



Combating Illegal Fishing in the EU: Interaction with WTO Rules

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Summary points

- Two new European regulations entered into force on 1 January 2010. Their aim is to establish a comprehensive system to close the European market to imports of illegally caught fish and to stop illegal activities by EU vessels.
- Some aspects of the regulations raise questions about their compatibility with World Trade Organization rules. Potential flashpoints include trade sanctions against foreign vessels and countries, and the application of different rules to EU and foreign operators.
- It seems more likely that a trade dispute would arise over the application of the regulations than over their provisions, for instance if fish exporters take issue with a specific trade ban, or feel that they have to fulfil more onerous requirements than EU nationals.
- Transparent and fair implementation of the regulations will be important not only to prevent a WTO challenge, but also to ensure that the regulations do indeed meet their objective of curbing illegal fishing.

Introduction

Over the past decade, the international community has increasingly come to recognize the damaging economic, social and environmental impacts of illegal, unreported and unregulated (IUU) fishing. By its very nature, the extent and costs of IUU fishing are difficult to estimate. Numbers tend to range widely; one assessment estimates annual financial losses from illegal and unreported fishing at somewhere between \$10 and 23.5 billion.¹ Even at the low end of this spectrum, the losses are substantial.

The European Union (EU) is not immune to the problem. In a number of European fisheries, IUU fishing is thought to account for one-third to one-half of all catches which could cost over €10 billion of lost catches, over €8 billion of lost stock value and over 27,000 lost jobs in fishing and processing industries by 2020.² Moreover, as the world's largest importer of fish and fish products with a market worth €14 billion annually, the EU presents an attractive destination for both legally and illegally sourced fish. The European Commission estimates that around 10 per cent of seafood imports (over €1.1 billion) could be illegally sourced.³ Until recently, the EU has had little control over the legality of its fish imports.

To address these gaps, two new EU regulations entered into force on 1 January 2010. Together they aim to set up a comprehensive system to ensure the legality of fishing by European vessels and imports of fish harvested by foreign operators. The regulation to prevent, deter and eliminate IUU fishing (the 'IUU Fishing Regulation') provides for a range of control and enforcement measures primarily aimed at keeping illegally caught fish off the European market. The second regulation (commonly referred to as the 'Control Regulation') establishes a modernized system to ensure the compliance of European operators with the rules of the EU's Common Fisheries Policy.

The IUU Fishing Regulation uses various measures to monitor and enforce the legality of fish imports. Other

aspects of the regulation, however, go beyond internationally agreed rules, including a number of measures that could have significant trade impacts. The regulation's broad scope raises questions about its compatibility with the EU's obligations under multilateral trade agreements.

This briefing paper outlines some of the key features of the EU regulations that have the potential to restrict trade and assesses whether the use of these measures could run counter to World Trade Organization rules. The analysis below indicates that a number of flash-points exist where the legality of these regulations relative to WTO rules may be in question. Should a dispute arise, it seems more likely to be over the way the regulations are applied in practice than over the provisions of the regulations themselves.

EU regulations on IUU fishing

IUU Fishing Regulation

The IUU Fishing Regulation⁴ aims to ensure that anyone who wishes to import fish and fish products⁵ to the EU can only do so if the country under whose flag the fish was caught can show that it has in place and enforces laws and regulations to conserve and manage its marine resources. Among other measures, the regulation allows EU member states to ban fish imports if they:

- are not accompanied by a catch certificate,
- were caught by a vessel that has been found to engage in IUU fishing,
- were caught by a vessel included in the EU IUU fishing list, or
- were caught by a vessel flying the flag of a non-cooperating third country.

The catch certificate that has to accompany any imports of fish and fish products caught by third country fishing vessels is a central element of the regulation. The certificate

¹ D. Agnew et al. (2008), *Estimating the Worldwide Extent of Illegal Fishing*, PLoS ONE 4(2).

² Pew Environment Group (2008), *The Costs of IUU Fishing to the EU*, Pew Charitable Trust.

³ DG Mare (2009), 'Fisheries: EU is ready to combat illegal fishing', press release 27-10-09.

⁴ Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing.

⁵ The regulation does not cover aquaculture products and excludes certain fishery products of minor importance in terms of conservation and trade (as listed in the Annex).

is issued by the flag state⁶ of the vessel that originally caught the fish. Catch certificates of a given flag state will only be accepted once that country has confirmed to the European Commission that ‘it has in place national arrangements for the implementation, control and enforcement of laws, regulations and conservation and management measures’. The catch certificate will need to be presented on import to the EU, both by non-EU vessels landing fish in an EU member state and by non-EU processors that obtain fish catches from EU or third country vessels and then export the fish products to the European market.

Trade sanctions can also be imposed on fish caught by vessels found to have engaged in IUU fishing. EU member states can ban imports as an immediate enforcement measure if a vessel has been caught fishing illegally. The European Commission can also add a vessel engaged in IUU fishing to a Community IUU vessel list if the flag state has failed to take action. Imports of fish and fish products from listed vessels to the EU are prohibited. Among other punitive measures, listed vessels will not be allowed to fish in European waters and enter the port of an EU member state. Vessels included in IUU lists of regional fisheries management organizations (RFMOs)⁷ will automatically be added to the Community list.

A country can also be blacklisted by decision of the European Council if it is found to have failed to implement adequate measures to address recurrent IUU fishing activities involving vessels flying its flag, fishing in its waters or using its ports, as well as to prevent access for illegally caught fisheries products to its market. Among others, actions against such so-called ‘non-cooperating third countries’ include a prohibition on imports of fish products caught by vessels flying their flag and a freeze on negotiating new fisheries partnership agreements with the EU to grant European fleets access to listed countries’ waters (as well as consideration of terminating existing agreements). In addition, the EU can implement short-term emergency

measures if actions by a third country undermine the conservation and management measures of RFMOs.

Control Regulation

While the IUU Fishing Regulation in principle also applies to EU vessels, they are exempt from a number of provisions, such as those dealing with port inspections and the requirement to obtain a catch certificate (provided that the catch is not exported to a third country and then re-exported to the EU, or in situations where a third country demands a catch certificate). Instead, EU vessels are covered by the newly revised Control Regulation⁸ which strengthens the system of inspection, monitoring, control, surveillance and enforcement of the Common Fisheries Policy throughout the market chain.

Among its provisions, the Control Regulation requires EU vessels to install satellite-based vessel monitoring systems and keep a detailed logbook. The regulation also obliges member states to put in place certain implementing measures, such as setting up traceability systems for fishery and aquaculture products at all stages of marketing and enforcing the rules of the Common Fisheries Policy. As will be discussed below, the application of different rules to foreigners and nationals, while in principle permitted under WTO rules, could raise questions about WTO compatibility if it amounts to discrimination against non-EU countries.

WTO compatibility

The WTO, which came into existence in 1995, oversees a set of agreements designed to regulate international trade centred around the General Agreement on Tariffs and Trade (GATT). WTO agreements regulate a wide range of trade measures applied to goods and services, including tariffs, standards, border measures, trade-related intellectual property rights and subsidies. At the heart of the WTO systems is a prohibition of discrimination in trade: WTO members are required to provide the same

⁶ The ‘flag state’ is the state which has granted to a vessel the right to sail under its flag and which has the exclusive right to exercise legislative and enforcement jurisdiction over its vessels on the high seas.

⁷ RFMOs are international organizations dedicated to the sustainable management of fishery resources in a particular region of international waters, or of highly migratory species.

⁸ Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the Common Fisheries Policy.

trade advantages to all trading partners (commonly referred to as the ‘most favoured nation’ principle),⁹ and discrimination between nationals and foreigners (referred to as ‘national treatment’) is not allowed.

The WTO’s dispute settlement system – through its panels and the Appellate Body – provides a space for WTO members to settle trade disputes. When examining the likelihood of a trade dispute, it is important to bear in mind that in the WTO system a dispute will only arise if a WTO member decides to challenge a particular trade measure. Thus, the issue is not so much whether the EU regulations are compatible with WTO rules in theory, but rather which aspects of the regulations or their application are most likely to be challenged in practice.

How disputes may pan out is difficult to predict; decisions by WTO panels and the Appellate Body usually take many months, with numerous submissions from both sides and rulings that can run into hundreds of pages. Nevertheless, a look at existing WTO cases can give an idea of how the dispute settlement body has decided on similar issues in the past and highlight those areas where jurisprudence is still lacking.¹⁰

Can the EU impose unilateral import bans for environmental purposes?

As outlined above, under the IUU Fishing Regulation EU member states can, under certain circumstances, prohibit imports of fish and fish products. It is likely that such measures would be classified as ‘quantitative restrictions’ – generally understood to include a range of import restraints other than ‘duties, taxes or other charges’¹¹ – and would therefore be prohibited.

A member state may nevertheless be allowed to impose a ban if it can justify the measure under Article XX of the GATT which lists a number of exceptions to WTO members’ obligations under the GATT. One such exception includes measures ‘relating to the conservation of exhaustible natural resources’ under Article XX(g). Importantly, such measures should not discriminate between countries or constitute a

disguised restriction on international trade. These conditions are meant to prevent the abuse of the rights provided by Article XX. To what extent this Article can be used to justify trade measures aimed at the conservation of marine resources has already been tested in one of the most well-known WTO disputes – the *Shrimp-turtle* case (Box 1).

When assessing whether the import bans could be justified under Article XX(g), a number of questions may arise:

- Does the trade measure indeed promote the conservation of exhaustible natural resources or does it constitute a disguised barrier to trade?
- Is the measure applied in a way that leads to discrimination between domestic and foreign producers or between different countries?
- Is the EU allowed to justify trade measures on environmental grounds if it seeks to address environmental impact outside its national jurisdiction (‘extraterritoriality’ in WTO jargon)?
- Is the measure based on multilaterally agreed norms or agreements?

Linking the trade measure to the policy objective

As a first step, it would need to be shown that the import ban relates to the conservation of exhaustible natural resources. On the face of it, this seems straightforward given that the aim of the measure is to curb IUU fishing. After all, the International Plan of Action to combat IUU fishing (IPOA-IUU) explicitly states that ‘IUU fishing undermines efforts to conserve and manage fish stocks in all capture fisheries’. In the WTO context, however, this assessment can require a number of analytical steps. Even if the policy objective (combating IUU fishing) is judged to be legitimate, it would still need to be shown that there is indeed a relationship between the disputed measure and the policy objective. This is important to ensure that trade measures (which are ostensibly motivated by environmental objectives) are not in fact used to favour domestic producers (also referred to as ‘green protectionism’).

⁹ Exceptions include preferential treatment of developing countries, regional free trade areas and customs unions (subject to certain conditions as set out in the WTO agreements).

¹⁰ The following analysis draws on N. Bernasconi et al. (2006), *Environment and Trade: A Guide to WTO Jurisprudence*, Earthscan, and P. Sands (2003), *Principles of International Environmental Law*, Cambridge University Press.

¹¹ Article XI of the GATT.

Box 1: *Shrimp-turtle case*

In 1997, India, Malaysia, Pakistan and Thailand launched a dispute procedure against the US over a ban imposed on imports of certain shrimp and shrimp products from the Asian countries. The ban was justified by a US regulation that prohibited the importation of shrimp if they were harvested in a way that adversely affected endangered sea turtles. Imports from harvest countries certified by the US as having a programme in place to prevent incidental turtle mortality or a fishing environment that did not pose risks to sea turtles were permitted. Exporters had to submit a declaration stating that catches were made in certified harvest countries' waters or under conditions that did not harm sea turtles.

The Appellate Body^a ruled in favour of the complaining countries. While it did not object to the US law as such, it felt that the US had contravened WTO rules by discriminating between WTO members in the application of the law. First, the US had not negotiated bilateral or multilateral agreements for the protection and conservation of sea turtles with the complaining countries before enforcing the import prohibition, but had done so with others. Second, the US had not made the same effort to transfer the required fishing technology (turtle excluder devices) to all countries. The Appellate Body also took issue with the way that harvest countries were certified, describing the US approach as 'singularly informal and casual' (para. 181). Moreover, the Appellate Body criticized the US regulation for not providing exporting countries with sufficient flexibility to implement programmes suitable for their different conditions, but essentially required them to adopt the same programme as the US.

Malaysia brought a second case against the revised guidelines that the US had adopted in response to the WTO ruling. Here, the Appellate Body sided with the US, concluding that the revised guidelines were compatible with WTO rules.

a. WTO (1998) *United States - Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body*, T/DS58/AB/R.

Avoiding discrimination between countries

Even if a measure can be justified as an exception under Article XX(g), it will still need to be applied in a way that does not constitute 'arbitrary or unjustifiable discrimination between countries where the same conditions prevail' (under the chapeau of Article XX). The focus here is on the *application* of the measure, rather than the measure itself. Thus, to what extent the EU may be discriminating between countries will depend on how the regulation is applied in practice. The *Shrimp-turtle* ruling in particular provides some useful lessons for the IUU Fishing Regulation in this regard:

- The acceptance of the initial notification by flag states of their competent authorities and conservation measures, and the decision to blacklist IUU vessels or non-cooperating third countries should be done in an open and transparent manner, including explanations of how the decisions were taken and an opportunity for countries to appeal.

- Any capacity-building or technology transfer related to the implementation of the IUU Fishing Regulation should be made available across the board.
- The EU should make equal efforts to engage bilaterally or multilaterally with countries before imposing unilateral trade sanctions.
- Exporting countries should be given sufficient flexibility to implement locally adapted regulations and enforcement measures to comply with the IUU Fishing Regulation.

Extraterritoriality

Another important issue is whether the EU can impose a trade measure (an import ban on certain fish products) for an environmental objective (to curb IUU fishing) if the effects are felt outside its territory. WTO jurisprudence on this question has not been conclusive. Some rulings have assessed whether there has been a sufficient 'nexus' between the policy objective to be achieved and the country enacting the measure. In the *Shrimp-turtle*

case, for instance, this nexus was thought to exist since the turtles also traversed US waters. It may be feasible for the EU to argue that a sufficient nexus exists where fisheries resources are shared (for instance in areas of the high seas where EU distant water fleets are operating or in the waters of coastal states where the EU has concluded agreements to grant access to its vessels). The EU's case may be more difficult where its fleet does not have existing or future fishing interests.

A multilateral basis for unilateral trade measures

In general, measures are likely to be more acceptable in the WTO context if they have a multilateral basis. The *effort* made to find a multilateral solution before imposing a unilateral measure is also relevant, even if no agreement was actually concluded.¹² In the case of the different import bans under the EU regulation outlined above, the level of support through multilateral agreements differs somewhat, both in terms of the extent to which the different types of trade sanctions are included in international agreements and with regard to the geographical scope of the agreements that include certain trade sanctions.

Regarding the catch certificate, international support for conditioning market access on the submission of documentation to certify the legality of fish catches is quite widespread. Several RFMOs¹³ have introduced so-called catch documentation schemes, with the explicit support of the IPOA-IUU which lists 'multilateral catch documentation and certification requirements' as a possible trade-related measure to address IUU fishing. Moreover, the Agreement on Port State Measures (APSM) provides that parties shall require a minimum set of information that it deems necessary before granting entry to ports.¹⁴ The IPOA also explicitly states, however, that 'unilateral trade-related measures should be avoided'.

Some RFMOs also allow for measures to be taken against individual vessels that are found to violate the RFMOs' conservation and management measures, including against non-member vessels.¹⁵ Many of the RFMOs blacklist non-member vessels found to have been fishing illegally and apply certain enforcement actions (such as denial of port entry or trade sanctions). However, measures against entire flag states that are not members of the RFMO (hence similar to measures against non-cooperation third countries under the EU IUU Fishing Regulation) are not common.¹⁶ RFMOs also differ from the EU regulation in that they are usually concerned with fisheries within or traversing the waters they cover, which is not necessarily the case for the EU.

This analysis suggests that for imports of fish covered by RFMOs that use comparable measures (including *vis-à-vis* non-members), the EU's case for the 'multilateral basis' of a trade ban would be stronger than for imports not covered by RFMOs or covered by RFMOs that do not provide for the use of an equivalent trade measure. Nevertheless it could be argued that the application of similar trade measures by certain RFMOs (some of which have a sizeable membership) shows that – at least with regard to trade bans related to the catch certificate and IUU vessel lists – there is widespread (albeit not universal) international support for the usefulness of such measures.

Is the application of different rules for EU and non-EU operators discriminatory?

Under the 'national treatment' principle, WTO members are not allowed to discriminate between nationals and foreigners. Specifically, WTO law states that any foreign-origin product 'shall be accorded treatment no less favourable than that accorded to like products of national

¹² See, for instance, the ruling of the Appellate Body in the *Shrimp-turtle* case.

¹³ Such as the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR), the Commission for the Conservation of Southern Bluefin Tuna (CCSBT) and the International Commission for the Conservation of Atlantic Tunas (ICCAT), the Inter-American-Tropical-Tuna-Commission (IATTC) and the Indian Ocean Tuna Commission (IOTC).

¹⁴ Article 8.1 and Annex A of the APSM, which was adopted in November 2009 and will enter into force 30 days after it is ratified by 25 countries.

¹⁵ Such as the CCSBT, IATTC, ICCAT and IOTC.

¹⁶ The only example is CCAMLR which has adopted a resolution on so-called 'flags of non-compliance' suggesting that any vessels flying such flags would be regarded as IUU vessels. So far, however, no agreement has been reached on whether this should be a binding measure with associated actions. See M. Lodge et al. (2007), *Recommended Best Practices for Regional Fisheries Management Organizations* (London: Chatham House).

Table 1: Broad comparison of the EU IUU Fishing and Control Regulations

Control Regulation	IUU Fishing Regulation
EU vessels are not required to submit a catch certificate. (Note: Under the IUU Fishing Regulation, a certificate is needed if the EU-caught fish are exported and then re-imported to the EU market or if demanded by a third country.)	Foreign operators are required to submit a catch certificate issued by the flag state.
Products from EU operators are subject to traceability systems to be put in place by the member states.	For foreign-caught and re-imported EU-caught fish, the catch certificate will need to be passed along the supply chain.
EU vessels are subject to a number of monitoring requirements, such as mandatory satellite-based Vessel Monitoring Systems and logbooks.	Monitoring requirements for foreign vessels are decided by the flag state and notified to the European Commission.
Enforcement measures are decided and implemented by each member state (with some guidelines).	Foreign operators are subject to enforcement measures set out in the regulation (with some flexibilities for member states' measures).
Inspections are carried out by member state officials and Community inspectors (no minimum number of inspections).	Member states will carry out inspections in their designated ports of at least 5% of landing and transshipment operations by non-EU vessels.
No provisions for an IUU vessel list. (Note: Under the IUU Fishing Regulation, EU vessels will be added to the EU IUU vessel list if the flag member state has not taken the necessary enforcement measures.)	Foreign vessels will be added to the EU IUU vessel list if their flag states have not complied with the official request to take the necessary measures.
The Commission can suspend or cancel financial assistance to a member state, temporarily close fisheries or deduct from a member state's fishing quotas/efforts in certain cases of non-compliance with Common Fisheries Policy rules.	Non-EU countries can be designated as non-cooperating third countries if they do not implement adequate measures to address recurrent IUU fishing activities by their nationals.

origin in respect of all laws'.¹⁷ As noted above, the EU applies different sets of rules to address IUU fishing by foreigners and nationals. Under WTO law, the EU is free to do so, provided that such different treatment does not amount to discrimination. Some of the differences between requirements in the IUU Fishing Regulation and the Control Regulation are set out in Table 1.

The EU can get support for some of the measures applied specifically to foreign vessels from the Agreement on Port State Measures. The agreement sets out a range of measures for a member state to take 'in respect of *vessels not entitled to fly its flag* that are seeking entry to its ports or are in one of its ports', such as procedures for port inspections or for granting access to ports.¹⁸ The agreement largely leaves it up to the parties to decide how they deal with their nationals.

Under WTO law, the EU is allowed to apply different rules to foreigners and nationals as long as the rules applied to foreigners do not result in 'less favourable' treatment. What such treatment would constitute is not

defined. A number of WTO cases have dealt with this question.¹⁹ The broad conclusion has been that the application of different rules should not distort competition in a way that results in protection for domestic production.

The application of different rules may become contentious where EU vessels are fishing overseas alongside foreign vessels but do not have to fulfil the same requirements to bring their fish into the EU. A scenario could be envisaged where foreign vessels complain that the need to procure a catch certificate from their flag state adds administrative steps and possible delays that could disadvantage them *vis-à-vis* their EU competitors.

How a panel would rule should a dispute over the EU regulations arise will very much depend on how the two regulations are applied in practice – for instance the comparability of the catch certification scheme under the IUU Fishing Regulation and the traceability systems to be developed by member states under the Control Regulation, or the comparability of enforcement measures taken against foreign and EU vessels under the two regulations.

¹⁷ Article 3 of the GATT. The same principle applies to services under Article XVII of the General Agreement on Trade in Services.

¹⁸ Article 3.1 (emphasis added).

¹⁹ E.g. Korea – Beef, EC – Asbestos AB, United States – Taxes on Petroleum and Certain Imported Substances (see Bernasconi et al., 2006, note 11 above).

Conclusions

What is the likelihood of a dispute arising over the EU regulations? It seems unlikely that countries would challenge the IUU Fishing Regulation itself. So far, no country has (officially) expressed concerns over the WTO compatibility of the regulation. Indeed, many flag states have already submitted the required information to the European Commission in order for their catch certificate to be accepted and are moving to implement the necessary measures to comply with the regulation.²⁰

Some of the general provisions of the EU IUU Fishing Regulation may become contentious if non-EU flag states feel that the application of different rules for foreigners and EU nationals puts their operators at a competitive disadvantage.

It seems more likely, however, that disagreements would arise over a specific trade measure taken under the regulation. Alleged discrimination between countries and questions over how the decision to impose a trade ban was reached could become contentious issues in this context. Some (purely hypothetical) questions could include the following. Has the EU provided more support or leniency to some countries than others? Has the EU made equal efforts to negotiate multilateral catch documentation schemes with all regions? Does a specific ban target a species where the EU does not have a fishing interest? Has the EU made sufficient effort to collaborate with a country before designating it as a non-cooperating third country or adding one of its vessels to the EU IUU vessel list?

Much will hinge on how the two regulations are implemented in the coming months and years. Progress in both areas will undoubtedly be closely watched by the many foreign operators interested in the EU's lucrative fish market. To date, many European businesses and trading partners, while raising some specific concerns, have broadly supported the EU's efforts to combat IUU fishing. Transparent and fair implementation of the regulations will be crucial not only to prevent a WTO challenge, but also to ensure their continued willingness to engage as a prerequisite for the effective implementation of the measures.

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For more details and further information on IUU fishing, see the specialist website www.illegal-fishing.info maintained by Chatham House.

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²⁰ By 13 January 2010, 77 flag states had submitted complete notifications of their competent authorities, among them many of the EU's main suppliers of fish products, such as Norway, China, the US and Iceland.