Enhancing the Effectiveness of Regional Fisheries Management Organizations through Trade and Market Measures

Richard Tarasofsky, Chatham House

Summary

- Regional Fisheries Management Organizations (RFMOs) can make more effective use of trade and market measures in achieving their objectives.
- There is some, but incomplete, evidence that trade sanctions have been shown to have some impact on countries that are not complying with RFMO standards.
- Independent third-party certification schemes, based on chain-of-custody, can usefully reinforce RFMO catch documentation schemes.
- ‘Leakage’ is a major problem: more needs to be done to prevent outlawed vessels from simply reflagging.

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Introduction

Trade and market measures can be enhanced by policy-makers in RFMOs in order to better achieve RFMO aims. By complementing and accompanying measures relating to access to fish, quotas and gear, trade and market measures can be the glue that cements the effectiveness of a regional fisheries management regime. However great this potential, the reality is that it is not being realized by RFMOs. Achieving this potential requires a better understanding of what such measures can achieve, their legal basis, and the experience so far with measures used by RFMOs.

How can trade and market measures contribute to achieving RFMO objectives?

Managing fisheries beyond territorial seas is inherently challenging. The 1982 UN Convention on the Law of the Sea placed responsibility on flag states to comply with RFMO measures in exclusive economic zones and on the high seas. This proved ineffective, because some flag states intentionally did not enforce such rules and others did not have the capacity to do so, even if they wished to. The result was a large increase in illegal, unregulated and unreported (IUU) fishing, because such vessels had little to fear by not complying.

Trade and market measures can be powerful economic levers that RFMOs can deploy to reinforce their rules. Such measures have the following purposes:

- Create negative incentives to deter non-compliance with RFMO objectives aimed at removing the profitability of such non-compliant behaviour;
- Create positive incentives for non-compliers to seek to join the RFMO or at least become cooperating non-parties that comply with the objectives of the RFMO, by removing competitive advantages arising from non-compliant fishing;
- Provide information on the amount of fish in trade, and which countries are involved.

These kinds of incentives are needed not only against vessels flying ‘flags of convenience’, which are inherently unlikely to comply with RFMO standards. They are also needed because the traditional membership criteria of RFMOs (based on having a ‘real interest’, i.e. being a coastal state or having fished for those fish in the high seas) are not always flexible enough to allow all the relevant port and market states to join RFMOs, even if they wanted to.

These measures are also illustrative of a trend towards moving away from reliance only on flag states for enforcement of conservation and management, to developing an increasing role for port and market states. Success, however, will depend on both the robustness of those measures and also cooperation between states in ensuring that that these measures are not undermined.

Types of trade measures emanating from RFMOs

- Documentation schemes based on either catch or trade required as a condition of landing or transhipments;
- Prohibiting landings and transhipments (to RFMO parties) from particular vessels;
- Trade-restrictive measures, such as import bans, against parties or non-parties, in fish products covered by an RFMO; and
- Certification and labelling of fish products entering the market.

Legal basis for trade measures

RFMO treaties often contain the legal basis for taking trade and marketing measures – or at least enable the governing bodies to make such decisions. Before examining these in more detail, it is worth noting that several global instruments also provide a legal basis. The most important is the UN Fish Stocks Agreement (UNFSA), which established RFMOs as the primary vehicle for the conservation and management of the world’s fisheries. The UNFSA states that RFMOs may take measures ‘consistent with this Agreement and international law’ to deter activities of non-party vessels that undermine the effectiveness of RFMO conservation and management measures. Port states are also permitted to prohibit landings and transhipments where the catch has been taken in a manner that undermines the effectiveness of RFMOs. The UNFSA also affirms the centrality of the ‘precautionary approach’ to the conservation and management of fish stocks.

Other agreements are also relevant. The FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing
Vessels on the High Seas requires parties to cooperate, in a manner consistent with the Agreement and international law, to ensure that vessels of non-parties do not engage in activities that undermine the effectiveness of international conservation and management measures.

The FAO Code of Conduct for Responsible Fisheries, a non-legally binding instrument adopted in 1995, stipulates that international trade in fish and fisheries products should be in accordance with the principles, rights and obligations established in the WTO Agreements. In addition, the Code of Conduct expresses support for the application of the precautionary approach, as well as measures to ensure compliance.

The International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, although not legally binding, is significant because provisions concerning trade are so detailed. According to the Plan, where a port state has clear evidence that a vessel granted access to its ports has been engaged in IUU fishing, that vessel should not be allowed to land or tranship fish in the ports of that state. The Plan allows RFMOs to establish port state measures based on the presumption that non-party vessels which have not agreed to cooperate with the applicable RFMO are engaged in IUU fishing. Such port state measures may include prohibiting landings and transshipments, unless the vessel can establish that the catch was taken in a manner consistent with the conservation and management measures of the applicable RFMO. States are to take all steps consistent with international law to prevent fish from vessels identified by RFMOs as engaging in IUU fishing from being traded or imported into their territories. RFMOs are to identify these vessels through ‘agreed

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<th>TABLE 1: TRADE-RELATED MEASURES IN PLACE IN MAJOR RFMOs</th>
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Notes:

a CCAMLR considered a proposal for trade sanctions at its 2006 meeting and agreed to develop draft measures intersessionally for reconsideration in 2007.
b The CCSBT considered a proposal for a catch documentation scheme at its October 2006 meeting. The Commission agreed to further development of this proposal (CCSBT, Report of the Thirteenth Annual Meeting of the Commission, 10–13 October 2006, Mizazaki, Japan, available at [http://www.ccsbt.org/docs/meeting_r.html](http://www.ccsbt.org/docs/meeting_r.html)).
c The WCPFC will consider proposals for development of a catch/trade documentation scheme for Bigeye Tuna at its December 2007 meeting.

Key:

- CCAMLR Commission for the Conservation of Antarctic Marine Living Resources
- CCSBT Commission for the Conservation of Southern Bluefin Tuna
- GFCM General Fisheries Commission for the Mediterranean
- IATTC Inter-American Tropical Tuna Commission
- ICCAT International Commission for the Conservation of Atlantic Tunas
- NAFO Northwest Atlantic Fisheries Organization
- NEAFC North East Atlantic Fisheries Commission
- SEAFO South East Atlantic Fisheries Organization
- WCPFC Western and Central Pacific Fisheries Commission
 procedures in a fair, transparent and non-discriminatory manner’. The Plan recognizes the supplementary role that multilaterally agreed catch documentation and certification can play. It calls for certification and documentation requirements to be standardized, to the extent feasible, to avoid unnecessary burdens on trade. Furthermore, the Plan provides that stock- or species-specific trade-related measures may be necessary to reduce or eliminate the economic incentive for vessels to engage in IUU fishing, although this does not specify whether RFMOs are the appropriate bodies to develop these measures. The Plan places some limitations on using trade-related measures. They should only be used in exceptional circumstances, or where other measures have proved unsuccessful, and only after prior consultation with interested states. Furthermore, unilateral trade-related measures are to be avoided. The emphasis on multilateralism is affirmed by calling on RFMOs to adopt multilaterally agreed trade-related measures, consistent with the WTO, to prevent, deter and eliminate IUU fishing.

There are important differences in the way import bans have been applied (see Table 1). In some cases, cooperating non-members can enjoy the same benefits as members vis-à-vis sanctions (IAATC, ICCAT, IO TC). ICCAT and CCSBT require their members to impose trade sanctions against flag states whose vessels have undermined the conservation and management measures of those RFMOs. In the case of ICCAT, this can be against member and non-member countries, while under the CCSBT, it is only against non-members. Under ICCAT, sanctions have been taken against countries involved in the Swordfish and Bigeye Tuna fisheries. Subsequent to being the target of such sanctions, Panama and Honduras became contracting parties of ICCAT. However, unless all relevant flag states effectively monitor their vessels in a meticulous fashion, it is possible for vessels to reflag to countries that are more lax in this respect. The CCSBT has identified countries whose vessels are undermining the effectiveness of its conservation and management measures, but so far has not developed trade sanctions against them.

Some RFMOs provide for the use of ‘quality marks’, which can be a basis for parties to develop certification and labelling schemes, multilaterally or unilaterally. So far, RFO quality marks have not been used extensively as market-based instruments designed to influence consumer behaviour, with the exception of the International Dolphin Conservation Program (IDCP), under the auspices of the Inter-American Tropical Tuna Commission (IATTC). This programme was established by the Agreement on the International Dolphin Conservation Program (AIDCP).

A key element of the programme is a voluntary certification and labelling scheme, based on a system for tracking and verifying tuna harvest in accordance with specified elements. A set of procedures for using the ‘AIDCP Dolphin-Safe’ labels has been agreed, should states choose to implement the scheme.

It is also not inconceivable that some RFMOs might consider linking their catch-documentation schemes (CDS) to certification schemes that involve states or private operators. For example, there is some experience that the British Overseas Territories of South Georgia and South Sandwich Islands sought to achieve Marine Stewardship Council (MSC) certification for Patagonian toothfish, which is covered by CCAMLR. The MSC’s fishery and chain-of-custody certifications – both of which were applied in this instance – are based on independent third-party auditing, which is stronger that CCAMLR CDS in preventing circumvention of traceability of fish after it has been landed. It is too soon to assess whether the market benefits of MSC certification have offset the costs in this particular case. There is no reason of principle, however, why industry certification schemes could not be applied successfully across international fisheries.

Are these measures WTO-compatible?

The rules of the World Trade Organization might impact on the trade and market measures adopted by RFMOs and implemented by member countries. Decision-makers need to be aware of this, not only because coherence is a virtue to be striven for in international governance, but because the WTO has a very powerful dispute settlement mechanism. This dispute settlement mechanism allows a single WTO member to trigger a case against any other WTO member (most international tribunals require the consent of both parties) and its decisions have real economic consequences for the countries concerned. The most likely scenario of such a measure being challenged as WTO-incompatible would be from a non-party to the RFMO complaining that another member implementing such a measure is infringing its WTO rights.

The WTO contains rules that aim to limit friction between trade measures and WTO rules:

• Use of import prohibitions against countries or landing and transhipping prohibitions against individual vessels, especially if they are meant to uphold conservation and management measures based on the precautionary principle.
Certification and labelling of fish aimed at the consumer market.

Although a definitive view cannot be expressed on the compatibility of RFMO trade and market measures with WTO rules until a WTO dispute has actually been heard, it is possible to extrapolate from the jurisprudence. A number of cases over the past decade have shed light on how some of the relevant WTO provisions have been applied to trade measures relating to management of natural resources. While import prohibitions would be *prima facie* incompatible with the WTO, the exceptions to those rules might save them if:

- there is a multilateral basis for the trade measures – the more it looks as if a single country is trying to use its economic clout to influence the policies of another, the more difficult it might be to justify.

- the decision-making process is transparent, and the decision to apply trade measures is taken after other alternative measures have failed.

- the design of the measures takes account of the interests of the main trading partners, including the capacity of developing countries to comply.

Factors which might undermine the RFMO measures include:

- whether the conservation and management measures have sufficient scientific basis, since the precautionary principle has not been recognized by the WTO as a principle of international law.

- the extent to which trade measures are meant to exclude non-parties from joining RFMOs and becoming entitled to fishing quotas.

It is more difficult to predict the outcome of a WTO challenge based on certification and labelling, because there is very little jurisprudence. One important factor is whether the certification and labelling is voluntary or mandatory – a WTO dispute settlement panel may look more closely at a mandatory scheme. However, even if the scheme is voluntary, such as the IDCP, there is an open question as to whether the WTO Agreement on Technical Barriers to Trade permits standards that are not based directly on the physical characteristics of the product. To the extent that such standards can be considered ‘international standards’, then they are presumed to be incompatible with the WTO. It is not clear whether a regional standard (i.e. from an RFMO) would be considered as an international standard.

Experience to date

Experience with catch documentation schemes, such as those under the CCAMLR or ICCAT, has not been deep enough to draw firm conclusions. There is little evidence that trade documentation schemes (TDS) have had much of an impact, while there may be evidence that the CCAMLR CDS has reduced IUU fishing and trade. There are a number of factors that play a role in the effectiveness of these schemes: involvement of all states in the supply chain, political will to implement the schemes, sufficient capacity, and the form and content of documentation. However, the potential for mislabelling or falsifying information is great, since customs officials do not always scrutinize shipments carefully and some species can be easily disguised as other species, especially in fillet form. The potential for abuse and evasion of these schemes can be diminished by harmonizing schemes and by use of complementary instruments, such as independent monitors and centralized vessel monitoring systems. Independent certification and labelling schemes can reinforce RFMO documentation schemes, but they are not always feasible.

Experience with restrictions on vessels has also been mixed. So far, black and white lists have had limited enduring impact, since it is often easy for a vessel to reflag under a different name. One problem is that RFMO parties resist the listing of their own vessels on black lists, even for the few RFMOs that provide for this possibility. Most lists are not independently verified. And there is little transparency or information-sharing between RFMOs. A recent resolution of the tuna RFMOs urged the creation of a harmonized list, which would be useful in strengthening this instrument. Prohibitions on landings and transhipments – which are linked to vessel lists – can only be effective to the extent that there exists a comprehensive set of port state measures that is not only adopted but also implemented.

Sanctions against states have been applied in a few cases under ICCAT, and Panama and Honduras did join ICCAT subsequently. Despite this success, CCSBT has refrained from taking the ultimate step of imposing trade sanctions against the countries that are not cooperating with its Commission, out of concern for, inter alia, WTO consistency, consistency of approach with other countries, and uncertainty about whether non-cooperation is intentional. In addition, it appears that even when sanctions have been applied, the ease in which vessels can reflag to other countries with lax administrations undermines the impact of these measures.
Choppy waters ahead?

As RFMOs face growing pressure to become more effective, it can be expected that they will intensify their use of trade and market mechanisms. At the 2006 UNFSA Review Conference a number of recommendations were agreed relating to the strengthening of trade-related measures, particularly with regard to addressing IUU fishing:

- adopt stringent measures to regulate transhipment, in particular at-sea transhipment.
- adopt all necessary port state measures, consistent with Article 23 of the UNFSA and particularly those envisioned in the Food and Agriculture Organization (FAO) Model Scheme on Port State Measures to Combat IUU Fishing (the Model Scheme).
- take necessary measures, consistent with international law, to ensure that only fish that have been taken in accordance with applicable conservation and management measures reach their markets, and take steps consistent with national and international law to require those involved in fish trade to cooperate fully to this end (United Nations General Assembly (UNGA), 2006).

Improving documentation schemes and complementary measures is on the agenda of several RFMOs. New certification and labelling of fish may emanate from or dovetail with these schemes, as this tool has been shown to have promise. It is also likely that the use of trade restrictions will continue, mainly in relation to individual vessels, but also in a limited fashion against countries.

The impact of such measures is likely to depend on a number of factors. One is whether there is policy uncertainty arising out of possible dissonance with WTO rules. Although a global clarification of the relationship between the WTO and other international agreements does not seem imminent, the WTO jurisprudence suggests that many of the problematic aspects can be avoided through the design and implementation of trade measures. Complementary instruments, including independent certification and labelling schemes and vessel monitoring systems, will enhance the impact of the trade measures. Such complementary instruments have costs that may be beyond some RFMO developing-country members. RFMOs do not normally contain instruments to provide financial assistance, but it may become necessary to apply some of the experience in international environmental agreements of providing financial and technical assistance, as well as technology transfer. Finally, political and economic will by all states involved in the fishery remains essential to creating a tight system. In making decisions about how to allocate political and economic resources, RFMO parties will continue to have to find the right balance between enforcing measures against IUU by non-parties, as against tightening up the management of fisheries by the RFMO members themselves.

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Chatham House Independent Panel on Improved Governance of RFMOs

This Briefing Paper is being produced in conjunction with an independent high-level panel on improved governance of RFMOs, which was established by Chatham House in August 2006.

The panel has been commissioned by the Governments of Australia, Canada, New Zealand and the United Kingdom in partnership with the international conservation organizations WWF International and IUCN. Its purpose is to develop a model for improved RFMO governance based on an analysis of best practices worldwide. Chatham House has been selected as the host institution in order to demonstrate that the panel is independent of any of the commissioning governments and organizations but at the same time ensure that the quality and integrity of the panel’s work meet established and objective standards of excellence.

The panel stems from the work of the ministerially led Task Force on IUU Fishing on the High Seas (the High Seas Task Force), which presented its final report in March 2006. Its primary aim is to promote better governance on the high seas. The panel’s report will also provide guidance for assessing RFMO performance in relation to international fishery instruments. It should therefore facilitate some measure of comparability and comprehensiveness in assessing performance, but should also address important new and emerging issues of concern:

- How can an ecosystem-based and precautionary approach to management be applied? What lessons can be learned from other sectors?
- What market-related measures could members of RFMOs apply better and how do they fit in with WTO requirements?
- How can flag states that do not enforce controls be dealt with? Is there scope for elaborating a requirement that to fish in the area, flag states must be able to show satisfactory performance standards. Should further measures be implemented to address fishing by vessels flying under flags of non-members?
- What is the scope for building on the FAO model port state scheme in RFMO measures?
- What are the best options for decision-making?

Other Chatham House Briefing Papers prepared under this project include:

*Managing International Fisheries: Improving Fisheries Governance by Strengthening Regional Fisheries Management Organizations*
Michael Lodge, March 2007

*Best Practices for High Seas Fisheries Management: Lessons Learned*
Marjorie L. Mooney-Seus and Andrew A. Rosenberg, May 2007

Forthcoming RFMO panel report:
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