

Current Debate Over Potential Use of Trade Measures

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Abstract. Various international instruments that could play a positive role in the management of fisheries on the high seas, such as the UN Fish Stocks Agreement and the FAO Compliance Agreement, have not yet come into force. The reach of Regional Fisheries Management Organizations does not yet extend seamless across the ocean's surface. Not all coastal and flag States play by the rules in support of sustainable fishing practices. To get at bad actors, States and RFMOs and other management bodies are turning to trade measures. This paper reports on the current use of trade measures as well as on a new initiative under debate.

INTRODUCTION

In a perfect world, the UN Fish Stocks Agreement and the FAO Compliance Agreement would be in force and their principles, along with those of the FAO Code of Conduct and the UN Convention on the Law of the Sea (UNCLOS), implemented in the management plans of all coastal and flag States. In a perfect world, all vessels would be flagged by States that controlled their fleets in line with principles set forth in these international instruments. In a perfect world, the reach of Regional Fisheries Management Organizations (RFMOs), governed by the principles of sustainable development, would extend over the world's oceans with no exceptions. In this scenario, monitoring, control and surveillance (MCS) would be seamless and extend from shore line to shore line including all nations' exclusive economic zones (EEZs) and the high seas. Every fish would be accounted for and enlightened global management, underpinned by sound science, would prevail.

Unfortunately, this scenario has not yet been realized. In the mean time trade measures tied to conservation goals are in place in certain RFMOs and may be considered by FAO Members in October to fight the global scourge of illegal, unreported, and unregulated fishing. Before discussing possible FAO action let me take a few minutes to review fisheries trade, define trade measures, and discuss where and under what conditions trade measures are currently being used.

2. TRADE IN FISHERIES

Trade in fisheries products is increasingly global. The FAO has noted that some 195 States exported part of their fisheries production and 180 States reported fishery imports in 1997. International trade continues to grow and at an accelerating rate. Export volume reached 45.8 million tons in 1997, which is nearly three times the volume traded in 1976, and, when converted into estimated live weight equivalent, represents 37.5 percent of overall fisheries production.¹

¹Feidi, Izzat H., "Expected Trends in Fish Production, Utilization and Trade." A paper presented at the 5th North Pacific Rim Fisheries Conference, Anchorage, AK, December 1999. Figures cited include products of aquaculture.

With nearly 40% of the world's fishery production traded internationally, it follows that trade measures can have an impact on the regulation of imports while supporting conservation goals.

3. TRADE MEASURES

3.1 What is a Trade Measure

For the purposes of this paper, a trade measure is a border control that allows a State or territory to regulate, restrict or prohibit trade. Examples of trade measures include landing actions, certification, labeling, size requirements, among others. It is recognized, however, that some high seas controls, such as monitoring system and boarding requirements, while not technically trade measures, are related and can trigger the imposition of border controls.

Trade measures that have been used effectively in support of conservation goals by RFMOs fall primarily, although not exclusively, under the category of port State controls. Even certification schemes, such as are being implemented in CCAMLR, initially require flag State responsibility but trigger port State actions as the chain of custody extends to the import market. It is a discussion of port State controls, or point of entry controls, that seems most appropriate to the objectives of this paper.

3.2 Trade Measures in International and Regional Management Arrangements

3.21 ICCAT

The International Commission for the Conservation of Atlantic Tunas was established to provide a forum for the international coordination of research and management of tuna and tuna-like species in the Atlantic Ocean. ICCAT seeks to conserve and manage such species throughout their range in a manner that maintains their population at levels that will permit the maximum sustainable catch. The Convention area is defined as all waters of the Atlantic Ocean, including the adjacent seas.

A. Bluefin and Swordfish Action Plans

In recent years, ICCAT has adopted several measures designed to encourage cooperation by non-members and compliance by ICCAT members with the Commission's

conservation and management decisions. The Bluefin Tuna Action Plan Resolution, adopted in 1994, provides a mechanism that can lead to the use of multilateral trade measures against parties deemed to diminish the effectiveness of the ICCAT conservation measures for bluefin tuna. In 1996, the ICCAT Commission recommended that its members take measures to prohibit the import of bluefin tuna in any form from the *non-ICCAT Member countries* Belize, Honduras and Panama. The recommendation for multilateral trade restrictive measures represented the first time that such measures had been authorized by an international fisheries management body. The action followed several years of effort to encourage cooperation with ICCAT conservation and management measures. Because Panama had demonstrated what ICCAT viewed as a sincere desire to rectify the fishing activities of its vessels, implementation of trade restrictions against this State were in fact delayed for approximately 6 months as the ICCAT Commission tried unsuccessfully to come to terms with Panama. Significantly, ICCAT adopted a measure at its 1999 meeting that lifted the bluefin tuna trade restrictions against Panama in recognition of Panama's new status as an ICCAT member and of its notable and continuing efforts to control its fleet. Also in 1999, ICCAT recommended pursuant to its Swordfish Action Plan Resolution that its members take measures to prohibit the import of Atlantic swordfish in any form from Belize and Honduras. The 1999 ICCAT meeting was also significant in that the Commission recommended that its members take actions prohibiting the import of bluefin tuna from Equatorial Guinea, a *contracting member*, under a bluefin tuna quota compliance measure adopted in 1996. In all cases (against contracting and non-contracting members) the recommendations of the Commission are binding on its members.

B. Swordfish Minimum Size

In 1995, ICCAT adopted a smaller, alternative minimum size requirement for Atlantic swordfish which can be selected by a State in lieu of the larger minimum size. Unlike the larger size limit, the smaller, alternative swordfish minimum size provides no tolerance level for the harvest of swordfish under that size. If a State selects the alternative minimum size, it must take measures to prohibit the taking by its vessels, as well as the landing and sale in its jurisdiction, of swordfish below the limit. The United States adopted the alternative minimum size and has taken steps to implement the terms of the ICCAT recommendation. To implement the ban on sale in its jurisdiction, the United States prohibited the import of Atlantic swordfish and swordfish pieces below the minimum size, unless the pieces were derived from a swordfish larger than that size. To determine if swordfish are eligible for import, all shipments must be accompanied by a certificate of eligibility (COE). This document must be signed and sealed by an official or authorized representative of the exporting authority. The United States appears to be the only State that has taken such a step. In order to ensure access to the US market, Canada had adopted ICCAT's alternative minimum size; however, Canada did not set up a system to control imports given its status as a swordfish

exporting rather than importing State.

3.22 NAFO

The Northwest Atlantic Fisheries Organization requires that 100 percent of its contracting parties carry observers while in the NAFO Regulatory Area (NRA). Not later than January 1, 2001, all vessels of contracting Parties will be required to be equipped with satellite vessel monitoring systems (VMS). Vessels of non-contracting Parties sighted fishing in the NRA are presumed to be undermining NAFO conservation and enforcement measures and must be inspected in a contracting Party port, before any product can be off loaded or transshipped. Within the NRA, non-contracting Parties may be boarded and inspected with the consent of the master.²

3.23 CCAMLR

The Convention on the Conservation on Antarctic Marine Living Resources established a Commission charged with protecting and conserving the marine living resources in the waters surrounding Antarctica. The Convention is based upon an ecosystem approach to the conservation of marine living resources and incorporates standards designed to ensure the conservation of individual populations and species and the Antarctic marine ecosystem as a whole. CCAMLR addresses IUU fishing through measures which require the marking of fishing vessels and gear; specify licensing and inspection obligations of Contracting Parties; encourage cooperation between Contracting Parties to ensure compliance with CCAMLR conservation measures; promote compliance by non-Contracting Party vessels with CCAMLR conservation measures; mandate the use of automated satellite-linked Vessel Monitoring Systems (VMS) on Contracting Party vessels fishing in the Convention Area; and establish a Catch Documentation Scheme (CDS) to track and monitor trade in toothfish. The CDS is designed to reduce unreported and illegal fishing for toothfish currently taking place in the Convention Area and adjacent waters. It does this by requiring that toothfish landed in the ports of CCAMLR parties, transshipped to their vessels or through their ports, or imported into their territories be documented.

3.24 CITES

The Convention on International Trade in Endangered Species of Wild Fauna and Flora was adopted in 1973 and came into force in 1975 and has 143 Parties or members. As a part of this multilateral environmental agreement (MEA), the Parties identify species that are or may be threatened by trade, listing them in Appendix 1. Species that may become threatened if trade in the species is not regulated are listed in Appendix 2. Commercial trade is forbidden for species on Appendix 1 and strictly regulated for species on Appendix 2.

²VMS and observer requirements in NAFO are not trade measures. Lack of compliance with NAFO requirements pertaining to them may, however, trigger landing or other trade restrictions.

4. UNILATERAL ACTION/TRADE EMBARGO

4.1 Tuna/Dolphin

The US Marine Mammal Protection Act (MMPA), as amended, seeks to minimize the mortality of dolphins in the purse seine tuna fishery of the Eastern Pacific Ocean. Until recently, the MMPA prohibited imports of yellowfin tuna from nations whose vessels participating in this fishery had dolphin mortality rates in excess of U.S. standards. As amended in 1997, however, the MMPA permits the importation of such tuna, provided that the harvesting nation is complying with newly agreed multilateral standards for dolphin safety, as set forth in the 1999 Agreement on the International Dolphin Conservation Program.

4.2 Shrimp/Turtle

Public Law 101-162, Section 609, prohibits the importation of shrimp harvested in ways that are harmful to endangered species of sea turtles. This import prohibition does not apply with respect to nations that are certified by the United States as meeting certain criteria relating to the protection of sea turtles in the course of commercial shrimp trawl fishing.

5. OTHER MEASURES

5.1 Blacklists

Blacklists have been suggested as a way to identify and commit to a list vessels engaged in a number of activities including: open registry without adequate flag-State controls, or reflagging to avoid conservation and management measures; non-party fishing in RFMOs; and illegal fishing on the high seas or within a State's EEZ.

5.2 White Lists

There are also "white" lists, such as the one maintained by the South Pacific Fisheries Forum Agency. To fish in the waters of any FFA Member States, a vessel must be in "good standing." CCAMLR also maintains a list of vessels licensed to fish in Convention waters.

5.3 Ecolabels

Whether private sector- or public sector-driven, labeling schemes are market-based opportunities for consumers to express their preferences on where or how a product was harvested or about a myriad other product characteristics.

6. EFFECTIVENESS OF AVAILABLE OPTIONS

6.1 RFMOs or MEAs

The RFMOs and CITES discussed above have three important, fundamental features which should be

incorporated in any future efforts. They are multilateral, they support well-defined conservation goals backed by sound science, and they expressly authorize trade measures as a means to enforce these objectives. These organizations articulate a set of common or shared standards of responsibility for their members and serve as a forum in which to discuss policy issues of mutual interest. The fact that the conservation goals and the role of trade measures in enforcing those goals have been agreed to in advance reduces the likelihood of controversy over trade measures.

6.2 Unilateral Action

Principle 12 of the Rio Declaration, agreed upon at the 1992 Earth Summit, discourages unilateral action but does not proscribe it: "[u]nilateral actions to deal with environmental challenges outside the jurisdiction of the importing State should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus." Despite the Rio Declaration and setting aside the question of world opinion, unilateral action is by definition less effective than multilateral action unless an importing State controls a large share of the market, which does occur but is not the norm. That said, the United States has acted unilaterally to meet conservation goals and has several domestic laws requiring it to do so. In at least one case, the WTO seems to have agreed that the US had, under the facts of the case, the right to do so.

6.3 Labels and Lists

Ecolabels have been contentiously debated in various intergovernmental fora such as the FAO Committee on Fisheries, the UN Committee on Sustainable Development and the WTO Committee on Trade and the Environment. The subject has proven to be a lightning rod for attracting criticism by certain States concerned that ecolabels are a trade barrier in disguise. So contentious are the basic conditions behind ecolabels -- standards of sustainability, certification authority, compliance capability, etc., that it is probably fair to say that FAO-endorsed technical guidelines for a potential ecolabel are not likely to see the light of day any time soon, if ever, leaving the exercise in the hands of national bodies and the private sector.

Blacklists of vessels are commonly cited as a way to address illegal fishing. One State has been distributing a list of vessels they consider to be flying "flags of convenience." It appears this list has been circulated among potential importers of fish in that State. In a sense, a blacklist can be another form of an ecolabel -- a market-based mechanism that allows consumers (or large importers) to make an informed judgment about the source or method of harvesting of the product they are considering purchasing.

Blacklists offer the consumer a choice but present a range of problems if generated without due process. Although NAFO has instituted a "guilty until proven innocent" position on non-Party vessels found fishing in its waters, verification of blacklists will likely lead to accusations of

false identification. Blacklists that are unilaterally assembled and distributed will remain more problematic than lists put together by multilateral organizations, for example, which are based on due process and broad oversight.

"White lists" as used by the FFA and CCAMLR are less problematic. CCAMLR maintains password protected websites, one listing sightings of vessels reported by CCAMLR Members to be fishing in apparent contravention of CCAMLR conservation measures, and a second, providing the details of vessels licensed by CCAMLR Member countries to fish in the Convention Area. The sightings list identifies vessel name, date of sighting, call sign, flag, activity (e.g., apprehended, VMS sighting, steaming, hauling, stationary, fishing), ASD code, latitude and longitude. The licenses list identifies vessel name, call sign, ASD code, target species, gear used, and duration of license. In addition, CCAMLR members notify one another through the CCAMLR Secretariat, of the disposition of prosecutions of apprehended vessels.

7. FRESH DEBATE IN THE FAO

Drawing on the positive experience of the RFMOs and MEAs in using trade measures to meet conservation goals the world's fisheries ministers, meeting at the FAO in 1999, called for the development of a global plan of action to deal *effectively* with all forms of illegal, unregulated and unreported fishing including fishing vessels flying "flags of convenience." Defining precisely what is meant by IUU fishing may ultimately prove futile and perhaps even unnecessary but suffice it to say that illegal, unreported and unregulated fishing contributes to a number of problems, from resource depletion to the miscalculation of biomass, that negatively affect the sustainability of fisheries resources. The tighter the controls by fisheries managers over the world's fish stocks, the more apparent and the more lucrative become the activities of the free riders, illegal fishers, and IUU fishing generally. The most egregious examples of these practices appear to be in the EEZs of some developing countries without resources and infrastructure to properly manage waters under their jurisdiction; on the high seas by members and non-members of RFMOs; and in remote areas where surveillance is often difficult or neglected. A disproportionate amount of IUU fishing appears to be carried out by vessels registered in States with open registries and stateless vessels.

Arriving at an accurate percentage of world trade in fisheries products that can be attributed to IUU fishing may be next to impossible, given the extra-legal nature of the problem.³ However if one takes a species-specific approach, *Dissostichus spp.* for example, it is clear that

³While recognizing the increasing trade in farmed fish and fish products, IUU fishing typically involves wild caught fish. Emphasis throughout this paper will therefore be on wild caught fish.

IUU fishing could contribute to the decimation of a stock and has, therefore, the potential to be a serious problem.

Taking into account the negative effects of IUU fishing on fragile resources a group of experts, serving in their own capacity, met in May 2000 in Sydney to draft an International Plan of Action (IPOA) to prevent, deter and eliminate IUU fishing. The draft IPOA includes a section on market related measures that calls on the international community to take, among other actions, "all steps necessary, consistent with international law, to prevent fish caught by vessels engaged in IUU fishing being imported into their territories or being traded by their natural or legal persons."

8. CONCLUSION

Whether an IPOA is adopted at the FAO that includes trade measures is still subject to debate. What seems important in minimizing challenges to trade measures in support of national and international conservation goals is that they should be transparent and administered in a fair and non-discriminatory manner. The underlying conservation goals must be based on best available science, well defined, and to the extent possible, multilaterally agreed. As highlighted in this paper, recent jurisprudence and the experience of RFMOs may provide useful guidance in designing elements of an IPOA aimed at eliminating IUU fishing particularly if it relies on the use of trade measures.

The lessons learned include that:

- multilaterally agreed conservation goals are most effective
- international agreement on the use of trade measures in support of conservation goals should be sought
- technical assistance should be provided to States, especially developing States, to implement requirements of conservation goals
- adequate time must be provided for States to implement conservation goals
- States should be allowed flexibility in adopting compliance measures to meet conservation goals
- an opportunity for due process should be provided

9. POST SCRIPT

FAO delegates will meet in Rome in October 2000 to consider what action, if any, should be taken to combat IUU fishing. Further consideration by the full Committee on Fisheries (COFI) is expected in February/March of next year. Trade measures which have already proven effective in meeting conservation goals on a regional

basis may be recruited to help do the job globally. Stay tuned.