article 94(1) and (2) of UNCLOS which provides that every State shall effectively ensure its jurisdiction and control over ships flying its flag. It is also not in line with point 24 of the Food and Agriculture Organization of the United Nations' (FAO) International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated fishing (IPOA IUU) ⁽¹⁾ that provides for the obligation to undertake comprehensive and effective control of fishing activities. The behaviour of Vietnamese nationals responsible for the operations of such fleet is also in breach of Article 62(4) of UNCLOS which provides that nationals of other States fishing in the economic exclusive zone shall comply with the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State. Furthermore, the manifest lack of cooperation of Vietnam with the authorities of concerned coastal States undermined their capacity in adopting effective enforcement actions.
- (21) Pursuant to Article 31(4)(b) of the IUU Regulation, the Commission examined the measures taken by Vietnam in respect of access of fisheries products stemming from IUU fishing to its market.
- (22) For the reasons described below and in Section 3.2, the legal framework of Vietnam concerning the fisheries management, based notably on the 2003 Fisheries Law and the Decree No 103/2013/ND-CP on administrative sanctions in the fisheries activities, does not appear to establish measures to effectively control landings in Vietnamese ports of fish and fishery products stemming from fishing vessels flagged to Vietnam and third country vessels.
- (23) The Commission analysed documentation and other information relating to monitoring and control procedures applicable to both fish and fishery products stemming from fishing activities of fishing vessels flagged to Vietnam and to fish and fishery products imported in Vietnam. Following this assessment, the Commission considers that Vietnam cannot ensure that fish and fishery products entering its market and processing plants through national ports do not stem from IUU fishing. Vietnamese authorities were not able to demonstrate they have all the necessary information required to certify the legality of imports and processed products destined for the Union and its market.
- (24) On 13 January 2016, a consignment of 179 tonnes of Antarctic toothfish was landed at the port of Haiphong in Vietnam from the vessel Asian Warrior. This vessel, also known as Kunlun and Taishan, has been in the IUU vessel list of the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) since 2013 and subject to an Interpol Purple Notice since 13 January 2015. According to the information provided by Vietnamese authorities the catches were confiscated and released to the market.
- (25) On the basis of information retrieved by the Commission on June 2017, an economic operator tried to market to the European Union a consignment of 320 tonnes of Antarctic toothfish stored in Vietnam. Based on the information available, there are indications that the products concerned were caught in subareas 88.1 and 88.2 of the area covered by the CCAMLR after the closure of the fishing season for this species in these areas.
- (26) Vietnamese authorities were not able to provide substantial information demonstrating that they have taken the necessary corrective measures to prevent Antarctic toothfish stemming from IUU fishing activities from entering into their territory. This does not reflect point 66 of the FAO IPOA IUU which establishes that States should take all steps necessary, consistent with international law, to prevent fish caught by vessels identified by the relevant regional fisheries management organisations to have been engaged in IUU fishing from being traded or imported into their territories.
- (27) Furthermore, the last visit conducted in May 2017 revealed an absence of control by fisheries authorities on landings of fishery products intended for processing, marketing and/or exporting, from vessels flagged to third States. Vietnam would be therefore unable to ensure the traceability of fishery products and therefore appears to not take into consideration point 71 of the IPOA IUU which advises States to take steps to improve the transparency of their markets in order to ensure the traceability of fish or fishery products.

⁽¹⁾ International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, Food and Agriculture Organization of the United Nations, 2001.

- (28) In preparation for the May 2017 visit, the European Fisheries Control Agency (EFCA) analysed a sample of catch certificates and processing statements presented at Union borders for consignments originating from Vietnam. These catch certificates and processing statements were validated and endorsed by the Vietnamese fishing authorities on the basis exclusively of information provided by the operators without further verifications.
- (29) The analysis of the catch certificates revealed a series of inconsistencies as regards weight, species and product description, dates of validation and use of outdated templates. Furthermore, the meetings held with competent authorities during the visit conducted in May 2017 revealed that the activities of the fishing vessels are not comprehensively checked before the validation of the catch certificates. The processing of products stemming from catch certificates with clearly identifiable errors demonstrates that Vietnam has failed to cooperate with other States and regional fisheries management organizations to adopt appropriate market related measures to prevent, deter or eliminate IUU fishing as is specified in point 68 and 72 of IPOA-IUU.
- (30) As regards processing statements, the analysis mentioned under the preceding recital, corroborated by evidence gathered during the visit conducted in May 2017, revealed a lack of control of imports of fish raw material and lack of conversion factors to check whether the processed weight declared by the exporting company is consistent with the weight of the available raw material and the type of processing carried out in the processing establishment concerned.
- (31) The information described in this section demonstrates that fishery products processed in or traded through Vietnam do not comply with sustainable post-harvest rules as described in Article 11 of the FAO Code of Conduct. Furthermore, Vietnam has failed to impose rules to ensure adequate cooperation with third country flag states in respect of fish and fishery products stemming from their fishing activities in accordance with measures that ensure transparency and traceability of imported fish products throughout the market foreseen in points 67 to 69 and 71 to 72 of the IPOA-IUU.
- (32) In view of the considerations presented in this Section and on the basis of all factual elements gathered by the Commission as well as all the statements made by the competent authorities of Vietnam it could be established, pursuant to Article 31(3), (4)(a) and (4)(b) of the IUU Regulation, that Vietnam fails to discharge its duties under international law as a flag, port, coastal and market State in respect of IUU vessels and IUU fishing carried out or supported by fishing vessels flying its flag or by its nationals and to prevent access of fisheries products stemming from IUU fishing to its market.

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

- (33) Under Article 31(5)(a) of the IUU Regulation, the Commission analysed its collaboration with Vietnam to see if they had effectively cooperated in responding to questions, providing feedback or investigating matters related to IUU fishing and associated activities.
- (34) While Vietnamese authorities have been generally cooperative in responding and providing feedback to requests for information, the reliability and correctness of their replies were undermined by the outdated legal framework that appears not to be in line with its international law obligations, and by the deficient monitoring, control and surveillance systems described in recitals (42) and (43).
- (35) The Fisheries Law of 2003 does not oblige fishing vessels either to report their catches by means of logbooks, or to submit a landing declaration. In this respect, Vietnam fails to uphold its responsibilities as coastal State to ensure optimum utilization of fishery resources in its EEZ according to scientific, environmental and economic factors as prescribed for in Articles 61 and 62 of UNCLOS.
- (36) The Fisheries Law 2003 also does not address the fishing activities conducted by Vietnamese vessels and nationals in high seas and waters of third States. This loophole in the scope of the Fisheries Law regarding fishing activities beyond the Economic Exclusive Zone of Vietnam undermines the capacity of competent authorities to prevent IUU activities in these areas.
- (37) The Vietnamese legal framework only provides for limited conservation and management measures in territorial waters. National legal provisions and control systems put in place to ensure compliance with conservation and management measures appear not to be sufficient. This is in breach of Article 61(2) of UNCLOS which states that coastal States shall ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation.

- (38) In accordance with Article 31(5)(b), the Commission analysed existing enforcement measures to prevent, deter and eliminate IUU fishing in Vietnam.
- (39) The present sanctioning system is established by Decree No 103/2013/ND-CP on administrative sanctions related to the fisheries activities. However, the definitions of IUU activities and serious infringements contained in the Fisheries law and the said Decree are not in line with international law. The level of sanctions provided in the legal framework therefore clearly fails to ensure the deterrence of the sanctioning scheme and does not reflect point 21 of the IPOA-IUU which advises that States should ensure that sanctions for IUU fishing by vessels and, to the greatest extent possible, by nationals under its jurisdiction, are of sufficient severity to deprive offenders of the benefits accruing from such fishing.
- (40) Following its visit on June 2016, the Commission highlighted these issues and invited the Vietnamese authorities to cooperate with the Commission in this regard. The Vietnamese authorities finally submitted in April 2017 a draft of a new Fisheries Law which, however, would still not align Vietnam with its international obligations.
- (41) In accordance with Article 31(5)(c), the Commission analysed the extent and gravity of IUU fishing conducted by vessels flying the Vietnamese flag or by fishing vessels operating in Vietnamese maritime waters or ports.
- (42) The visits conducted by the Commission revealed that Vietnam does not dispose of the necessary means to ensure an appropriate control of the vessels flying its flag, including ensuring that fishing activities are not conducted in high seas and waters of third States. Whereas Vietnam does not authorise its vessels to operate in high seas and waters of third States, the evidence is that, as detailed in recitals (14) to (19), these illegal activities are still conducted by Vietnamese vessels in third States' waters⁽¹⁾.
- (43) According to the information provided by the Vietnamese authorities, the Vietnamese fishing fleet is composed of 109 000 vessels, out of which 33 000 operate in the Economic Exclusive Zone of Vietnam beyond the 24 nautical miles from the baseline. Vietnamese authorities acknowledged that only 10 % of the 33 000 vessels that operate beyond 24 nautical miles from baseline are equipped with Vessels Monitoring Scheme (VMS) devices and there is no legal obligation for them to activate it. The last visit to the Fisheries Monitoring Centre (FMC) in May 2017 also showed that the staff entrusted with monitoring, control and surveillance tasks was not familiar with the available tools and that basic shortcomings already identified during the previous visit in June 2016 had not been addressed. In addition, during the visit, according to the VMS tracking displayed on the screens of the FMC, two Vietnamese fishing vessels were spotted outside Vietnam waters and the FMC staff acknowledged that no action had been taken. Inadequate logbook requirements and the absence of a risk-based scheme of inspections at port and at sea further undermine the capacity of the authorities to control maritime activities.
- (44) The facts described in this section indicate that although the current fisheries legal framework needs to be revised to ensure consistency between national law and international rules, Vietnam has failed to cooperate effectively with the Commission in bringing its legislation in line with the relevant international legal instruments. This results in the infringement of Article 94 of UNCLOS, which requires the flag State to assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew. Vietnam also appears to fail to implement the recommendations in point 24 of the IPOA IUU which advises flag States to ensure comprehensive and effective monitoring, control and surveillance of fishing, from the catch to the point of landing, to final destination, including through the use of Vessel Monitoring Systems (VMS) on board fishing vessels in accordance with the relevant national, regional and international standards.
- (45) In view of the considerations presented in this Section and on the basis of all factual elements gathered by the Commission as well as all the statements made by the Vietnamese authorities, it could be established, pursuant to Article 31(3) and (5) of the IUU Regulation, that Vietnam failed to discharge its duties under international law with respect to cooperation and enforcement.

⁽¹⁾ The illegal activities of the so-called Vietnamese 'blue boats' have been extensively related by media in the Pacific region:
<https://www.undercurrentnews.com/2016/03/29/australia-captures-vietnamese-vessels-suspected-of-iuu/>
<http://nationalpost.com/news/world/tiny-island-nation-of-palau-very-publicly-burns-vietnamese-boats-caught-fishing-illegally>
<http://www.themalaymailonline.com/malaysia/article/mmea-detains-vietnamese-fishermen-for-illegal-fishing#UEtd7edz4ez9lRch.97>
<https://www.solomonstarnews.com/news/national/12655-blue-boats-seized>
<http://e.vnexpress.net/news/news/malaysia-detains-another-40-vietnamese-for-illegal-fishing-3616922.html>

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

- (46) In accordance with Article 31(6)(a) and (b) of the IUU Regulation, the Commission analysed Vietnam's ratification or accession to relevant international fisheries instruments and its status as a contracting party to regional fisheries management organisations or its agreement to apply the conservation and management measures adopted by them.
- (47) Vietnam has ratified UNCLOS in 1994 and is Cooperating Non-Member of WCPFC.
- (48) With the exception of UNCLOS, Vietnam has not ratified other international legal instruments related to fisheries management. The performance of Vietnam in implementing international instruments is not in accordance with the recommendations of point 11 of the IPOA IUU which encourages States, as a matter of priority, to ratify, accept or accede to the United Nations Agreement for the Implementation of the Provisions of UNCLOS relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (UNFSA) and the FAO Compliance Agreement. It also contravenes point 14 of the IPOA IUU that provides that states should fully and effectively implement the Code of Conduct and its associated international plans of action.
- (49) Vietnam has not ratified the 2009 FAO Port State Measures Agreement (PSMA). This also means that, as detailed in recital (27), Vietnam does not implement any port control measures on the landings from foreign fishing vessels despite the importance of fish and fishery products that are imported into the country to supply the processing industry.
- (50) The Vietnamese legal framework and enforcement measures also appears to be in breach of the basic requirements in Articles 62 and 117 to 119 of UNCLOS, concerning optimum utilization of living resources, the duty of states to adopt with respect to their nationals measures for the conservation of the living resources of the high seas, the duty of mutual cooperation in the conservation and management of living resources and the duty to conserve the living resources of the high seas.
- (51) In accordance with Article 31(6)(c), the Commission analysed whether Vietnam may have been involved in any acts or omissions that may have diminished the effectiveness of applicable laws, regulations or international conservation and management measures.
- (52) The Commission notes that the CCAMLR annual Commission identified Vietnam as a non-contracting party possibly involved in the harvest, landing and/or trade of toothfish but not cooperating with the Catch Documentation Scheme (CDS) implemented in 2000 to track these species from the point of landing throughout the trade cycle.
- (53) In view of the considerations presented in this Section and on the basis of all factual elements gathered by the Commission as well as all the statements made by Vietnam, it could be established pursuant to Article 31(3) and (6) of the IUU Regulation, that Vietnam 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 (Article 31(7) of the IUU Regulations)

- (54) According to the United Nations Human Development Index (UNHDI) ⁽¹⁾, in 2015 Vietnam was considered to be a medium human development country ranked 115 out of 188 countries.
- (55) Account taken of the above UNHDI ranking and observations during the 2012 to 2017 visits, no evidence suggests that the failure of Vietnam to discharge its duties under international law is the result of low levels of development. No tangible evidence exists to correlate shortcomings in fisheries legal framework, monitoring, control and surveillance, and traceability systems, with poor capacity and infrastructure. The Commission has responded positively to the request made by Vietnam in May 2017 for support in the revision of the fisheries legal framework.
- (56) In view of the situation explained in this Section 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 Vietnam with respect to fisheries management are not impaired by its level of development.

⁽¹⁾ Information from: <http://hdr.undp.org/en/data>

4. CONCLUSION ON THE POSSIBLE IDENTIFICATION AS A NON-COOPERATING THIRD COUNTRY

- (57) In view of the conclusions reached with regard to the failure of Vietnam to discharge its duties under international law as flag, port, coastal or market State and to take action to prevent, deter and eliminate IUU fishing, Vietnam should be notified, in accordance with Article 32 of the IUU Regulation, of the possibility of being identified by the Commission as a non-cooperating third country in fighting IUU fishing.
- (58) The Commission should also take all the *démarches* set out in Article 32 of the IUU Regulation with respect to Vietnam. In the interest of sound administration, a period should be fixed within which that country may respond in writing to the notification and rectify the situation.
- (59) Furthermore, the notification to Vietnam of the possibility of being identified as a country which the Commission considers to be a non-cooperating third country 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 third countries,

HAS DECIDED AS FOLLOWS:

Sole Article

Vietnam shall be notified of the possibility of being identified by the Commission as a non-cooperating third country in fighting illegal, unreported and unregulated fishing.

Done at Brussels, 23 October 2017.

For the Commission

Karmenu VELLA

Member of the Commission
