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**RE: EUROPEAN UNION PROPOSAL FOR AN ICCAT RECOMMENDATION  
ON A MULTIANNUAL CONSERVATION AND MANAGEMENT PROGRAMME  
FOR TROPICAL TUNAS**

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**LEGAL ANALYSIS BY KATE COOK, MATRIX CHAMBERS<sup>1</sup>**

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**INTRODUCTION AND SUMMARY**

This analysis evaluates whether a 2015 proposal presented by the European Union (EU) to the International Commission for the Conservation of Atlantic Tunas (ICCAT), regarding management of the Atlantic Ocean tropical tunas, is consistent with EU legislation governing the Common Fisheries Policy (CFP), including its external dimension.

In 2015, the ICCAT Standing Committee on Research and Statistics (SCRS) conducted the regular stock assessment of Atlantic bigeye tuna and concluded that the population was both overfished and currently experiencing overfishing. The EU presented its proposal for an ICCAT Recommendation on a Multi-Annual Conservation and Management Programme for Tropical Tunas to the ICCAT annual meeting in 2015<sup>2</sup> and included a Total Allowable Catch (TAC) of 65 000 t for bigeye tuna<sup>3</sup> for 2016 and for subsequent years of the multiannual programme, as well as a number of additional measurement

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<sup>1</sup> Prepared for the Pew Charitable Trusts (Pew).

<sup>2</sup> Presented as Doc. No. PA1-502 / 2015

<sup>3</sup> Paragraph 2 of the EU proposal.



measures (see further background **Appendix 1**). ICCAT subsequently adopted Recommendation 15-01, which incorporated many of the relevant EU proposals, including the TAC of 65 000 t.<sup>4</sup>

Regulation (EU) No 1380/2013<sup>5</sup> (the CFP Regulation) expressly requires (1) that the EU conduct its external fisheries relations in accordance with its international obligations and policy objectives, as well as with the objectives and principles laid down in the Regulation, and (2) that positions of the EU in international organizations and Regional Fisheries Management Organizations (RFMOs) be based on the best available scientific advice so as to ensure that fisheries resources are managed in accordance with the objectives of Article 2(2) of the Regulation<sup>6</sup>. In the light of these two overarching requirements for the external dimension this analysis considers whether the proposal, as presented to ICCAT as the relevant RFMO, complies with the specific requirements that the EU CFP:

- ensures that fishing activities are environmentally sustainable in the long term (Article 2(1));
- aims to ensure that exploitation of living marine biological resources restores and maintains populations of harvested species above levels which can produce the maximum sustainable yield (MSY) and that the MSY exploitation rate is achieved by 2015 where possible and 2020 at the latest for all stocks (Article 2(2))
- applies the precautionary approach to fisheries management (Article 2(2));
- is guided by the principle that measures shall be established in accordance with the best available scientific advice (Article 3(c))
- is based on transparency and the use of impact assessments as appropriate.

In the light of my review and the evidence to which I refer below, I am of the opinion that the 2015 proposal submitted by the EU is not compliant with the legal requirements of the CFP, for at least three reasons: (1) contrary to Articles 2(2) and 3(c) of the CFP Regulation, as read with Articles 28 and 29, the TAC proposed by the EU (subsequently adopted in part by ICCAT) had a low probability, as indicated by the SCRS, of securing the MSY targets laid down in the EU CFP regulation, whereas the EU was required to act on the basis of the best available scientific advice to secure the goals laid down in Article 2(2) of the Regulation. Accordingly it was foreseeable that, should the EU proposal be adopted, the MSY exploitation rate would not be achieved in 2015, nor, as indicated by the SCRS, is the MSY exploitation rate likely to be achieved by 2020, while the biomass level required to produce MSY is not likely to be achieved by 2028; (2) also contrary to Article 2(2) of the CFP Regulation, as read with Articles 28 and 29, the proposal does not adhere to the precautionary approach in that it appears to rely on indirect measures that the EU hopes will improve management of the Atlantic bigeye stock (and presumably increase the chances of achieving Article 2(2) goals), but without sufficient supporting scientific evidence to support this hope or to quantify the added value of such measures in securing Article 2(2)

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<sup>4</sup> ICCAT Recommendation 15-01 on a Multi-Annual Conservation and Management Program for Tropical Tunas

<sup>5</sup> Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 004/585/EC, OJ L354/22 of 28 December 2013.

<sup>6</sup> See Articles 28 and 29 respectively. Article 2(2) provides that: "The CFP shall apply the precautionary approach to fisheries management, and shall aim to ensure that exploitation of living marine biological resources restores and maintains populations of harvested species above levels which can produce the maximum sustainable yield...In order to reach the objective of progressively restoring and maintaining populations of fish stocks above biomass levels capable of producing maximum sustainable yield, the maximum sustainable yield exploitation rate shall be achieved by 2015 where possible and, on a progressive, incremental basis at the latest by 2020 for all stocks."



goals; and (3) contrary to the requirements of Articles 3(c), 3(i) and 3(j), as read with Articles 28 and 29, the EU did not meet its obligation to demonstrate that its proposed management plan will not lead to further harm to the already depleted stock and also fairly applies the provisions of the CFP to its fishing operations that fish outside of the Union's waters.

## THE EU CFP REGULATION

1. The CFP Regulation expressly includes, for the first time<sup>7</sup> in EU CFP legislation, specific provisions regulating the conduct of the external dimension of the CFP, including EU conduct at RFMOs. Foreshadowing the obligation placed on the EU in Article 28, the Preamble to the CFP Regulation states that the EU should promote the objectives of the CFP internationally "ensuring that Union fishing activities outside Union waters are based on the same principles and standards as those applicable under Union law".<sup>8</sup>

Article 28, paragraph (1) provides:

In order to ensure sustainable exploitation, management and conservation of marine biological resources and the marine environment, the Union shall conduct its external fisheries relations in accordance with its international obligations and policy objectives, as well as the objectives and principles set out in Articles 2 and 3.

The EU must also:

ensure that Union fishing activities outside Union waters are based on the same principles and standards as those applicable under Union law in the area of the CFP, while promoting a level-playing field for Union operators vis-à-vis third-country operators<sup>9</sup>

2. The CFP Regulation requires that the CFP be guided by the principle of coherence between the internal and external dimension of the CFP<sup>10</sup>.

3. While this analysis is not focused on compliance of the proposal with the EU's international obligations, it is clear from the terms of the Regulation, including Article 28(1), that this is relevant to an assessment of EU conduct under the CFP<sup>11</sup>. Furthermore, the Council Decision setting out the EU's negotiating framework for ICCAT affirms at Annex I the commitment to comply with international law as well as its obligation to act in accordance with CFP objectives and principles<sup>12</sup>.

### *EU Conduct at RFMOs*

4. Article 29 of the CFP Regulation requires the EU to actively support and contribute to the activities of international organizations dealing with fisheries, including RFMOs:

The positions of the Union in international organisations dealing with fisheries and RFMOs shall be based on the best available scientific advice so as to ensure that fishery resources are managed in accordance with the objectives laid down in Article 2, in particular paragraph (2) and point (c) of paragraph 5 thereof. The Union shall seek to lead the process of

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<sup>7</sup> The CFP regulation entered into force on 1 January 2014.

<sup>8</sup> Preamble Recital 50.

<sup>9</sup> (Art 28(2)(d)) of the CFP Regulation.

<sup>10</sup> Article 3(j) of the CFP Regulation.

<sup>11</sup> Some of the relevant international provisions are set out at Appendix 2 to this analysis.

<sup>12</sup> Pursuant to Article 218(9) of the TFEU, the position of the EU at an RFMO such as ICCAT must be adopted by Council Decision, on proposal from the Commission. Council Decision on the position to be adopted, on behalf of the EU, in the ICCAT, 20 June 2014, 10974/1/14 REV 1. Annex I also affirms that the EU shall ensure that ICCAT measures are in accordance with ICCAT objectives.



strengthening the performance of RFMOs so as to better enable them to conserve and manage marine living resources under their purview.<sup>13</sup>

5. Thus a number of specific obligations flow from Article 29: the EU position must (1) be based on the best available scientific advice (BASA) so as to ensure that (2) the relevant fishery resources are managed in accordance with the precautionary approach; (3) be aimed at ensuring that the MSY exploitation rate is achieved by 2015 where possible and by 2020 at the latest and (4) the EU should seek to 'lead the process' of strengthening the performance of ICCAT<sup>14</sup>. The EU is also required, under Article 29(4), to support the development of scientific knowledge and advice by RFMOs to ensure that their recommendations are based on such scientific advice.

#### *Restoration or Maintenance of Populations above Biomass Levels which can Produce MSY*

6. The overall CFP requirement to ensure long term environmental sustainability is given further specificity by reference, in Article 2(2), to the aim of ensuring that populations are restored or maintained above biomass levels which can produce MSY<sup>15</sup>:

In order to reach the objective of progressively restoring and maintaining populations of fish stocks above biomass levels capable of producing maximum sustainable yield, the maximum sustainable yield exploitation rate shall be achieved by 2015 where possible and, on a progressive, incremental basis at the latest by 2020 for all stocks.

7. Thus the exploitation rate must be set at the maximum sustainable rate by 2015 where possible or (progressively and incrementally) by 2020 at the latest. The 2015 EU proposal does not appear to be in accordance with this requirement. Where the EU bases its position on an exploitation rate that is not in accordance with the 2015 primary target, it must in my view explain why that is not 'possible'. The EU has not, so far as I am aware, sought to argue that achievement of the necessary exploitation rates by 2015 would seriously jeopardise the social and economic sustainability of the relevant fishing fleets<sup>16</sup>. Furthermore the EU must present proposals that are based on progressive incremental achievement of that rate by 2020. There is no margin of discretion for the latter target year so it is difficult to see how a proposal which jeopardises attainment of that requirement could be consistent with Article 2(2), as read with Articles 28 and 29.

8. Taking also into account the CFP requirements for transparency and action based on BASA, the EU is in my view required to explain fully the basis for its proposals to ICCAT and in particular how any proposal will secure the Article 2(2) objective by 2020. This logically includes an explanation as to why alternative proposals, such as the selection of a lower TAC<sup>17</sup>, have been rejected. Critically, the EU should not propose or support action which will jeopardise the achievement of the MSY goal within the CFP timelines. It is possible that it might be outvoted at an RFMO but that is a separate matter<sup>18</sup>.

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<sup>13</sup> Article 29(2).

<sup>14</sup> These derive from Article 2(2). Article 2(5)(c) refers to providing conditions for economically viable and competitive fishing capture and processing industry and land-based fishery activity. I do not consider the latter aspect further.

<sup>15</sup> MSY is defined in Article 4(7) as: "the highest theoretical equilibrium yield that can be continuously taken on average from a stock under existing average environmental conditions without significantly affecting the reproduction process".

<sup>16</sup> Recital 7 to the CFP Regulation states that: Achieving those exploitation rates by a later date should be allowed only if achieving them by 2015 would seriously jeopardise the social and economic sustainability of the fishing fleets involved.

<sup>17</sup> In particular the other TACs presented by SCRS, see Table BET2 at Appendix 5.

<sup>18</sup> There is provision for an ICCAT Contracting Party to object to Recommendations (Article VIII(3) of the Convention)



9. In accordance with Articles 28 and 29, the aim in Article 2(2) is a relevant reference point for assessing whether measures proposed by the EU at RFMOs are consistent with the requirements of the CFP. Furthermore the SCRS recommended to the Commission, in relation to bigeye:

...to reduce the TAC to level that would allow the recovery of the stock with high probability and in as short period as possible in accordance with the principles of Recommendation 11-13.<sup>19</sup>

Furthermore the TAC of 65000 t was referred to by the SCRS but not specifically recommended, indeed a TAC of 60 000 t was also discussed<sup>20</sup>. In fact, it is my understanding, that as a result of exceptions for coastal, developing states in the EU proposal and in the final Recommendation 15-01, combined with a diminishing stock size, the TAC of 65000 t is not guaranteed (or likely) to lead to any decrease from current catch levels at all.

10. The EU did include a proposal for adjustment of the TAC and catch limits:

The TAC and catch limits for 2016 and subsequent years of the Multi-annual Programme shall be adjusted based on the latest scientific assessment available...

This was included in Recommendation 15-01. However, the possibility of further adjustment does not alter the position that the TAC is not consistent with Article 2(2) of the CFP Regulation, since the effect of any future, hypothetical adjustment is uncertain and unspecified.

11. A further consideration is that ICCAT Recommendations form the basis of SFAs<sup>21</sup> agreed by the EU with third states<sup>22</sup>. A decision to adopt an unsustainable TAC by an RFMO such as ICCAT will jeopardise the attainment of ensuring sustainable fishing that is reflected in agreements between the EU and third countries and for the EU to make a proposal of this kind at an RFMO runs contrary to its obligations under the CFP Regulation (in particular Articles 28, 29 and 31). It follows in my view that EU proposals which jeopardise the attainment of the Article 2(2) objective by promoting an unsustainable TAC at an RFMO may also jeopardise that objective in SFAs entered into with third countries.

#### *Best Available Scientific Advice*

12. A number of RFMOs, including ICCAT, have recently reiterated the need for the best available science in order for the organizations to be able to fulfil their mandate. ICCAT Resolution 2011-17 recognizes:

the importance of sound scientific advice as the centre piece for the conservation and management of tuna and tuna-like species in the Atlantic and the Mediterranean in line with international law and recommendations and Article VIII of the ICCAT Convention...

13. The EU has reinforced this approach in the CFP. Article 3(c) of the Regulation requires that the CFP be guided by the principle that measures be established in accordance with BASA. The importance of basing fisheries management on a scientific base is further underlined in Part V of the Regulation<sup>23</sup>. In the light of Article 3(c), read with Articles 28 and 29, it is clear that there must also be a sound scientific

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<sup>19</sup> SCRS, Executive Summary at page 35.

<sup>20</sup> SCRS ES at page 34.

<sup>21</sup> 'sustainable fisheries partnership agreement' means an international agreement concluded with a third state for the purpose of obtaining access to waters and resources in order to sustainably exploit a share of the surplus of marine biological resources, in exchange for financial compensation from the Union, which may include sectoral support (Article 4(37)).

<sup>22</sup> See for example the provisions of the partnership agreements between the EU and Ivory Coast and the EU and Senegal discussed in **Appendix 3**.

<sup>23</sup> See Article 25(1) at **Appendix 4**.



base for EU actions in RFMOs. The relevance of Part V to the operation of external fisheries policy lies in the emphasis on the proactive role required both of Member States and the Commission. The EU is required to do all it can to ensure that the necessary data are available and that it has consulted appropriate scientific bodies as to the conservation and management of the living marine resources in question. In the light of BASA, the EU must seek to ensure that EU fishing activity does not jeopardise the overall CFP aim of long term sustainability in circumstances where data are inadequate. Moreover this is consistent with the overall aim of ICCAT which is to maintain populations at levels permitting the maximum sustainable catch<sup>24</sup>.

14. The EU appears to have based its proposal for the establishment of a TAC at 65, 000t on the SCRS findings, but the SCRS did not endorse any particular TAC. Instead the Committee simply set out a range of TACs and the accompanying estimated probabilities of the Atlantic bigeye tuna stock being below FMSY (overfishing not occurring), above BMSY (not overfished) and above BMSY and below FMSY (green zone) in a given year for catch level ('000 t), based upon the 2015 assessment outcomes until 2028<sup>25</sup>. Moreover it does not appear that the selection of that TAC by the EU is consistent with the requirements of Article 2(2) of the CFP Regulation (see above). Nor, as I understand it, did the EU *explain or quantify how* its proposed additional measures were in line with the SCRS recommendation to adopt measure that would allow a recovery with a high degree of probability and within a short timeframe (or its own Article 2(2) objective)<sup>26</sup>. In fact it appears that there are sound reasons to doubt the likelihood that the additional measures proposed by the EU (and partially adopted in Recommendation 15-01) would have a positive impact on achieving MSY (see below).

15. Assuming that the SCRS advice is the BASA as to the impact of a TAC of 65 000 t<sup>27</sup>, the advice would strongly indicate the EU should *not* adopt that level of TAC since this will prejudice attainment of the CFP objectives set out in Article 2(2) of the Regulation and is moreover less than 50% likely to achieve the ICCAT target either. Nor, as indicated above, and discussed further below, is there any presentation of a scientific assessment of the likely added value of the proposed complementary measures: the elimination of underage, the capacity freeze, the proposed closure, the FAD limitation or the ban of transshipment, in securing the EU or the ICCAT target. It bears repeating that the EU was required to present a proposal that was in line with the more exacting EU CFP target, even if that proposal had not been adopted by ICCAT. In its proposal, the EU chose a catch limit that has only a 49% chance of successfully recovering the population and ending overfishing on an arbitrary and long timeline which exceeds that imposed by the CFP.

16. The EU proposed management rules, including a spatially expanded time-area fishing closure,<sup>28</sup> but the EU did not present any scientific advice as to how the proposed additional measures would improve the percentage change of achieving the MSY exploitation rate by 2028 (or within the CFP time frame of

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<sup>24</sup> See the Preamble to the ICCAT Convention.

<sup>25</sup> See excerpt from SCRS report and table BET2 at **Appendix 5**. SCRS refer to 2028 as the final year of the table of TAC likely impacts, but indicated that this year is arbitrary and does not represent a target year for recovery (personal communication)

<sup>26</sup> The 24<sup>th</sup> Recital to the EU Proposal states: *CONSIDERING* that the SCRS recommended taking measures to reduce the Bigeye TAC to levels that would allow a recovery with a high degree of probability and within a short timeframe and to find effective measures to reduce FAD-related and other fishing mortality of small Bigeye tunas.

<sup>27</sup> The EU proposal appears to accept the SCRS assessment as to the estimated impact of the 65 000 t TAC and does not seek to argue that such a TAC per se has a higher chance of securing MSY by 2028 than presented in BET2.

<sup>28</sup> The proposal was adopted in modified form in Recommendation 15-01, see paras 13-15. See further background in Appendix I.





2015/2020). It is my understanding that all previous attempts to use a time-area closure to manage bigeye tuna fisheries have been unsuccessful. Additionally, the growing take of juvenile bigeye associated with FADs is a primary driver of this decline in the stock and threatens bigeye fisheries by decreasing the MSY and increasing the adult biomass required to produce MSY.<sup>29</sup>

17. A paper coauthored by Pew and WWF and addressed to the WCPFC FAD Management Options Working Group, raises concerns as to the failure of closure measures relating to FAD sets to reduce the impact of purse seining on bigeye. The paper notes that a science-based FAD set limit could be effective in ending overfishing of bigeye<sup>30</sup>. Whilst it may be correct, as the paper notes, that fishing in each RFMO may be different, the concerns raised in this paper which is based on scientific evidence call into question the measures proposed by the EU to ICCAT. At the very least, the EU requirements to base measures on BASA and to apply the precautionary principle would require the EU to explain the proposal it made to ICCAT in the light of the concerns raised in the paper presented to WCPFC.

18. Whilst there is some scientific advice that implies that closed areas could be more successful if implemented properly, it is my understanding that there is no published advice on how closure would change the SCRS projections about the status of the Atlantic bigeye population. Thus, the EU has not sufficiently justified its argument that the likelihood of recovery or the timeline for recovery would be improved by the time area closure adopted in 2015. ICCAT has established a FAD Working group which is addressing these issues and will report further in the autumn. Pending further advice on the effectiveness of FAD management measures from the relevant ICCAT body, and in the light of the EU requirement to act in accordance with the precautionary approach (see below), it was incumbent on the EU, in my view, to justify and quantify any assumptions made in its proposal as to the added benefit of the measures it proposed in terms of meeting CFP or ICCAT targets. Going forward, the EU should fully justify any further proposal in line with BASA and the precautionary approach. Future EU proposals to ICCAT should comply with the CFP Regulation, taking into account the inconsistency of the earlier EU position.

19. Furthermore, the newly expanded closure was not in fact implemented in 2016 as the closure period includes only January and February, and despite an informal agreement to implement the closure in 2016 (prior to the entry into force of the Recommendation), it is my understanding that some Parties, including the EU, refused to do so. This further calls into question the added value of the closure in improving the probability of achieving the Article 2(2) objectives.

### *Precautionary Principle*

20. Article 2(2) requires that the CFP apply the precautionary approach to fisheries management which is defined as an approach according to which the absence of adequate scientific information should not justify postponing or failing to take management measures to conserve target species, associated or dependent species and non-target species and their environment<sup>31</sup>. In my view, the emphasis placed on the precautionary approach to the operation of the CFP, both internally and externally, places a high

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<sup>29</sup> Appendix 1 para 3, SCRS Report at page 34 BET3, page 35 BET6.

<sup>30</sup> Statement to WCPFC FAD WG at page 9, <https://www.wcpfc.int/system/files/WCPFC-2015-FADMgmtOptions-IWG01-OP01%20PEW%20and%20WWF%20statement.pdf>.

<sup>31</sup> Article 4(8) of the CFP Regulation.



degree of responsibility on the EU to act appropriately in circumstances where there is a lack of scientific data or uncertainty about the impacts of proposals on fish stocks. However in this case, the EU does not appear to have acted consistently with that approach.

21. The EU's failure to present a scientific basis indicating that the proposed additional measures would result in a mortality reduction in line with CFP provisions, as discussed above, also represents a failure to comply with the precautionary approach. It is notable that Article 6(c) of the UN Fish Stocks Agreement, which forms the basis for the definition set out in the CFP Regulation, requires Parties to: take into account, *inter alia*, uncertainties relating to the size and productivity of the stocks, reference points, stock condition in relation to such reference points, levels and distribution of fishing mortality and the impact of fishing activities on non-target and associated or dependent species, as well as existing and predicted oceanic, environmental and socio-economic conditions.

In failing to justify its proposal in the light of the uncertainties highlighted by SCRS, the EU does not appear to have complied with either the CFP Regulation or with Article 6 of the 1995 Agreement.

22. The operation of the precautionary principle has been examined by the EU courts many times including by the General Court in *Du Pont de Nemours (France) and others v Commission*<sup>32</sup>. In relation to risk assessment (as an element of precaution) the Court held:

...scientific risk assessment should be based on the best scientific data available and should be undertaken in an independent, objective and transparent manner... In such a situation, 'risk' thus constitutes the degree of probability that the acceptance of certain measures or practices will adversely affect the interests safeguarded by the legal order. ..<sup>33</sup>

In relation to risk management, the Court observed:

Risk management corresponds to the body of actions taken by an institution faced with a risk in order to reduce it to a level deemed acceptable for society having regard to its obligation, in accordance with the precautionary principle, to ensure a high level of protection of ...the environment. ...Those actions include the adoption of provisional measures, which must be proportionate, non-discriminatory, transparent, and consistent with similar measures already taken...<sup>34</sup>

23. Although *the Pont de Nemours* case concerned a measure under a different legal framework, one which was designed to protect human health as well as the environment, the description of risk assessment and management is relevant to decisions taken under the CFP, including EU positions taken at RFMOs. In application of the precautionary principle, the EU proposal should have been based on a transparent risk assessment (as to the EU's decision to propose a TAC of 65 000 t) and a transparent risk management proposal which set out a scientific basis indicating that the additional measures proposed would ensure that the overall objective of the CFP, as well as of ICCAT, namely securing biomass levels above those capable of supporting MSY, was achieved. It is my understanding that in this case no such risk assessment or risk management plan in relation to the EU proposal has been presented by the EU.

#### *Ending Overfishing by 2015 or at the latest 2020*

24. As indicated in the table BET-2 included in the SCRS report<sup>35</sup>, the likelihood of ending overfishing by 2020, under the EU's proposed limit of 65k metric tons, is only 54%. The SCRS also considered the

<sup>32</sup> Case T31/07 judgment of 12 April 2013, see further at **Appendix 7**.

<sup>33</sup> Case T31/07 paragraphs 141 and 144 of the judgment (emphasis added).

<sup>34</sup> Case T31/07 paragraphs 148 and 149 of the judgment.

<sup>35</sup> See **Appendix 5**.





impact of the previously implemented additional management measures (as laid out in Recommendation 14-01) and concluded:

...that the moratorium has not been effective at reducing the mortality of juvenile bigeye tuna, and any reduction in yellowfin tuna mortality was minimal, largely due to the redistribution of effort into areas adjacent to the moratorium area (for more details see response to Commission 19.1)<sup>36</sup>.

25. In the light of the SCRS findings, and the failure of the EU to present any alternative scientific assessment which would have supported their proposal, the EU proposal does not appear to have been consistent with Article 2(2) of the CFP Regulation, as read with Articles 28 and 29.

### *Transparency and Impact Assessments*

26. The CFP requirements to establish measures on the basis of BASA and in the light of the precautionary principle are complemented and reinforced by the emphasis on the use of impact assessments and the requirement for transparency. Article 3(i)) mandates the use of impact assessments 'as appropriate'. Requirements for environmental impact assessment (EIA) are found in many EU and international instruments<sup>37</sup> and a requirement for EIA has also been confirmed as an obligation under general international law by the International Court of Justice (ICJ) in circumstances where proposed activities may have a significant adverse impact in a transboundary context<sup>38</sup>.

27. Transparency of risk assessment and management is a general requirement under EU law as indicated in the Court decision referred to above. Furthermore, Article 3(k) of the CFP Regulation includes transparency of data handling as one of the principles of good governance which should guide the CFP and which, by virtue of Article 28, applies to the international operation of the CFP. These requirements underline the need for the EU to publish the basis for proposals made to RFMOs, including the scientific and policy basis for decisions as to the proposed TAC and other management and conservation measures, bearing in mind the EU's obligations under the UN/ECE Aarhus Convention<sup>39</sup>. The failure to present a scientifically based impact assessment of its proposal does not appear to be consistent with these two requirements.

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<sup>36</sup> SCRS Report at page 35.

<sup>37</sup> Including Article 5(d) of the UN Fish Stocks Agreement and, more generally, Article 14 of the Convention on Biological Diversity (CBD). The EU has adopted legislation on environmental impact assessment including Council Directive 85/337 on the assessment of certain public and private projects on the environment and Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (the SEA Directive) which require EIA for certain projects, plans and programmes, including certain plans and programmes relating to fisheries adopted at the national level.

<sup>38</sup> ICJ *Pulp Mills I.C.J. Reports 2010 (I)*, p. 83, para. 204; ICJ *Costa Rica v Nicaragua* judgment of 16 December 2015 at paragraph 104.

<sup>39</sup> The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, adopted on 25th June 1998 and entered into force on 30 October 2001. The EU and its Member States have ratified the Aarhus Convention. The EU became a party to the Convention on 17 February 2005.



## Appendices to Legal Analysis

### Appendix 1: Background

1. Atlantic bigeye tuna is managed by ICCAT pursuant to the International Convention for the Conservation of Atlantic Tunas (the Convention)<sup>40</sup>. The EU holds approximately 26 percent of the Atlantic bigeye quota. The aim of the Convention is expressed in the Preamble:

The Governments whose duly authorized representatives have subscribed hereto, considering their mutual interest in the populations of tuna and tuna-like fishes found in the Atlantic Ocean, and desiring to co-operate in maintaining the populations of these fishes *at levels which will permit the maximum sustainable catch for food and other purposes*, resolve to conclude a Convention for the conservation of the resources of tuna and tuna-like fishes of the Atlantic Ocean... (Emphasis added)

2. Accordingly Article VIII(1) provides that

The Commission may, on the basis of scientific evidence, make recommendations designed to maintain the populations of tuna and tuna-like fishes that may be taken in the Convention area at levels which will permit the maximum sustainable catch<sup>41</sup>

3. In 2015, the ICCAT Standing Committee on Research and Statistics (SCRS) conducted the regular stock assessment of Atlantic bigeye tuna. The results of that assessment revealed that the population is both overfished and currently experiencing overfishing. The SCRS Committee noted that:

The current TAC did not result in the stock achieving levels consistent with the Convention Objectives.<sup>42</sup>

It also noted that:

Projections indicate that catches at current TAC level of 85,000 t will have around 30% of probability to recover the population to a level that is consistent with the Convention objectives by 2028. Therefore, the Committee recommends the Commission to reduce the TAC to level that would allow the recovery of the stock with high probability and in as short period as possible in accordance with the principles of Recommendation 11-13. The Commission should be aware that increased harvests on FADs could have had negative consequences for the productivity of bigeye tuna fisheries (e.g. reduced yield at MSY and increased SSB required to produce MSY) and, therefore, should the Commission wish to increase long-term sustainable yield, the Committee continues to recommend that effective measures be found to reduce FAD-related and other fishing mortality of small bigeye tunas.<sup>43</sup>

In relation to its assessment of the impact of additional conservation measures, the Committee concluded that:

the moratorium [area/time closure] has not been effective at reducing the mortality of juvenile bigeye tuna, and any reduction in yellowfin tuna mortality was minimal, largely due to the redistribution of effort into areas adjacent to the moratorium area...<sup>44</sup>

4. The 2015 EU proposal noted that the SCRS had concluded that the Bigeye tuna stock was overfished and that overfishing was occurring, and referred to the fact that the “SCRS recommended taking measures to reduce the Bigeye TAC to levels that would allow a recovery with

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<sup>40</sup> The Convention was adopted in 1966 and entered into force in 1969. It currently has 50 contracting parties. The EC became a party in 1997 (succeeded by the EU in 2009)

<sup>41</sup> In accordance with Article VIII(2), recommendations enter into force 6 months after adoption except in relation to those Parties registering an objection falling within the conditions laid down in Article VIII (3).

<sup>42</sup> *Report of The Standing Committee on Research and Statistics (SCRS)* (Madrid, Spain, 28 September to 2 October 2015) at page 35 (SCRS Report).

<sup>43</sup> SCRS Report page 35.

<sup>44</sup> SCRS Report at page 245.



a high degree of probability and within a short timeframe and to find effective measures to reduce FAD-related and other fishing mortality of small Bigeye tunas.”<sup>45</sup> This language was adopted in Recommendation 15-01<sup>46</sup>.

5. The EU proposal also recommended other conservation and management measures in relation to bigeye tuna, relating to fishing capacity limitation, closure of the fishing season and management of fish aggregating devices (FADs), as well as a number of general control measures. In relation to closure, the EU proposal stated that: ‘The efficacy of the closure ...in relation to the protection of bigeye tuna shall be evaluated on an annual basis by the SCRS’<sup>47</sup>.

As soon as possible and at the latest by 2018, the SCRS shall evaluate the efficacy of the area/time closure referred to in paragraph 13 for the reduction of catches of juvenile bigeye and yellowfin tunas. In addition the SCRS shall advise the Commission on a possible area/time-closure of fishing activities on FADs to reduce the catch of small bigeye and yellowfin tuna at various levels including the impacts of such reduction on the MSY and relative stock status, in light of the historical records on bigeye and yellowfin tuna catches

6. Recommendation 15-01 adopted different closure measures for bigeye tuna (fixed closure period of 1 January to end of February including the deployment of FADs). The original EU draft included a closed season, as opposed to the closed area. The draft closed season was a closure for all gears that target bigeye (both longline and purse seine) and was intended to cover the entire Atlantic. The final adopted measure calls for a time-area closure only for fisheries using fish aggregating devices. The draft closed season offered fishing operators a choice between halting fishing for the month of May or the month of November. The final time-area closure requires all vessels fishing with FADs to halt operations in a limited area for the two months of January and February.

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<sup>45</sup> Preamble to the EU Proposed Recommendation, see 22<sup>nd</sup> and 23<sup>rd</sup> recitals.

<sup>46</sup> Preamble to Recommendation 15-01, 5<sup>th</sup> recital.

<sup>47</sup> See para 13 of the EU Proposal.



## **Appendix 2: International Legal Framework**

### **UNCLOS**

#### **Article 62**

##### *Utilization of the living resources*

1. The coastal State shall promote the objective of optimum utilization of the living resources in the exclusive economic zone without prejudice to article 61.
2. The coastal State shall determine its capacity to harvest the living resources of the exclusive economic zone. Where the coastal State does not have the capacity to harvest the entire allowable catch, it shall, through agreements or other arrangements and pursuant to the terms, conditions, laws and regulations referred to in paragraph 4, give other States access to the surplus of the allowable catch, having particular regard to the provisions of articles 69 and 70, especially in relation to the developing States mentioned therein.
3. In giving access to other States to its exclusive economic zone under this article, the coastal State shall take into account all relevant factors, including, *inter alia*, the significance of the living resources of the area to the economy of the coastal State concerned and its other national interests, the provisions of articles 69 and 70, the requirements of developing States in the subregion or region in harvesting part of the surplus and the need to minimize economic dislocation in States whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks.
4. Nationals of other States fishing in the exclusive economic zone shall comply with the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State. These laws and regulations shall be consistent with this Convention

#### **Accordingly Article 31(4) of the CFP Regulation provides:**

Union fishing vessels shall only catch surplus of the allowable catch as referred to in Article 62(2) and (3) of the UNCLOS, and identified, in a clear and transparent manner, on the basis of the best available scientific advice and of the relevant information exchanged between the Union and the third country about the total fishing effort on the affected stocks by all fleets.

#### **Article 64**

1. The coastal State and other States whose nationals fish in the region for the highly migratory species listed in Annex I shall cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone. In regions for which no appropriate international organization exists, the coastal State and other States whose nationals harvest these species in the region shall cooperate to establish such an organization and participate in its work.
2. The provisions of paragraph 1 apply in addition to the other provisions of this Part.

#### **Article 119 (high seas) addresses conservation in a similar way to Article 61 (EEZs) and provides:**

1. In determining the allowable catch and establishing other conservation measures for the living resources in the high seas, States shall:
  - (a) take measures which are designed, on the best scientific evidence available to the States concerned, to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global;



(b) take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened.

2. Available scientific information, catch and fishing effort statistics, and other data relevant to the conservation of fish stocks shall be contributed and exchanged on a regular basis through competent international organizations, whether subregional, regional or global, where appropriate and with participation by all States concerned.

3. States concerned shall ensure that conservation measures and their implementation do not discriminate in form or in fact against the fishermen of any State.

### 1995 UN Fish Stocks Agreement<sup>48</sup>

Article 5 of the 1995 Agreement lays down a series of general principles which states should apply in fulfilling their duty of cooperation under UNCLOS. These include ensuring that conservation and management measures are based on the best scientific evidence available and are designed to maintain or restore stocks at levels capable of producing MSY, as qualified by relevant environmental and economic factors. There is also reference to the precautionary approach which is further elaborated in Article 6, the use of impact assessment, the elimination of over-fishing and the use of effective monitoring, control and surveillance, among others. These elements are reflected in the new CFP Regulation.

Article 5 of the UN Fish Stocks Agreement requires that Parties “maintain or restore stocks at levels capable of producing maximum sustainable yield”. Annex II, which sets out guidelines for the application of reference points, provides that “the fishing mortality rate which generates maximum sustainable yield should be regarded as a minimum standard for limit reference points”.

As discussed in the Legal Analysis, the new CFP Regulation reflects these international principles including: that measures are based on the best scientific evidence available (Article 3(c) and Part V of the CFP Regulation); that measures are designed to maintain or restore stocks above MSY (Article 2(2) of the CFP Regulation); the application of the precautionary approach (Article 2(2) of the CFP Regulation) and the use of impact assessment (Article 3(i) of the CFP Regulation).

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<sup>48</sup> The full title of the 1995 Agreement is ‘The 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



### **Appendix 3: EU and Third Country Fisheries Partnership Agreement Provisions Referring to on ICCAT Recommendations**

The EU currently has thirteen active partnership agreement protocol agreements in place with third countries, ten of which relate to tuna and three of which are 'mixed'. They are intended to allow EU vessels to fish for surplus stocks in the partner country's EEZ in a legally regulated environment. The tuna agreements allow EU vessels to pursue migrating tuna stocks as they move along the shores of Africa and along to the Indian Ocean.<sup>49</sup> Two of these tuna agreements are considered below.

#### **FPA between EU and Ivory Coast**

The EU and Ivory Coast entered into a fisheries partnership agreement in 2007 (in the form of an exchange of letters on the provisional application of the protocol)<sup>50</sup>. That agreement is tacitly renewed every six years. The current Protocol will expire on 30 June 2018.

The Preamble to the Fisheries Partnership Agreement (FPA) states that the Parties are:

DETERMINED to apply the decisions and recommendations of the International Commission for the Conservation of Atlantic Tunas, hereinafter referred to as 'ICCAT',

...

DETERMINED to cooperate, in their mutual interest, in promoting the introduction of responsible fisheries to ensure the long-term conservation and sustainable exploitation of marine living resources,

Article 1 of the FPA provides that:

This Agreement establishes the principles, rules and procedures governing:

— economic, financial, technical and scientific cooperation in the fisheries sector with a view to promoting responsible fishing in Côte d'Ivoire's fishing zones to guarantee the conservation and sustainable exploitation of fisheries resources and develop Côte d'Ivoire's fisheries sector

Article 4(2) of the FPA provides:

2. The two Parties, on the basis of the recommendations and resolutions adopted within the International Commission for the Conservation of Atlantic Tunas (ICCAT), and in the light of the best available scientific advice, shall consult each other within the Joint Committee provided for in Article 9 of the Agreement and adopt, where appropriate after a scientific meeting and by mutual agreement, measures to ensure the sustainable management of fisheries resources affecting the activities of Community vessels.

It is clear therefore that the sustainability of decisions taken under the FPA is dependent to a great extent on the sustainability of decisions taken by ICCAT. In circumstances where ICCAT adopts an unsustainable tuna TAC, the sustainability of fisheries in Ivorian waters is directly threatened. For the EU to propose to ICCAT a TAC that is unsustainable in the light of the best available scientific evidence is contrary to the requirements of the CFP Regulation. Although the FPA predates the new CFP regulation, that legal framework now applies to EU conduct at RFMOs, including ICCAT. This in turn has implications for the implementation of the FPA as from 1 January 2014 when the CFP Regulation came into force.

#### **2014 SFPA between EU and Senegal**

The current fisheries partnership agreement between the EU and Senegal was adopted on 25 April 2014 and covers the period 20 November 2014 to 19 November 2019 and is tacitly renewed for 5 year periods. The agreement allows EU vessels from Spain and France to fish in the Senegalese waters and is part of the tuna network of fisheries agreements in West Africa.<sup>51</sup>

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<sup>49</sup> <http://ec.europa.eu/fisheries/cfp/international/agreements>.

<sup>50</sup> See the FPA and Protocol attached to Council Decision of 12 February 2008, 2008/151/EC. FPAs are to be superseded by SFPAs under the new CFP Regulation.

<sup>51</sup> [http://ec.europa.eu/fisheries/cfp/international/agreements/senegal/index\\_en.htm](http://ec.europa.eu/fisheries/cfp/international/agreements/senegal/index_en.htm)





The Preamble to the 2014 SFPA provides that the Parties are:

DETERMINED to apply the decisions and recommendations taken by the relevant Regional Fisheries Management Organisations of which the Parties are members; ...

DETERMINED to cooperate, in their mutual interest, in promoting the establishment of responsible fisheries to ensure the long-term conservation and sustainable exploitation of marine living resource...

The 2014 SFPA is accompanied by a Protocol on the implementation of the sustainable fisheries partnership agreement between the European Union and the Republic of Senegal. Article 5 of the Protocol, concerning scientific cooperation, provides that:

1. With regard to the region of West Africa, the Parties undertake to promote cooperation as regards responsible fishing. The Parties undertake to comply with the recommendations and resolutions of the International Commission for the Conservation of Atlantic Tunas (ICCAT) and to take account of the scientific opinions of other competent regional organisations such as the Committee for Eastern Central Atlantic Fisheries (CECAF).

2. The Parties undertake to convene the Joint Scientific Working Group regularly and when required in order to examine all scientific issues relating to the implementation of this Protocol. The mandate, composition and functioning of this Joint Scientific Working Group shall be laid down by the Joint Committee.

3. Based on the recommendations and resolutions adopted by ICCAT and in the light of the best available scientific advice such as that of CECAF and, where appropriate, of the findings of the Joint Scientific Working Group meetings, the Joint Committee shall adopt measures to ensure the sustainable management of the fishery resources covered by this Protocol and concerning the activities of Union fishing vessels.

In relation to the SFPA with Senegal, the Commission webpage states that the 2014 agreement and protocol were “negotiated in strict accordance with the requirements of the new EU fisheries policy thus ensuring sustainability of the fish stocks, protection of the local fishermen and food security, strict controls and support to the fight against IUU fishing”<sup>52</sup>.

It is clear therefore that the sustainability of decisions taken under the SFPA is dependent to a great extent on the sustainability of decisions taken by ICCAT. In circumstances where ICCAT adopts an unsustainable tuna TAC, the sustainability of fisheries in Senegalese waters is directly threatened. For the EU to propose to ICCAT, a TAC that is unsustainable in the light of the best available scientific evidence is contrary to the requirements of the CFP Regulation.

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<sup>52</sup> [http://ec.europa.eu/fisheries/cfp/international/agreements/senegal/index\\_en.htm](http://ec.europa.eu/fisheries/cfp/international/agreements/senegal/index_en.htm), accessed on 14 August 2016.



## Appendix 4: Provisions of the CFP Regulation and Council Decision

Foreshadowing the obligation placed on the EU in Article 28, the Preamble to the CFP Regulation states that the EU should promote the objectives of the CFP internationally “ensuring that Union fishing activities outside Union waters are based on the same principles and standards as those applicable under Union law”.<sup>53</sup>

Article 25(1) of the Regulation requires that:

Member States shall, in accordance with the rules adopted in the area of data collection, collect biological, environmental, technical, and socio-economic data necessary for fisheries management, manage those data and make them available to end-users, including bodies designated by the Commission. ...Those data shall, in particular, enable the assessment of:

- (a) the state of exploited marine biological resources;
- (b) the level of fishing and the impact that fishing activities have on the marine biological resources and on the marine ecosystems; and
- (c) the socio-economic performance of the fisheries, aquaculture and processing sectors within and outside Union waters.

Annex I to the 2014 Council Decision on ICCAT<sup>54</sup> expressly provides that:

In the framework of the ICCAT, the Union shall:

- a) act in accordance with the objectives and principles pursued by the Union within the Common Fisheries Policy, notably through the precautionary approach and the aims related to the maximum sustainable yield as laid down in Article 2(2) of Regulation (EU) No 1380/2013, to promote the implementation of an ecosystem-based approach to fisheries management and limiting environmental impacts of fishing activities, to avoid and reduce as far as possible unwanted catches, and gradually eliminate discards, and to minimise the impact of fishing activities on marine eco-systems, as well as, through the promotion of economically viable and competitive Union fisheries, to provide a fair standard of living for those who depend on fishing activities and taking account of the interests of consumers;
- b) ensure that measures adopted within the ICCAT are in accordance with the objectives of the ICCAT Convention;
- c) ensure that measures adopted within the ICCAT are consistent with international law, and in particular with the provisions of the UN Convention on the Law of the Sea, the UN Agreement relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks and the Agreement to promote compliance with international conservation and management measures by fishing vessels on the high seas; and the 2009 Food and Agriculture Organization Port State Measures Agreement;
- d) promote consistent positions within Regional Fisheries Management Organisations, and, where applicable, with Regional Sea Conventions in the same area;
- e) seek synergy with the policy that the Union is pursuing as part of its bilateral fisheries relations with third countries, and ensure coherence with its other policies notably in external relations, environment, trade, development, research and innovation and others;
- f) ensure that the Union's international commitments are respected;
- (g) be in line with the Council Conclusions of 19 March 2012 on the Commission Communication on the External dimension of the Common Fisheries Policy<sup>4</sup>;
- h) aim to create a level playing field for the Union fleet within the Convention area based on the same principles and standards as those applicable under Union law, and to promote the uniform implementation of recommendations

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<sup>53</sup> Preamble Recital 50.

<sup>54</sup> 10974/1/14 REV 1 dated 20 June 2014, PECHÉ 315.



## Appendix 5: SCRS Report

**BET-Table 2.** Estimated probabilities of the Atlantic bigeye tuna stock being below FMSY (overfishing not occurring), above BMSY (not overfished) and above BMSY and below FMSY (green zone) in a given year for catch level ('000 t), based upon the 2015 assessment outcomes. (Executive Summary, page 39)

### Probability of Overfishing not occurring ( $F < F_{msy}$ )

**Catch (000 t) 2015 2016 2017 2018 2019 2020 2021 2022 2023 2024 2025 2026 2027 2028**

**0** 29 100 100 100 100 100 100 100 100 100 100 100 100

**40** 29 84 89 92 93 94 95 95 96 96 97 97 97

**45** 29 72 80 84 88 89 91 92 93 94 94 94 95

**50** 29 61 70 75 79 83 85 87 89 90 91 92 92

**55** 29 52 59 65 69 73 76 79 81 82 84 85 86

**60** 29 44 51 55 59 62 65 69 70 72 74 76 77

**65** 29 38 44 48 51 54 56 58 60 62 63 65 66

**70** 29 32 38 41 44 47 49 50 52 53 53 59 60

**75** 29 27 33 36 37 40 42 43 45 50 51 52 52

**80** 29 24 29 31 33 34 36 42 42 43 46 46 47

**85** 29 22 26 28 30 31 37 37 38 41 43 45 48

**90** 29 19 23 24 26 28 31 34 40 39 42 40 43

**95** 29 17 20 20 20 24 26 31 30 31 31 35 35

**100** 29 14 15 15 15 16 19 22 24 31 35 37 37

### Probability of not being overfished ( $B > B_{msy}$ )

**Catch (000 t) 2015 2016 2017 2018 2019 2020 2021 2022 2023 2024 2025 2026 2027 2028**

**0** 17 17 21 33 57 74 85 92 95 97 98 98 99

**40** 17 17 18 22 31 40 51 60 67 73 78 81 84

**45** 17 17 18 21 29 37 46 53 60 66 71 76 79

**50** 17 17 18 20 27 34 41 48 53 59 65 69 72

**55** 17 17 18 20 25 31 37 42 47 52 56 61 65

**60** 17 17 17 19 24 28 34 37 41 45 49 53 56

**65** 17 17 17 18 22 26 30 33 37 40 43 45 48

**70** 17 17 17 18 21 24 27 30 33 35 38 40 41

**75** 17 17 17 18 20 23 25 27 29 31 33 34 36

**80** 17 17 17 17 19 20 23 24 26 27 29 29 31

**85** 17 17 17 17 19 20 22 23 24 25 30 28 31

**90** 17 17 17 17 18 19 21 22 22 24 23 23 23

**95** 17 17 17 16 17 17 17 19 20 19 18 17 17

**100** 17 17 16 16 16 15 14 15 14 11 13 10 8

### Probability of being in the green zone ( $B > B_{msy}$ and $F < F_{msy}$ )

**Catch (000 t) 2015 2016 2017 2018 2019 2020 2021 2022 2023 2024 2025 2026 2027 2028**

**0** 17 17 21 33 57 74 85 92 95 97 98 98 99

**40** 17 17 18 22 31 40 51 60 67 73 78 81 84

**45** 17 17 18 21 29 37 45 53 60 66 71 76 79

**50** 17 17 18 20 27 34 41 48 53 59 64 69 72

**55** 17 17 18 20 25 31 37 42 47 51 56 60 64

**60** 17 17 17 19 23 28 33 37 40 44 48 52 55

**65** 17 17 17 18 22 26 30 33 36 39 42 44 46

**70** 17 17 17 18 21 24 26 30 31 34 36 38 39

**75** 17 17 17 18 19 22 24 26 27 29 31 32 33

**80** 17 16 16 16 18 19 21 22 23 25 26 27 28

**85** 17 16 16 16 18 18 20 21 21 22 25 24 26

**90** 17 15 15 15 16 16 17 19 19 19 19 18 18

**95** 17 14 14 13 13 12 12 12 12 11 10 10 10

**100** 17 12 11 10 8 7 6 6 5 4 6 5 4

### BASA

It is noteworthy that the modeled probabilities of the stock achieving levels consistent with the Convention objective at the end of the projection time period in 2028 are 29% for a future constant



catch at the current TAC level of 85,000 t, and 41% probability at current levels of 70,000t. Higher probabilities of rebuilding require longer timeframes and/or larger reduction of current catches...49% probability of rebuilding would be achieved by 2028 with a constant catch of 65,000 t and 58% of probability with catches of 60,000 t<sup>55</sup>

### *Precautionary principle*

The Committee notes, as it did in previous assessments, that there is considerable uncertainty as well as potential bias in the assessment of stock status and productivity for bigeye tuna. There are many sources of uncertainty including which method represents best the dynamics of the stock, which method is supported more by the available data, which relative abundance indices are appropriate to be used in the assessment, and what precision is associated with the measurement/calculation of each of the model inputs. In general, data availability has improved since 2010 but there is still a lack of information regarding detailed fishing effort and catch-at-size data from certain fleets.<sup>56</sup>

SCRS also noted further uncertainty as to the total removals from the stock (when assessing the percentages discussed below):

It needs to be noted that projections made by the Committee assume that future constant catches represent the total removals from the stock, and not just the reported catches and the current selectivity pattern is maintained. ICCAT established a TAC of 85,000 t for 2010 onwards through [Rec. 09-01], and [Rec. 11-01]. Note that because this TAC does not affect all countries that can land bigeye tuna, in theory the total catch removed from the stock could exceed 85,000 t which will worsen the prospect of rebuilding at current TAC levels. Furthermore, any future changes in selectivity due to changes in the ratios of relative mortality exerted by the different fleets – such as an increase in the relative mortality of small fish - will change and add to the uncertainty of these projections.<sup>57</sup>

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<sup>55</sup> Page 34 of the SCRS Report.

<sup>56</sup> Page 34 of the SCRS Report.

<sup>57</sup> Page 34 of the SCRS Report.



## **Appendix 6: Pew/WWF Paper**<sup>58</sup>

Closing the fishery to FAD sets during four months of the year has not achieved the WCPFC's objective of reducing the impact of purse seining on bigeye. According to the SPC, the impact of the purse seine fishery incidentally catching juvenile bigeye is now roughly the same as the impact of the longliners targeting adult bigeye

The paper then calls for a new way of managing FADs and notes:

...scientific analysis shows that options that indirectly manage bigeye mortality – such as longer FAD closures, changes to the design of FADs, changes to how purse seiners set on FADs, and use of species discriminating buoy technologies – will not be successful in reducing the impact of the purse seine fishery on bigeye.

Instead, the FAD Working Group should assess and recommend how to implement options that directly control fishing mortality – such as limits on the number of FAD sets or bigeye catch limits<sup>59</sup>

The paper points out that:

Despite doubling the FAD closure period to four months in 2013, up from two months in 2009, the purse seine fleet is catching more bigeye tuna than before and the number of FAD sets was the third highest on record in 2014 (Williams and Terawasi, 2014 and 2015)<sup>60</sup>

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<sup>58</sup> Dated 23 November 2015 and reviewing scientific analysis conducted between 2007-2015.

<sup>59</sup> Statement to WCPFC FAD WG , Key Points at page 3.

<sup>60</sup> Statement to WCPFC FAD WG at page 5.



## Appendix 7: Court Judgments

In ICJ *Argentina v Uruguay* (Pulp Mills), a case concerning the transboundary impact of a paper pulp mill constructed on the river Uruguay, the Court held, in the context of its interpretation of requirements resulting from a bilateral treaty for the management of the river that:

... the obligation to protect and preserve, under Article 41 (a) of the Statute, has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource.  
[para 204 of the judgment]

In *Pont de Nemours*, the General Court identified three elements within the process leading to the adoption by an institution of appropriate measures to prevent specific, potential risks to, inter alia, the environment, by reason of the precautionary principle: (1) identification of the potentially adverse effects arising from a phenomenon; (2) assessment of the risks to the environment which are related to that phenomenon; (3) when the potential risks identified exceed the threshold of what is acceptable for society, risk management by the adoption of appropriate protective measures. The Court observed that stages (2) and (3) called for clarification. In relation to risk assessment the Court held:

...scientific risk assessment should be based on the best scientific data available and should be undertaken in an independent, objective *and transparent* manner...

In such a situation, 'risk' *thus constitutes the degree of probability that the acceptance of certain measures or practices will adversely affect the interests safeguarded by the legal order. ..*<sup>61</sup>

In relation to risk management, the Court observed:

Risk management corresponds to the body of actions taken by an institution faced with a risk in order to reduce it to a level deemed acceptable for society having regard to its obligation, in accordance with the precautionary principle, to ensure a high level of protection of ...the environment.

Those actions include the adoption of provisional measures, which must be proportionate, non-discriminatory, *transparent*, and consistent with similar measures already taken ...<sup>62</sup>

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<sup>61</sup> Case T31/07 paragraphs 141 and 144 of the judgment.

<sup>62</sup> Case T31/07 paragraphs 148 and 149 of the judgment.





