

COMMISSION DECISION**of 12 December 2014****on notifying a third country of the possibility of being identified as a non-cooperating third country in fighting illegal, unreported and unregulated fishing**

(2014/C 447/11)

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) In accordance with Article 32 of the IUU Regulation, the Commission is to notify third countries of the possibility of their being identified as non-cooperating countries. 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 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.
- (4) Pursuant to Article 31 of the IUU Regulation, the Commission is to identify third countries that it considers as non-cooperating countries in fighting 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.
- (5) The identification of non-cooperating third countries is to be based on the review of all information as set out under Article 31(2) of the IUU 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 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 the fishing vessels of the concerned third countries.
- (8) Pursuant to Article 20(4) of the IUU Regulation, the Commission is to cooperate administratively with third countries in areas pertaining to the implementation of that Regulation.

2. PROCEDURE WITH RESPECT TO TUVALU

- (9) From 18 to 20 February 2014, the Commission, with the support of the European Fisheries Control Agency (EFCA), visited Tuvalu in the context of administrative cooperation provided for in Article 20(4) of the IUU Regulation.

⁽¹⁾ OJ L 286, 29.10.2008, p. 1.

- (10) The visit sought to verify information concerning Tuvalu's arrangements for the implementation, control and enforcement of laws, regulations and conservation and management measures to be complied with by its fishing vessels and the measures taken by Tuvalu to implement its obligations in the fight against IUU fishing.
- (11) The final report of the visit was sent to Tuvalu on 18 March 2014.
- (12) Tuvalu replied to the final report of the visit on 16 October 2014.
- (13) Tuvalu is a member of the Western and Central Pacific Fisheries Commission (WCPFC). Tuvalu ratified the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and the 1995 United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (UNFSA). It is a party to the South Pacific Forum Fisheries Agency Convention⁽¹⁾ (FFA Convention) and to the Nauru Agreement (PNA) concerning cooperation in the management of fisheries of common interest⁽²⁾.
- (14) In order to evaluate Tuvalu's compliance with its international obligations as flag, port, coastal or market State set out in the international agreements referred to in recital 13 and established by the relevant RFMOs referred to in that recital, the Commission sought and analysed all the information it deemed necessary for the purpose of such an exercise.
- (15) The Commission also used information derived from available data published by RFMOs, in this case the WCPFC, as well as publicly available information.

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

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

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

- (17) With respect to Tuvalu-flagged vessels it is noted that on the basis of information retrieved from RFMOs vessel lists there are no vessels in provisional or final IUU lists and no evidence of past cases of Tuvalu-flagged vessels exists that would enable the Commission to analyse the performance of Tuvalu with respect to recurring IUU fishing activities in accordance with Article 31(4)(a) of the IUU Regulation.
- (18) In the absence of information and evidence as explained in recital 17 it is concluded, pursuant to Article 31(3) and Article 31(4)(a), that it is not necessary to evaluate the compliance of Tuvalu'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.

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

- (19) The Commission analysed whether Tuvalu effectively cooperated with the Commission, by providing a response to requests made by the Commission to investigate, provide feed-back or follow-up on IUU fishing and associated activities.
- (20) In that respect, Tuvalu is reluctant to cooperate with the Commission in addressing the deficiencies in its fisheries management system identified during the Commission's visit. In the reply to the final report submitted on 16 October 2014, Tuvalu does not present contractual commitments to address the deficiencies identified by the Commission. In particular, Tuvalu recognized the issues and challenges, considers that it would need technical assistance and time to work on improvements but does not offer any commitment or concrete plan of action to solve the established shortcomings.
- (21) In the context of the overall assessment of the fulfilment of Tuvalu's duties to discharge its obligations as flag, port and coastal State, the Commission also analysed whether Tuvalu cooperates with other flag States in the fight against IUU fishing.

⁽¹⁾ <http://www.ffa.int/>

⁽²⁾ Nauru Agreement (<http://www.ffa.int/node/93#attachments>).

- (22) According to Articles 63 and 64 of UNCLOS, coastal and flag States are to cooperate with regard to straddling and highly-migratory fish species. Articles 7 and 20 of the UNFSA further develop the obligation to cooperate, respectively in setting compatible conservation and management measures and in ensuring compliance and enforcement with such measures. In addition, Article 7(1)(3) of the FAO Code of Conduct ⁽¹⁾ recommends that States concerned by the exploitation of straddling and trans-boundary fish stocks establish bilateral agreements to guarantee effective cooperation in order to ensure effective conservation and management of resources. This is further specified in points 28 and 51 of the International Plan of Action to prevent, deter and eliminate illegal, unreported and unregulated fishing (IPOA-IUU) ⁽²⁾, setting out detailed practices for direct cooperation between States, including the exchange of data or information available to coastal States.
- (23) In that respect, Article 25(10) of the WCPFC Convention ⁽³⁾ stipulates that each member where it has reasonable grounds for believing that a fishing vessel flying the flag of another State has engaged in any activity that undermines the effectiveness of conservation and management measures adopted for the Convention area, shall draw this to the attention of the flag State concerned.
- (24) The importance of efficient cooperation mechanisms has to be appraised in the context of the predominant presence of foreign-flagged vessels in waters under jurisdiction of Tuvalu. According to the information provided by Tuvaluan authorities during the Commission's visit in February 2014, a total of 18 bilateral private licensing contracts from ten countries are currently in force. In that respect, the fleet authorised to operate in Tuvalu waters is composed by 213 purse seine, 17 pole-and-line and 7 longline vessels, from which only one purse seine and two longline vessels are flagged in Tuvalu. Nevertheless, Tuvalu acknowledged that no cooperation channels with the concerned flag States had been setup to ensure that Tuvalu complies with its obligations to cooperate with flag States as described in recitals 22 and 23.
- (25) With respect to effective enforcement measures, Article 19(2) of the UNFSA establishes that sanctions applicable in respect of violations are to be adequate in severity to be effective in securing compliance and to discourage violations wherever they occur and are to deprive offenders of the benefits accruing from their illegal activities. As examined in recitals 26 to 29, Tuvalu does not have the legal framework or the control over its fleet and waters necessary to adequately sanction offenders.
- (26) The sanction system is setup in Tuvalu's Marine Resources Act 2006. Although that Act was amended in 2012, it does not take into account the latest developments in international law as regards the fight against IUU fishing. In that respect, the current legal framework lacks an explicit definition of IUU fishing activities and serious infringements and a comprehensive list of serious offences addressed with severe sanctions.
- (27) In addition, Tuvalu's legislation does not contain administrative accompanying measures in a systematic manner. This kind of complementary measures is limited to the suspension and revocation of licences and only applicable in cases of 'serious offences' whereas this concept of 'serious offences' is not defined within Tuvaluan law.
- (28) The notion of 'serious offences or infringements' has not been streamlined in Tuvalu' law. The current legal framework does not provide for detrimental sanctions to deprive the offenders from the benefits obtained from an illegal activity.
- (29) Hence, the sanction system in its current form is not comprehensive and severe enough to achieve its deterrent function. Indeed, the treatment of serious infringements is not adequate to secure compliance, to discourage violations wherever they occur and to deprive offenders of the benefits accruing from their illegal activities, as required by Article 19(2) of the UNFSA and Article 25(7) of the WCPFC Convention.
- (30) With respect to the history, nature, circumstances, extent and gravity of the manifestations of IUU fishing considered, the possibility of assessing these aspects is equally compromised by the lack of clarity and transparency described in recitals 39 to (48). As a consequence of such shortcomings, it is not possible to establish, in a reliable way, the potential dimension of IUU fishing related activities. It is however an acknowledged fact that lack of transparency combined with the lack of effective controls encourages illegal behaviour.

⁽¹⁾ Code of Conduct for responsible fisheries, Food and Agriculture Organization of the United Nations, 1995.

⁽²⁾ International Plan of Action to prevent, deter and eliminate illegal, unreported and unregulated fishing, Food and Agriculture Organization of the United Nations, 2001.

⁽³⁾ Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, done at Honolulu, 5 September 2000 (<http://www.wcpfc.int/doc/convention-conservation-and-management-highly-migratory-fish-stocks-western-and-central-pacific>).

- (31) With respect to Tuvalu's existing financial and administrative capacity, it should be noted that Tuvalu is not ranked within the United Nations Human Development Index⁽¹⁾. In the Annex II to Regulation (EC) No 1905/2006 of the European Parliament and of the Council⁽²⁾ Tuvalu is listed in the category of least developed countries, in line with the Organisation for Economic Cooperation and Development (OECD) Development Assistance Committee (DAC) list of official development assistance (ODA) recipients of 1 January 2013⁽³⁾. In that respect, Tuvalu's financial and administrative capacity constraints may be considered as a factor that undermines Tuvalu's ability of to fulfil its cooperation and enforcement duties.
- (32) Despite the analysis in recital 31 it is also noted that, on the basis of information derived from the Commission's visit in February 2014, it cannot be considered that Tuvalu authorities' lack financial resources. Rather, Tuvalu lacks the necessary legal and administrative environment to ensure the efficient and effective performance of its duties as flag, coastal, port and market State.
- (33) 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 Tuvalu, it could be established, pursuant to Article 31(3) and (5) of the IUU Regulation, that Tuvalu 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)**
- (34) Tuvalu has ratified the UNCLOS and the UNFSA. Tuvalu is a member to WCPFC. Tuvalu is a party to the FFA Convention and to the PNA concerning cooperation in the management of fisheries of common interest.
- (35) The Commission analysed all the information deemed relevant with respect to Tuvalu's status as a member of WCPFC.
- (36) The Commission also analysed any information deemed relevant with respect to Tuvalu's agreement to apply conservation and management measures adopted by WCPFC.
- (37) According to the comprehensive information provided by Tuvalu on the situation of tuna fishing activities in its waters⁽⁴⁾, catches in Tuvalu economic exclusive zone (EEZ) tuna stocks accounted in 2011 to 51 800 metric tonnes (mt). While that represents a decrease from previous years (63 427 mt in 2009 and 60 618 mt in 2010), stocks in Tuvalu's EEZ still constitute a significant part of the total tuna stocks in the Central and Western Pacific.
- (38) On the basis of the figures presented in recital 37 it appears that Tuvalu manages important global tuna resources and thus has the responsibility, as coastal State, to ensure responsible and long-term sustainable management of those resources. Articles 61 to 64 of UNCLOS and Articles 7 and 8 of the UNFSA regulate the utilisation of living resources by the coastal State, which should adopt measures compatible to those applying in the region and in the high seas to ensure the long term sustainability of straddling and highly migratory fish stocks and promote the objective of their optimum utilisation of the living resources in its EEZ. Coastal States must also ensure compliance of nationals of other States fishing in their EEZ with conservation and management measures, as well as cooperate with the relevant States and regional organisations involved in that fishery.
- (39) Tuvalu's legal framework fails to provide with clear and transparent conservation and management measures ensuring the efficient and effective management of vessels operating in waters under its jurisdiction. In particular, there are no conservation and management measures for inshore fisheries. Tuvalu also acknowledged that the existing Tuna Management Plan is outdated and in need of revision. Likewise, a shark management plan has not yet been adopted in line with the requirement of WCPFC Conservation and Management Measure (CMM) 2010-07⁽⁵⁾.
- (40) The conservation and management measures in relation to the waters under national jurisdiction, including the archipelagic waters, are incomplete and not based in scientific advice as requested by UNCLOS, UNFSA and WCPFC. Whereas Tuvalu's 2006 Fisheries Act sets up the main principles for a sustainable management of fisheries and

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

⁽²⁾ Regulation (EC) No 1905/2006 of the European Parliament and of the Council of 18 December 2006 establishing a financing instrument for development cooperation (OJ L 378, 27.12.2006, p. 41).

⁽³⁾ DAC List of ODA Recipients (<http://www.oecd.org/dac/stats/daclistofodarecipients.htm>).

⁽⁴⁾ WCPFC Scientific Committee Ninth Regular Session, WCPFC SC9-AR/CCM-25.

⁽⁵⁾ <http://www.wcpfc.int/system/files/CMM%202010-07%20%5BSharks%5D.pdf>

empowers the Ministry of Natural Resources to adopt conservation and management measures accordingly, the Commission's visit revealed that the development of this type of provisions is very weak. The main effort in that respect has focused on the transposition of the measures contained in PNA Third Arrangement⁽¹⁾ to Tuvalu's legislative framework in 2009.

- (41) Waters under Tuvalu's jurisdiction are referred to as territorial sea, archipelagic waters and EEZ. According to Article 3 of the WCPFC Convention, the WCPFC area of competence comprises in principle all waters of the Pacific Ocean, including waters under Tuvalu's jurisdiction. Having said that, Tuvalu excludes its territorial and archipelagic waters from the application of the Vessels Day Scheme (VDS), a system that limits fishing effort of the purse seine fleet through the allocation of fishing days. Therefore, the main legal instrument for the conservation of fisheries resources in Tuvalu's waters does not apply to a considerable portion of the waters under its jurisdiction. With regards to longline and pole-and-line vessels, the conservation and management measures are set in the individual licences. However, there is no public available information on the actual management of catch and effort for both fisheries apart from the general policy of limiting the number of fishing licences.
- (42) In addition, Tuvalu confirmed during the Commission's visit that some WCPFC CMMs are not currently being applied. Those concern CMM 2007-1 on regional observer program establishing 5 % observer coverage on longline vessels and CMM 2010-07 setting that weight of fins landed cannot be more than 5 % of the weight of sharks. The lack of technical capacity and resources was claimed to hinder progress in complying with relevant WCPFC CMMs.
- (43) The clear shortcomings as regards clarity and transparency of the applicable conservation and management rules described in recitals 39 to 42, including the control over fishing effort under VDS, combined with the existence of 18 different private licencing contracts as described in recital 24, undermines the effective implementation of conservation and management measures, in breach of the obligations set out in Article 61(2) to (5), Article 62(1) and Article 64 of the UNCLOS concerning optimum utilisation of resources through proper conservation and management measures.
- (44) Pursuant to Article 61 of the UNCLOS, Articles 5 and 6 of the UNFSA, and Articles 5 and 6 of the WCPFC Convention, coastal States must determine the allowable catch of the living resources in their EEZ, based on the best scientific evidence available and on the basis of a precautionary approach; coastal States also have to ensure through proper conservation and management measures that living resources and stocks in the EEZ and other waters under their jurisdiction are not endangered by over-exploitation. The FAO Code of Conduct, in particular paragraphs 7(3), 7(4) and 7(5), recommends good practices to comply with those obligations.
- (45) In the report to the WCPFC Ninth Scientific Committee, Tuvalu acknowledged the existence of remaining challenges as regards data collection, reporting and compliance⁽²⁾. Those issues are attributed to capacity difficulties within the Department of fisheries with respect to monitoring of reporting and data management.
- (46) In that vein, reports of the WCPFC Scientific Committee regularly raise the issue of data gaps. For example, in the report of its 7th session in 2011, the WCPFC Scientific Committee noted under point 89 some inconsistencies in the reporting of skipjack and yellowfin, bigeye tuna on purse-seine logsheets. Considering the importance, for scientific purposes, of accurate purse-seine catch composition data, the Committee recommended this problem to be referred to the Technical and Compliance Committee⁽³⁾. Under point 37, it emphasised the uncertainty in purse seine species composition, and urged contracting parties to continue improving estimates of purse seine composition data. In its 8th session, the WCPFC Scientific Committee again raised issues of data gaps and inconsistencies⁽⁴⁾, in relation to catch and catch composition, commented on reporting obligations under chartering arrangements and issued management recommendations for improvement⁽⁵⁾. It also addressed the lack of data submissions or weak data of some contracting parties, some of which are operating in waters under national jurisdiction of Tuvalu.

⁽¹⁾ Parties to Nauru Agreement (PNA) Third Arrangement, 2008.

⁽²⁾ WCPFC Scientific Committee Ninth Regular Session, WCPFC SC9-AR/CCM-25.

⁽³⁾ Summary report of the WCPFC Scientific Committee, Seventh Regular Session, Pohnpei, Federated States of Micronesia 9–17 August 2011 (<http://www.wcpfc.int/node/2896>).

⁽⁴⁾ Summary report of the WCPFC Scientific Committee Eighth Regular Session 7-15 August 2012 (<http://www.wcpfc.int/node/4587>), section 3.1.

⁽⁵⁾ Summary report of the WCPFC Scientific Committee Eighth Regular Session, points 69-71.

- (47) The WCPFC Scientific Committee advised in its 7th meeting, that, if recent fishing practices for skipjack tuna continue, catch rate levels were likely to decline and catch should decrease as stock levels are fished down to Maximum Sustainable Yield level. Therefore, increases of fishing effort should be monitored⁽¹⁾. However, the Commission's visit revealed the absence of a real fleet and fishing access policy as demonstrated by the obsolescence and incompleteness of the Tuna Management Plan.
- (48) Tuvalu does not apply any WCPFC conservation and management measures in its archipelagic waters and has only limited compatible measures in place. Taking into consideration the highly migratory and straddling nature of tuna resources and the importance of tuna stocks and fishing activities in Tuvalu archipelagic waters, which are an important geographical spawning area for tuna species, that situation puts at stake any conservation effort on tuna stocks as a whole in the Pacific region. Therefore, Tuvalu does not ensure application of conservation and management measures in all waters under its jurisdiction in a manner compatible with WCPFC's requirements, and in accordance with the obligation to ensure that species under the jurisdiction of the coastal State are not endangered by over-exploitation.
- (49) The Commission also assessed any act or omission by Tuvalu that may have diminished the effectiveness of applicable laws, regulations or international conservation and management measures.
- (50) In that respect, as acknowledged by Tuvalu, the outdated Tuna Management Plan fails to establish clear objectives to limit the number of fishing licences and the total allowable catch. The Commission considers therefore that the lack of conservation and management measures undermines compliance of Tuvalu with its international obligations. As tuna is a straddling and highly migratory stock, conservation and management measures have to be consistent and compatible in the entire area of migration to be effective and sustainable, this being also the overall objective of the WCPFC Convention.
- (51) 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 Tuvalu, it could be established, pursuant to Article 31(3) and (6) of the IUU Regulation, that Tuvalu failed to discharge its duties under international law with respect to international rules, regulations and conservation and management measures.

3.4. Specific constraints of developing countries

- (52) Taking into account the ranking of Tuvalu as a least developed country (as noted in recital 31), the Commission analysed if the information gathered could be linked with its specific constraints as a developing country.
- (53) Although specific capacity constraints may exist in general with respect to control and monitoring, the specific constraints of Tuvalu 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 Tuvalu's failure to establish a sanctions system for infringements of international management and conservation measures.
- (54) In addition, it appears that the deficiencies of monitoring, control and surveillance system result from the imbalance between the weak capabilities of the Tuvalu to control fishing activities in its EEZ and the attribution of access to its waters to a large foreign fleet. In addition, despite the important contribution of fisheries to Tuvalu's general income, it seems that the budget allocated to fisheries management is significantly lower. Consequently, although Tuvalu may have development constraints, the policies followed by that country for the management of fishery resources are not coherent with the allocated resources and country priorities with respect to fisheries management.
- (55) In view of the situation explained in this Section and on the basis of all factual elements gathered by the Commission as well as the statements made by Tuvalu, it could be established, pursuant to Article 31(7) of the IUU Regulation, that the development status of Tuvalu fisheries governance may be impaired by its level of development. However, account taken of the nature of the established shortcomings of Tuvalu and actions taken to rectify the situation, Tuvalu's development level cannot fully excuse or otherwise justify its overall performance as flag or coastal State with respect to fisheries and the insufficiency of its action to prevent, deter and eliminate IUU fishing.

⁽¹⁾ Summary report of the WCPFC Scientific Committee, Seventh Regular Session, points 35 and 36.

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

- (56) In view of the conclusions reached with regard to Tuvalu's failure of 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, that country 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.
- (57) In accordance with Article 32(1) of the IUU Regulation, the Commission should notify Tuvalu of the possibility of being identified as a non-cooperating third country. The Commission should also take all the *démarches* set out in Article 32 of the IUU Regulation with respect to Tuvalu. 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.
- (58) Furthermore, the notification to Tuvalu of the possibility of being identified as a country which 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

Tuvalu 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, 12 December 2014.

For the Commission

Karmenu VELLA

Member of the Commission
