

## GATT/WTO Compatibility Issues

The international trade in fish and fishery products is subject to the General Agreement on Tariffs and Trade and a number of agreements adopted within the framework of the WTO.<sup>171</sup> The GATT requires a substantial reduction of tariffs and other barriers to trade,<sup>172</sup> consistent with its underlying objective of trade liberalisation. It has also adopted legal principles to ensure the conduct of multilateral trade on a non-discriminatory basis.<sup>173</sup> These principles have been reflected in the FAO Code of Conduct for Responsible Fisheries, which calls on states to ‘liberalise trade in fish and fishery products and eliminate barriers and distortions to trade such as duties, quotas and non-tariff barriers’.<sup>174</sup>

The IUU Regulation enables the application of a number of restrictive measures that affect the international trade in fish and fisheries products. Notwithstanding the fact that the IUU Regulation has yet to be implemented, a number of issues may be raised with respect to the compatibility of certain features of the IUU Regulation with WTO agreements. These relate to:

- The catch certification requirements and measures that may be applied by the EC territories against third country fisheries products that fail to comply with the requirements;
- The actions that may be taken by EC territories against foreign vessels, including vessels on the Community IUU vessel list and vessels flying the flags of states listed under the EC list of non-cooperating third countries;
- The actions that may be taken by EC territories against non-cooperating third countries.

This chapter analyses the compatibility of measures adopted under the IUU Regulation within the GATT/WTO framework in respect of these issues by reference to trade rules established by WTO Agreements, interpretations of such agreements by the WTO Dispute Settlement Body (DSB) in the context of compulsory WTO dispute resolution proceedings and the degree to which such measures have been accepted internationally as a legitimate response to IUU fishing.

### 10.1 Catch certification requirements

As set out in detail above, Chapter III of the IUU Regulation establishes catch certification requirements for fisheries products from third countries that enter EC territories. The compatibility of these requirements with WTO rules requires analysis of the GATT, in addition to the Agreement on Technical Barriers to Trade (TBT Agreement).

Article XI(1) of the GATT, entitled 'General Elimination of Quantitative Restrictions', is considered a fundamental feature of the WTO system<sup>175</sup> and has been interpreted by the WTO DSB as applying broadly to all measures 'prohibiting or restricting the importation, exportation or sale for export of products other than measures that take the form of duties, taxes or other charges'.<sup>176</sup> The prohibition of the importation, exportation, re-exportation and indirect importation of fisheries products on the basis of non-compliance with catch certification requirements under the IUU Regulation may be seen as a quantitative restriction under the GATT. However, Article XX of the GATT establishes several exceptions to the application of the agreement, and provides that:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any [Member] of measures: ... (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; ...

In summary, GATT Article XX allows for, among other things, the protection of some important non-economic societal values, such as public health and the environment. Measures satisfying the conditions set out in Article XX are thus permitted, even if they are inconsistent with other provisions of the GATT 1994.<sup>177</sup>

The IUU Regulation may be viewed as justifiable in terms of Article XX(g) for two reasons: (a) the Regulation has been designed fundamentally for the purpose of conserving fisheries resources; and (b) as described above, it forms part of a EC strategy to impose equivalent restrictions on both domestic and international IUU fishing vessels.

In relation to the *chapeau* requirement that a trade measure must not amount to 'arbitrary or unjustifiable discrimination between countries where the same conditions prevail', the DSB has noted that:

Authorising an importing Member to condition market access on exporting Members putting in place regulatory programmes comparable in effectiveness to that of the importing Member gives sufficient latitude to the exporting Member with respect to the programme it may adopt to achieve the level of effectiveness required. It allows the exporting Member to adopt a regulatory programme that is suitable to the specific conditions prevailing in its territory. As we see it ... conditioning market access on the adoption of a programme comparable in effectiveness, allows for sufficient flexibility in the application of the measure so as to avoid 'arbitrary or unjustifiable discrimination'.<sup>178</sup>

The Appellate Body of the DSB has also stressed that, in order to meet the requirements of the *chapeau* of Article XX, WTO members need to make serious efforts, in good faith, to negotiate a multilateral solution before resorting to unilateral trade measures.<sup>179</sup>

In view of the above comments, the IUU Regulation may be viewed as consistent with the *chapeau* of Article XX because: (a) catch certification requirements may be satisfied by documentation adopted by RFMOs; (b) the Regulation has been developed in the context of international efforts and consultation to combat IUU fishing; and (c) the Regulation provides for assistance to and consultation with affected states.

Catch certification requirements set out in the IUU Regulation may also be viewed as technical barriers to trade, thereby coming under the TBT Agreement. In its preamble, the TBT Agreement provides that:

*Recognizing* that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement;

*Recognizing* that no country should be prevented from taking measures necessary for the protection of its essential security interest;

*Recognizing* the contribution which international standardization can make to the transfer of technology from developed to developing countries;

*Recognizing* that developing countries may encounter special difficulties in the formulation and application of technical regulations and standards and procedures for assessment of conformity with technical regulations and standards, and desiring to assist them in their endeavours in this regard.

Catch certification requirements set out in the IUU Regulation may be viewed as consistent with the principles of the TBT Agreement in three ways:<sup>180</sup>

- The requirement under the IUU Regulation to certify that fish catch has been obtained in accordance with applicable laws and regulations and international conservation and management measures is, arguably, ‘necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices’ as such as IUU fishing.
- The IUU Regulation explicitly recognises the capacity constraints of developing countries in the implementation of the catch certification scheme and other requirements.<sup>181</sup> The Regulation also provides for assistance to ensure compliance with the requirements of the IUU Regulation.<sup>182</sup>
- The catch certification system set out in the IUU Regulation is intended to be implemented in a non-discriminatory manner. The EC currently implements catch certifi-

cation systems for fisheries products of EC territories based on catch certification schemes established by RFMOs. The IUU Regulation extends the application of the current scheme to all fish and fishery products, including those traded between the EC and third states in order to strengthen measures to combat IUU fishing. Chapter III of the IUU Regulation also clearly stipulates the actions that may be taken by EC competent authorities to verify catch certificates, as well as the procedure for the notification of any refusal of importation to the flag state concerned and the right to appeal against any decision taken by the EC authorities.

In terms of specific provisions, the TBT Agreement requires that technical regulations and measures should not create unnecessary obstacles to international trade.<sup>183</sup> To this end, Article 2.2 provides that ‘technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate object, taking into account the risks non-fulfilment would create’. Article 2.2 sets out several legitimate objectives, including the protection of human life or health or protection of the environment.<sup>184</sup> Article 2.4 of the TBT Agreement further provides that: ‘Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations’.<sup>185</sup>

The IUU Regulation can be viewed as compatible with the above articles by virtue of the fact that catch certification requirements set out in the Regulation are predominantly consistent with measures adopted by RFMOs and called for by the IPOA-IUU to prevent the depletion of fish stocks by IUU fishing.

## **10.2 Vessel inspections and actions to be taken against IUU vessels**

The second issue relevant to consideration of the compatibility of the IUU Regulation with international trade rules concerns the actions that may be taken by EC member states against foreign vessels, including vessels on the Community IUU vessel list and vessels flying the flags of states listed under the list of non-cooperating third countries.

In accordance with Chapter II, Section 2 of the IUU Regulation, EC member states are required to carry out inspections in their ports of at least 5 per cent of landings and transshipment operations by third country fishing vessels each year. Chapter II, Section 2 also requires the mandatory inspection of all vessels that have been sighted as, or alleged or presumed to have conducted, IUU fishing, have been reported in the Community alert system or have been listed on an RFMO IUU list.<sup>186</sup> Article 36 of the IUU Regulation provides for both port state and market-related measures against IUU vessels, including the restriction of landing, transshipment and trade of fish and fishery products caught through IUU means.

The above measures are port enforcement actions which, in respect of IUU vessels, have already been mandated under international fisheries agreements and conservation and management measures adopted by RFMOs. In view of this international acceptance of port enforcement actions, such measures taken against IUU vessels under the IUU Regulation are unlikely to be challenged in WTO fora, especially in the light of recent

negotiations and efforts to achieve consistency between multilateral environmental agreements and WTO rules.<sup>187</sup> Furthermore, many ACP states are obliged to take equivalent port enforcement actions against IUU vessels by virtue of their endorsement of the IPOA-IUU and membership of RFMOs, which is outlined in Appendix 2.

However, in order to achieve consistency with the principles of non-discrimination set out in the GATT and TBT Agreement,<sup>188</sup> there are precautions that would need to be taken by the EC before any port state enforcement action is taken against foreign vessels, especially in relation to the requirement to inspect 5 per cent of landings, transshipments and on-board processing operations by third country fishing vessels each year. The EC will need to ensure that the identification and listing of vessels believed to have conducted IUU fishing has been conducted in a transparent manner that avoids arbitrary discrimination against specific flag states. Consequently, each EC territory acting as a port state will need to put in place a more detailed, fair, transparent and non-discriminatory procedure that establishes that a vessel has indeed engaged in IUU fishing.

The prohibition of the importation and exportation of fish and fisheries products derived from IUU fishing is by nature a trade-related measure, and may be more susceptible to objections by affected vessels or flag states. In order to fully comply with WTO rules and principles, any prohibition on the trade in fish and fisheries products imposed on foreign fishing vessels must also be applied in a fair and non-discriminatory manner. In the same way as the procedures that should be established by EC port state members, such measures should be reflected in the national regulations of each EC territory and publicised to affected trading partners.<sup>189</sup> If the importation of a fisheries product from a third country is prohibited without established national administrative arrangements being put in place, the probability that the proposed measures would be considered arbitrary or discriminatory increases.

### **10.3 Actions to be taken against ‘non-cooperating’ states**

The third issue regarding the compatibility between the IUU Regulation and international trade rules relates to the actions that may be taken against states listed under the EC list of non-cooperating third countries. The measures to be applied to such countries under Article 38 of the IUU Regulation largely take the form of prohibitions against vessels flying the flags of such states. Article 37(5) of the IUU Regulation provides for the prohibition of the exportation of Community fishing vessels to states considered as non-cooperating. Furthermore, under Article 37(8) and (9), the EC ‘shall propose the denunciation of any standing bilateral fisheries agreement or fisheries partnership agreement with such countries’ and ‘shall not enter into negotiations to conclude a bilateral fisheries agreement or fisheries partnership agreement with such countries’.

There may be instances where actions taken by the EC against a non-cooperating third country may be justified on the basis of international fisheries instruments. If, for example, a state is listed by the EC as a non-cooperating third country on the basis that its vessels have been engaged in IUU fishing in the area of competence of an RFMO,

and that RFMO has called on its members to prohibit the importation of fish and fisheries products until such a time as that state has rectified the actions of its fishing vessels (similar to previous actions taken by ICCAT), the prohibition of trade with that 'non-cooperating state' may be permissible. It may also be justifiable to list a flag state as non-cooperating on the basis that the state has continuously failed to take action against IUU fishing which directly affects the EC market (despite assistance, consultation and co-operation with such state).

If a state is listed as non-cooperating for failure to comply with the catch certification requirements of the IUU Regulation, WTO rules are more specifically relevant than principles contained in international fisheries instruments. Imposition of similar types of trade restrictions have been ruled in the past as unilateral and contrary to WTO agreements. For example, a US ban on imports of yellow-fin tuna from Mexico for failure to protect eastern Pacific tropical dolphins in accordance with the *Marine Mammal Protection Act*<sup>190</sup> was considered contrary to GATT rules.<sup>191</sup>

In *US-Shrimp*, a DSB Panel found that the USA acted inconsistently with GATT Article XI(1) by imposing an import ban on shrimp and shrimp products harvested by vessels of foreign nations where the exporting country had not been certified by the US authorities as using methods not leading to the accidental killing of sea turtles above certain levels.<sup>192</sup> The DSB Appellate Body stated:

It may be quite acceptable for a government, in adopting and implementing a domestic policy, to adopt a single standard applicable to all its citizens throughout that country. However, it is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to require the other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member's territory, without taking into consideration different conditions which may occur in the territories of those other Members.<sup>193</sup>

However, a revised version of the US trade measure at issue in *US-Shrimp*, containing more flexible criteria for the certification of shrimp imports and involving consultation with affected states, was subsequently upheld by the DSB Appellate Body as justified by GATT Article XX(g).<sup>194</sup>

In view of the above comments, the listing of a state as non-cooperating for failure to comply with the catch certification requirements is arguably justified in terms of Article XX(g) because: (a) the catch certification requirements contain a sufficient degree of flexibility by accepting documentation adopted by RFMOs; (b) the Regulation has been developed in the context of international efforts and consultation to combat IUU fishing; and (c) the Regulation provides for assistance to and consultation with affected states. Consistent with Article 34 of the IUU Regulation, states may also be removed from the list of non-cooperating third countries if the state concerned 'demonstrates that the situation that warranted its listing has been rectified'.

Finally, with respect to the possible application of Articles 37(8) and (9) of the IUU

Regulation, denunciation of standing bilateral fisheries agreements with third states and prevention of fisheries partnership agreements may be viewed as forms of economic sanctions that would directly affect developing states, particularly LDCs. If implemented, these specific features of the IUU Regulation may not only be viewed as more restrictive than existing requirements adopted by RFMOs and set out in the IPOA-IUU, but may also have strong negative implications for international trade in fish and fisheries products, contrary to the basic objectives of the WTO system.