

COMMISSION DECISION**of 30 October 2019****notifying the Republic of Ecuador of the possibility of being identified as a non-cooperating third country in fighting illegal, unreported and unregulated fishing**

(2019/C 373/04)

THE EUROPEAN COMMISSION,

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

Having regard to Council Regulation (EC) No 1005/2008 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 REPUBLIC OF ECUADOR

- (9) The notification of the Republic of Ecuador (hereafter 'Ecuador') as flag State was received by the Commission in accordance with Article 20 of the IUU Regulation on the 22 July 2009.
- (10) Following this notification, the Commission initiated a process of administrative cooperation with the authorities of Ecuador as provided for in Article 20(4) of the IUU Regulation. This cooperation covered issues pertaining to the implementation of the European Union catch certification scheme and to the national arrangements in place for the implementation, control, renewal and enforcement of the fisheries legal framework and applicable conservation and management measures. It entailed exchange of oral and written comments as well as five visits to Ecuador between 30 January and 6 February 2014, 22 and 24 September 2015, 11 and 15 December 2017, 12 and 16 November 2018, and 17 and 21 June 2019, where the Commission sought and verified all information deemed necessary concerning the measures taken by Ecuador in order to implement its obligations in the fight against IUU fishing. A delegation from Ecuador also visited DG MARE on the 2 July 2015.
- (11) Ecuador is a member of the Inter-American Tropical Tuna Commission (IATTC), and of the South Pacific Regional Fisheries Management Organisation (SPRFMO), a cooperating non-member of the Western and Central Pacific Fisheries Commission (WCPFC) and a non-contracting party voluntarily participating in the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) catch documentation scheme. Ecuador has ratified the 1982 United Nations Convention on the Law of the Sea (UNCLOS) ⁽³⁾, the United Nations Fish Stocks Agreement (UNFSA) ⁽³⁾, and the Port State Measures Agreement (PSMA) ⁽⁴⁾.
- (12) In order to evaluate the compliance of Ecuador 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 ECUADOR BEING IDENTIFIED AS A NON-COOPERATING THIRD COUNTRY

- (13) Pursuant to Article 31(3) of the IUU Regulation, the Commission analysed the duties of Ecuador 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 Ecuador 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) The information gathered by the Commission demonstrated that in 2017 there were at least 24 longliners greater than 23 meters length overall fishing for species covered by the IATTC Convention within the IATTC Convention Area and which were not on the IATTC Regional Vessel Register. Although Ecuadorian authorities subsequently reported that this breach of IATTC Resolutions C-11-05 and C-14-01 (subsequently replaced by Resolution C-18-06), which could entail IUU listing of the vessels pursuant to Resolution C-15-01, had been addressed and that all the vessels concerned had been added to the IATTC Regional Vessel Register, in 2019 the Commission identified again a similar case.

⁽³⁾ <https://treaties.un.org/>

⁽³⁾ https://www.un.org/depts/los/convention_agreements/convention_overview_fish_stocks.htm

⁽⁴⁾ <http://www.fao.org/port-state-measures/background/parties-psma/en/>

- (16) The information collected by the Commission also led to the identification of two squid-jiggers that engaged in 2015 and early 2016 in fishing activities in the SPRFMO Convention area, but were not at that moment on the SPRFMO Record of vessels authorised to fish in the Convention Area. Although Ecuadorian authorities acknowledged these were illegal activities, in June 2019 there were still no sanction procedure initiated against the operator of the two vessels.
- (17) During the visits to the country, the Commission also detected various cases of Ecuadorian vessels fishing in waters under jurisdiction of third countries. In such cases, Ecuadorian authorities were not able to confirm whether the vessels concerned had been duly authorised by the country concerned to fish in its waters. The same issue arose again during the visit made in 2019. In spite of the recurrence of the described situation, Ecuadorian authorities have not put in place the appropriate mechanisms of cooperation with third countries where the Ecuadorian fleet operates. The existing cooperation agreement in place with a neighbouring country does not contemplate exchange of information on fishing licences, and the arrangement with another neighbouring country is still in preparation. During the last visit to Ecuador, authorities were also unable to provide information on the follow-up given to a case identified in 2017.
- (18) Contrary to points 36 and 42 of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated fishing (IPOA IUU) ⁽⁵⁾, the procedures in place prior to the registration of a fishing vessel do not entail a comprehensive verification of the history of the vessel and are limited to a verification of the RFMOs IUU lists. The Commission collected suitable evidence that at least one vessel with a problematic compliance history had been registered in Ecuador and in 2017 escaped to the control of the authorities, which were unable to locate it. Subsequent exchanges indicated as well that due to the currently applicable legislation Ecuadorian authorities had been, so far, unable to deregister the vessel and to impose sanctions of adequate severity.
- (19) Hence, the evidence retrieved by the Commission demonstrates that specific weaknesses that were notified to the Ecuadorian authorities during the missions of 2017 and 2018, and resulting in possible or confirmed IUU activities, remain poorly addressed in 2019.
- (20) With regard to the information laid out in recitals (15), (16), (17), (18) and (19), the Commission concluded that Ecuador 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 vessels flying its flag. It is also not in line with point 24 of the Food and Agriculture Organization of the United Nations (FAO) IPOA-IUU that provides for the obligation to undertake comprehensive and effective control of fishing activities.
- (21) Pursuant to Article 31(4)(b) of the IUU Regulation, the Commission examined the measures taken by Ecuador in respect of access of fisheries products stemming from IUU fishing to its market and subsequent trade flows.
- (22) The Commission analysed documentation and other information relating to monitoring and control procedures and considers that Ecuador cannot ensure that fish and fishery products entering its market and processing plants do not stem from IUU fishing. Ecuadorian authorities were not able to demonstrate they are collecting and verifying all the necessary information required to control the legality of fish entering their market or destined to others.
- (23) Findings made during the missions especially question the level of control that Ecuadorian authorities exert on processing plants. In 2017, the Commission detected significant inconsistencies in the information reported by a processing plant. Nevertheless the figures provided by this processing plant had been endorsed without further verifications by Ecuadorian authorities, and it was only upon Commission's intervention that additional verifications were eventually carried out, resulting in the confirmation of serious misreporting by this processing plant. In 2018, the Commission also detected fish lots in the cold store of a processing plant whereas the Ecuadorian Fisheries Administration was unaware of these lots having entered the plant.

⁽⁵⁾ International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, Food and Agriculture Organization of the United Nations, 2001.

- (24) Information obtained from Ecuadorian authorities also points to the conclusion that controls on processing plants supplies remain based on random sampling rather than focusing on high-risks scenarios.
- (25) In preparation for the missions to the country, the European Fisheries Control Agency analysed samples of catch certificates and processing statements originating from Ecuador. All these analysis revealed mistakes at the level of validation of catch certificates stemming from superficial verification of information provided by the operators in these documents, which the Ecuadorian authorities acknowledged. The latest analysis carried out in 2019 also showed that Ecuadorian authorities were endorsing processing statements referring to processing of quantities of fish higher than in the supporting catch certificates.
- (26) The information described in recitals (22), (23), (24) and (25) demonstrates that fishery products landed, processed in or traded through Ecuador do not comply with sustainable post-harvest rules as described in Article 11 of the FAO Code of Conduct. Furthermore, Ecuador has failed to impose rules to ensure the traceability of fish or fish products through the market in accordance with points 67 to 69 and 71 to 72 of the IPOA-IUU.
- (27) 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 Ecuador, there are strong indications, pursuant to Article 31(3), (4)(a) and (4)(b) of the IUU Regulation, that Ecuador fails to discharge its duties under international law as a flag, port, coastal and market State in respect of 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)

- (28) Under Article 31(5)(a) of the IUU Regulation, the Commission analysed its collaboration with Ecuador to see if the authorities had effectively cooperated in responding to questions, providing feedback or investigating matters related to IUU fishing and associated activities.
- (29) While Ecuadorian authorities have been generally cooperative in responding and providing feedback to requests for information, on various occasions there was limited follow-up on issues raised by the Commission. As an example, the Commission did not receive clear and comprehensive explanations on the significant discrepancies it observed between quantities of fish landed by purse seiners and the carrying capacity and fish hold volumes reported to the IATTC, whereas carrying capacity and fish hold volumes are the elements that IATTC uses to manage the fishing capacity in the Eastern Pacific, including through 72 days annual fishing stops applying to vessels exceeding 182 metric tons carrying capacity.
- (30) As underlined in recitals (15), (16), (17) and (25), there is also a lack of continuity and consistence in efforts to address the identified shortcomings.
- (31) In accordance with Article 31(5)(b), the Commission analysed existing enforcement measures to prevent, deter and eliminate IUU fishing in Ecuador.
- (32) The current sanction system is based on the Fisheries Law which was adopted in 1974 and complemented in 2016 by the Decree 852. However, the sanctions contemplated in the Decree 852, and which were originally designed to compensate for the weakness of the ones in the 1974 Fisheries Law, have been seldom applied since the entry into force of this Decree.
- (33) Consequently, the sanctioning scheme remains based on a weak and outdated legal framework, which lacks a definition of IUU activities and provides for a level of sanctions which fails to ensure deterrence of these sanctions. The maximum fine imposed in Ecuador for industrial vessels in 2018, irrespective of the gravity of the infringement and the value of the fishery products involved, did not exceed 4 500 USD. In addition, Ecuadorian authorities also acknowledged that they face legal and practical issues to recover the fines, and cumbersome administrative procedures often result in practical impossibility to address recidivism. Information provided by Ecuadorian authorities also suggests uneven approach in relation to the application of sanctions, notably as regards the confiscation of illegal catches.

- (34) Moreover, the entry into force of a new fisheries Law and the development of a revised sanctioning scheme has been repeatedly delayed since 2015.
- (35) Consequently, the current sanction system fails to address point 16 of the IPOA-IUU, which states that national legislation should address IUU fishing as well as point 21 which states that States should ensure that sanctions for IUU fishing by vessels and, to the greatest extent possible, by nationals under their jurisdiction, are of sufficient severity to deprive offenders of the benefits accruing from such fishing.
- (36) In light of the information gathered on the legal framework and the sanction procedures, the Commission concluded that Ecuador failed to apply Article 19(2) of UNFSA, which states that sanctions must be adequate in severity to secure compliance and discourage violations, as well as to deprive offenders of the benefits accruing from their illegal activities.
- (37) In accordance with Article 31(5)(c), the Commission analysed the extent and gravity of the manifestations of IUU fishing considered.
- (38) The visits conducted by the Commission revealed serious and recurrent issues in the control of vessels and fish processed in the country, as reflected notably in recitals (15), (16), (17), (18), (23) and (24). These issues result in significant risks of large volumes of fish stemming from IUU activities being traded or processed in Ecuador.
- (39) It is also pertinent to mention that Ecuador was also identified in the United States of America National Marine Fisheries Service report to Congress of 2017 ⁽⁹⁾ as having vessels engaged in IUU fishing. In particular, Ecuador was identified for having 25 vessels acting in violation of IATTC resolutions in 2014 and 2015. The report states that several of the vessels included repeat offenders from the 2015 and prior round of identifications. In addition, the Commission collected evidence that several of the vessels have also been subject to infringement administrative procedures by Ecuador in 2018 and 2019.
- (40) 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 Ecuadorian authorities, there are strong indications, pursuant to Article 31(3) and (5) of the IUU Regulation, that Ecuador failed to discharge its duties under international law with respect to cooperation and enforcement.

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

- (41) In accordance with Article 31(6)(a) and (b) of the IUU Regulation, the Commission analysed Ecuador'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.
- (42) Ecuador ratified UNCLOS in 2012, and the Agreement for the implementation of the provisions of the Convention of 10 December 1982 relating to the conservation and management of straddling fish stocks and highly migratory fish stocks (UNFSA) in 2016. Ecuador has also acceded the 2009 FAO Port State Measures Agreement (PSMA) in 2019.
- (43) However, the current national legal framework does not provide for a comprehensive implementation of the PSMA. Ecuadorian authorities reported for instance that there is no legally established mechanism to ensure the control of transshipments in ports.
- (44) The information gathered by the Commission also demonstrates that initiation of a sanction procedure for serious infringement (undertaking a fishing trip during the annual fishing stop imposed by IATTC) took place more than 17 months after the infringement, while Article 19(1)(b) of the UNFSA requests States to investigate immediately and fully any alleged violation of subregional or regional conservation and management measures.
- (45) In accordance with Article 31(6)(c), the Commission analysed any act or omission by the third country concerned that may have diminished the effectiveness of applicable laws, regulations or international conservation and management measures.

⁽⁹⁾ <https://www.fisheries.noaa.gov/international-affairs/identification-iuu-fishing-activities#magnuson-stevens-reauthorization-act-biennial-reports-to-congress>

- (46) As described in recital (11), Ecuador is a member of IATTC and SPRFMO, a cooperating non-member of WCPFC and a non-contracting party voluntarily participating in the CCAMLR's catch documentation scheme.
- (47) As described in recitals (15) and (16), several vessels have been operating over the recent years without proper registration with the RFMOs concerned. This has resulted in illegal and unreported fishing by these vessels.
- (48) As described in recitals (33) and (39), failure to enforce deterrent sanctions also resulted in recidivism by Ecuadorian vessels operating in the IATTC area and therefore additional breaches of the conservation and management measures adopted by this organisation.
- (49) The absence of a structured and risk-based strategy for the management of inspection activities also results in a failure to ensure that the main compliance risks are addressed, as underlined for instance in recital (23).
- (50) 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 Ecuadorian authorities, there are strong indications, pursuant to Article 31(3) and (6) of the IUU Regulation, that Ecuador failed to discharge all 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)

- (51) According to the United Nations Human Development Index (UNHDI) ⁽⁷⁾, in 2017 Ecuador was considered a high human development country ranked 86 out of 189 countries ⁽⁸⁾.
- (52) Account taken of the above UNHDI ranking and observations during the 2017 to 2019 visits, no evidence suggests that the failure of Ecuador 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 responded positively to the requests made by Ecuador for support in the revision of its fisheries legal framework.
- (53) 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, there are strong indications, pursuant to Article 31 (7) of the IUU Regulation, that the development status and overall performance of Ecuador with respect to fisheries management are not impaired by its level of development.

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

- (54) In view of the conclusions reached with regard to the failure of Ecuador 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, Ecuador 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.
- (55) The Commission should also take all the *démarches* set out in Article 32 of the IUU Regulation with respect to Ecuador. 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.
- (56) Furthermore, the notification to Ecuador 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,

⁽⁷⁾ Information from: <http://hdr.undp.org/en/data>

⁽⁸⁾ http://hdr.undp.org/sites/all/themes/hdr_theme/country-notes/ECU.pdf

HAS DECIDED AS FOLLOWS:

Sole Article

Ecuador 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, 30 October 2019.

For the Commission
Karmenu VELLA
Member of the Commission
