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Trade-Related Measures to Address Illegal, Unreported and Unregulated Fishing

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Think Piece

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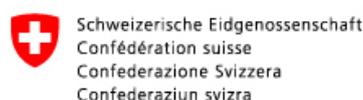
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ABSTRACT

Illegal, unreported and unregulated (IUU) fishing is a major problem with worldwide social, environmental, and economic impacts. Commonly linked to fish piracy or seafood fraud, IUU fishing describes fishing that violates international, regional, or domestic fisheries management, conservation, or reporting laws. As well as being a major contributor to the global ecological crisis of overfishing and biodiversity depletion, IUU fishing harms legitimate fishing activities and livelihoods, jeopardises food security, consolidates transnational crime, distorts markets, and undermines ongoing efforts to implement sustainable fisheries policies. There are similarities between IUU fishing and the illegal logging that deprives developing countries of valuable exports and taxes, impacts the livelihood of indigenous peoples and forest-dwelling communities, and causes massive deforestation and biodiversity depletion. Effective regulatory oversight and implementation of these activities is essential to avoid major adverse implications for present and future livelihoods that extend beyond fisheries (or forestry) to ecological balance itself. In order to solve these problems, measures that impose stringent import documentation, certification, or traceability requirements, regulate transshipment, or prohibit the trade in relevant products are very important. As with every major regulatory policy, such measures are likely to affect the existing conditions of trade between countries, many of whom are members of the World Trade Organization (WTO). This think-piece provides a comparative legal analysis of such measures and initiatives, and concludes with recommendations for governments, international organisations, private actors, and the global community.

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LIST OF ABBREVIATIONS

AIPCE	European Fish Processors and Export/Import Association	NAFTA	North American Free Trade Agreement
ASCM	Agreement on Subsidies and Countervailing Measures	NEAFC	North East Atlantic Fisheries Commission
CBP	Customs and Border Protection	NGOs	non-government organisations
CCAMLR	Commission for the Conservation of Antarctic Marine Living Resources	NOAA	National Oceanic and Atmospheric Administration
CITES	Convention on the International Trade in Endangered Species of Wild Flora and Fauna	PNG	Papua New Guinea
COP	Conferences of the Parties	REDD+	Reducing Emissions from Deforestation and Forest Degradation
CTE	Committee on Trade and Environment	RFMOs	regional fisheries management organizations
EEZ	exclusive economic zone	RTAs	regional trade agreements
EU	European Union	SEAFO	South East Atlantic Fisheries Organisation
FAO	Food and Agriculture Organization	SRFC	Sub-Regional Fisheries Commission
FDA	Food and Drug Administration	TBT	Technical Barriers to Trade
FIPs	Fisheries Improvement Programmes	TPP	Trans-Pacific Partnership
FLEGT	Forest Law Enforcement, Governance and Trade	UK	United Kingdom
FSC	Forest Stewardship Council	UN	United Nations
GATT	General Agreement on Tariffs and Trade	UNDP	United Nations Development Programme
ICCAT	International Commission for the Conservation of Atlantic Tunas	UNEP	United Nations Environment Programme
Interpol	International Criminal Police Organization	UNFCC	United Nations Framework Convention on Climate Change
IOTC	Indian Ocean Tuna Commission	US	United States
IPOA-IUU Fishing	Fishing International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing	VPA	Voluntary Partner Agreement
ITLOS	International Tribunal for the Law of the Sea	WTO	World Trade Organization
IUU	Illegal, unreported and unregulated		
MFN	most favoured nation		
MPAs	marine protected areas		
MSC	Marine Stewardship Council		
NAFO	Northwest Atlantic Fisheries Organization		

EXECUTIVE SUMMARY

Current approaches to address illegal, unreported and unregulated (IUU) fishing increasingly depend on methods to secure information about how the product was sourced. Countries or private actors may make trade in the product contingent on the production of this information. Methods include catch documentation, catch certification or traceability requirements; the identification and assessment of vessels engaged in IUU fishing; the blocking of port access and landings; and prohibition on imports, transshipments, or trade of fish products. There are examples from both the fisheries and forest sectors which point to existing, new, emerging, and potential approaches, which utilise the enforcement power of trade and markets through these and other techniques, and which are advanced by states and regional organisations, and through private initiatives. These measures and initiatives complement existing regulatory approaches to which states have agreed, including the Port State Measures Agreement that is yet to come into force.

Pointing to the intersections between these approaches and trade law, this think-piece identifies the action necessary by states to ensure WTO compatibility of their measures, which require, in particular, that trade measures are fair, transparent, and non-discriminatory. Prohibition of imports and other trade measures are currently most often done on a unilateral basis, but there is scope for a more collective or regional approach—especially in the sharing of IUU vessel lists, the harmonisation of catch documentation schemes and traceability requirements, and the mutual non-acceptance of accompanying catch certificates for relevant flag, port, coastal, or market states who have failed to take appropriate measures to ensure compliance by their vessels. Just as port state measures may be undermined by the use of ports of convenience, so too can import bans be undermined by the openness of alternative markets. It is in the interests of an effective market mechanism that states act together in denying access to markets of all IUU landed catch. In cooperating to achieve this unified response, states must be sensitive to the need for consultation and due process for affected trading partners, and the EU Regulation on IUU Fishing provides a useful model for this. It is also likely that states will need to engage with affected trading partners and also affected communities, such as indigenous peoples or small-scale fishers, to ensure an approach that meets its objectives, and to ensure that the measures improve the legality of catch rather than simply diverting illegal catch to other markets.

Current negotiations on regional trade agreements (RTAs) are important avenues for trade-related IUU measures to be developed through consultation. For example, there is scope for the inclusion of IUU obligations in the agreements or associated side-agreements or environmental chapters—some RTAs, such as the Trans-Pacific Partnership, now under

negotiation, involve multiple and significant fish-producing and consuming nations and include a significant proportion of global trade. In addition, current schemes such as the catch documentation schemes in regional fisheries management organizations (RFMOs) provide useful precedents for other RFMOs, for states, and for a more general application. There is also a role for industry groups and other private actors to maintain good practices in designing and implementing their initiatives. Aside from trade-related measures and initiatives to combat IUU fishing, there is scope to consider independent legal developments in the forest sector, particularly those that are seeking to create alternative incentives for the safeguarding of forest carbon sinks, and those that are reducing the attractiveness of investing in forest enterprises linked with illegal logging.

In conclusion, there are four recommendations for the use of trade-related measures to address IUU fishing. First, the recently emerging unilateral trade measures appear to have been designed and implemented to ensure that they are fair, transparent and non-discriminatory. While they include import prohibitions, these are preceded by the use of less trade-restrictive measures, before moving to more restrictive measures in case of need. As such, the measures provide solid models of WTO-compatible regulation.

Secondly, unilateral trade measures could be made more effective through collective or regional implementation. While some efforts have already been made by RFMOs, such as through the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), this could be extended. This would involve cooperation by states and RFMOs, and possibly even private bodies, in the compilation and sharing of lists of IUU vessels; the harmonisation of catch documentation schemes and traceability requirements; and the prohibition of fish products being imported, landed, or transhipped by states who have failed to take appropriate measures to ensure compliance by their vessels.

Thirdly, such cooperation on the use of trade-related measures should be open and transparent and could occur in one or several forums, including the FAO, the WTO Committee on Trade and Environment, the Convention on the International Trade in Endangered Species of Wild Flora and Fauna (CITES), RTA negotiations, and RFMOs. Cooperation will adapt to situations where the relevant trade measures are principally state based (such as a joint import ban) and where they involve private initiatives (such as some traceability and certification schemes). In addition to interaction among states and between international regimes relating to trade, environment, and the law of the sea, policy coordination within states is necessary.

Fourth, industry groups and other private actors seeking to remove IUU fishing products from the supply chain through voluntary arrangements have an important role to play. Such initiatives should maintain good practices, including in consulting with affected stakeholders and proceeding with transparency, openness, and impartiality.

INTRODUCTION

Illegal, unreported and unregulated (IUU) fishing is a major problem with worldwide social, environmental, and economic impacts. Commonly linked to fish piracy or seafood fraud, IUU fishing is loosely defined to include fishing that violates international, regional, or domestic fisheries management, conservation, or reporting laws.¹ As well as being a major contributor to the global ecological crisis of overfishing and biodiversity depletion, IUU fishing harms legitimate fishing activities and livelihoods, jeopardises food security, consolidates transnational crime, distorts markets, and undermines ongoing efforts to implement sustainable fisheries policies. There are similarities between IUU fishing and the illegal logging that deprives developing countries of valuable exports and taxes, impacts the livelihood of indigenous peoples and forest-dwelling communities, and causes massive deforestation and biodiversity depletion. Effective regulatory oversight and implementation of measures to address these activities is essential to avoid major adverse implications for present and future livelihoods that extend beyond fisheries (or forestry) to ecological balance itself. In order to solve these problems, measures that impose stringent import documentation, certification, or traceability requirements, regulate transshipment, or prohibit the trade in a relevant product are very important. As with every major regulatory policy, such measures are likely to affect the existing conditions of trade between countries, many of whom are members of the World Trade Organization (WTO). This think-piece provides a comparative legal analysis of such measures and initiatives, and concludes with recommendations for governments, international organisations, private actors and the global community.

The think-piece is structured in five parts. After the introduction, Part 2 provides an overview of the challenge posed by IUU fishing. It refers to the common definitions of IUU fishing, summarises the main international, regional, and domestic regulatory responses, and cites recent estimates of traded IUU fish. It then reviews current and proposed trade mechanisms that use the power of market access and consumer preferences to reverse incentives to fish illegally. Such mechanisms might be unilaterally defined—such as the European Union's (EU) 2008 regulation to prevent, deter and eliminate IUU fishing²—or agreed bilaterally or multilaterally—such as the catch documentation scheme agreed on by parties to the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) and the trade restrictions agreed on by parties to the Convention on the International Trade in Endangered Species of Wild Flora and Fauna (CITES). They may prioritise domestic regulation—such as the proposed establishment of a United States (US) traceability programme to track high-risk seafood species—or emphasise the lead role of private actors in developing protocols or standards on

managing data for traceability across the supply chain. Part 3 compares similar approaches taken in the forestry sector, reviewing a range of public measures and private initiatives such as domestic prohibitions on the import of illegally logged timber products and forest certification schemes. Part 4 points to the relationship between trade-related measures on IUU fish and timber products and WTO law and associated trade agreements. It suggests ways in which trade measures can be compatible with the laws of the WTO in both their design and implementation, and identifies some key areas requiring attention. The ideas are not limited to the WTO but extend to current rules and ongoing discussions, and negotiations in other trade law forums, such as preferential or regional trade agreements (RTAs), and fisheries or environmental forums. RTAs, in particular, are significant to the issue of IUU fishing because their preferential terms of trade govern a significant proportion of fisheries consuming and producing countries.³ Part 5 concludes with recommendations and a table summarising relevant measures and initiatives, and the associated issues of implementation and trade law.

THE CHALLENGE OF IUU FISHING

Attempts to combat IUU fishing have long occupied states and their affected constituents, particularly within the Food and Agriculture Organization (FAO) of the United Nations (UN) and other forums such as the General Assembly.⁴ This part provides a brief overview of the definition and FAO legal framework relevant to IUU fishing. It then gives a brief review of recent estimates of the current volume, value, origin, and destinations of traded IUU fish. Next, it describes current and proposed trade-related measures that are designed to augment the international legal framework. The most prominent of these are measures to deny market access to IUU fishery products, which are implemented via catch documentation, certification or traceability schemes, lists of IUU vessels, and trade bans—the EU Regulation on

1 See note 5 and surrounding text for common definitions of IUU fishing.

2 EC Regulation No 1005/2008 of 29 Sep 2008 (*Official Journal of the European Union*, L286/1), which establishes a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing.

3 A good example are the current negotiations on the Trans-Pacific Partnership, involving Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the US, and Vietnam.

4 See, for example, United Nations (2014: para 14.4), including an aim to end IUU fishing by 2020 as part of the proposed Sustainable Development Goal (SDG) to "conserve and sustainably use the oceans, seas and marine resources for sustainable development." The SDGs are expected to be agreed in Sep 2015 and will be applicable from Jan 2016.

IUU Fishing and the CCAMLR catch documentation scheme being two examples. At a multilateral level, trade is restricted in a limited group of commercially exploited marine species that are identified as threatened with extinction under the auspices of CITES, and the part describes how CITES-listed species include some but not all the products of IUU fishing. It concludes with additional trade-related mechanisms—domestic prosecutions (such as the US Lacey Act); private initiatives to further traceability through standardisation, certification, procurement or labelling requirements; subsidy disciplines; and non-take areas.

IUU FISHING – DEFINITIONS AND OVERVIEW

IUU fishing refers to a wide range of activities. Drawing on the definition adopted by the FAO, IUU fishing is illegal when it contravenes the laws and regulations governing waters that are part of a coastal state's jurisdiction, or that are part of areas beyond national jurisdiction known as the high seas, or when it violates conservation and management measures required by relevant fisheries management organizations or by international conventions.⁵ It is unreported when it fails to fulfil relevant reporting procedures, thus compromising the compilation and monitoring of regional and international fisheries data and quotas. It is unregulated when it is conducted by vessels without nationality, or by those flying the flag of a state that is not a party to a relevant regional fisheries management organization (RFMO).

IUU fishing is addressed by a range of legal and management mechanisms at the international, regional, and domestic levels. These centre around monitoring, control, and surveillance, the regulation of landings within port states, the obligations of states that authorise or “flag” fishing vessels, and the allocation of fishing rights, and are developed under the auspices of the FAO and RFMOs.⁶ The FAO's International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU Fishing) is a voluntary instrument agreed in 2001. There are three further FAO developments of relevance—first, the adoption in 2009 of the FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, which is yet to come into force; second, the adoption of the 2013 FAO Voluntary Guidelines for Flag State Performance; and third, the proposed establishment of a Comprehensive Global Record of Fishing Vessels, Refrigerated Transport Vessels and Supply Vessels (see FAO 2014a: 130–36). Outside intergovernmental organizations, groupings of states have addressed the issue of IUU fishing, such as the taskforce instituted by Australia, Canada, Chile, Namibia, New Zealand, and the United Kingdom (UK) (High Seas Taskforce 2006), as well as various coalitions addressing the WTO negotiations on fisheries subsidies. There is growing awareness of the significant scope for trade measures to add to these efforts, as discussed below.

TRADED IUU FISH

The global losses attributed to IUU fishing products are estimated to be worth between US\$10 and 23 billion annually, representing between 11 and 26 million tonnes (Agnew et al. 2009).⁷ Recent estimates of the extent of IUU fishing by country and region suggest that the results of IUU fishing make up between 13 and 31 percent of reported catches, and more than 50 percent in some regions (Agnew et al. 2009). Targeted species from the high seas include tunas, billfish, sharks, and deep-water species such as roughy, toothfish, and squid (High Seas Taskforce 2006: 18). Important regions of origin of IUU fish products are the Southeast Atlantic, Eastern Central Pacific, and the Southeast Pacific. There is a demonstrated correlation between the origin of IUU fishing and poor governance indicators of the relevant states (Agnew et al. 2009). This lost revenue is significant, especially for developing countries—it is estimated, for example, that for sub-Saharan Africa, the cost of illegal fishing is about US\$0.9 billion (about 19 percent of current landed value) (High Seas Taskforce 2006: 19). There are also flow-on economic impacts due in part to the ecological destruction caused by IUU fishing, which harms non-target species such as seabirds, turtles, and dolphins (High Seas Taskforce 2006: 19), and affects entire marine ecosystems. The products of IUU fishing are often traded and transported across multiple jurisdictions, and the supply chain that links producers, processors, retailers, and final consumers is often very long. One of the most important destinations for IUU fishing is the US. It is estimated that between 20 and 32 percent (US\$1.3–2.1 billion) of wild-caught seafood US imports are illegal, facilitated by opaque supply chains such as Chinese reprocessing, and illegal and unreported sources of fish from

5 This definition is drawn from paragraph 3 of the FAO's International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU), an instrument endorsed by the FAO Council in June 2001. The EC Regulation on IUU Fishing contains a definition (Article 2) that is virtually identical to the FAO's definition, although it is expressly limited to commercial fishing. Compare also the definition adopted by an intergovernmental report on IUU fishing on the high seas in High Seas Taskforce (2006: 94–95).

6 An explanation of these measures is outside the scope of this think-piece. However, it is important to note the major legal provisions of the United Nations Convention on the Law of the Sea (UNCLOS), the Agreement for the Implementation of the Provisions of UNCLOS relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (Fish Stocks Agreement), the FAO Code of Conduct for Responsible Fisheries (including the FAO Compliance Agreement), the FAO IPOA-IUU, and the FAO Agreement on Port State Measures to Prevent, Determine and Eliminate IUU Fishing (still awaiting the requisite number of ratifications before entry into force). See further Young (2011); Palma et al. (2010). Note also the recent rulings relating to the nature of legal rights and obligations of flag states vis-à-vis RFMOs and coastal states by the International Tribunal for the Law of the Sea (ITLOS) in response to a request by the Sub-Regional Fisheries Commission (SRFC) for an Advisory Opinion on IUU fishing activities (2 April 2015).

7 Also cited in US Presidential Memorandum – Comprehensive Framework to Combat Illegal, Unreported, and Unregulated Fishing and Seafood Fraud, 17 June 2014.

countries such as Thailand (Pramoda 2014: 102–113). In the EU, IUU fishing imports are estimated to be 10 percent of the total value of fish and fish products imports.⁸

TRADE MEASURES TO RESTRICT ACCESS TO MARKETS FOR IUU FISHERY PRODUCTS

Trade measures to restrict access to markets for IUU fishery products have emerged within regional fora such as RFMOs as well as through unilateral legal developments such as the EU Regulation on IUU Fishing and multilateral treaties such as CITES. This section outlines the key aspects of these measures—their reliance on catch documentation schemes, traceability requirements, lists of IUU vessels, and import bans.

Catch documentation and catch certification schemes

Catch documentation and certification schemes have been developed under the auspices of RFMOs, as well as through unilateral schemes such as the EU Regulation on IUU Fishing and multilateral schemes such as CITES. These schemes help to give effect to prohibitions on fishery products obtained from IUU fishing (which are the most trade-restrictive of the graduating list of trade measures used).

The EU Regulation on IUU Fishing, inspired from RFMO instruments (European Commission 2009), uses a catch certification scheme to ensure the effectiveness of its prohibition on the import of fishery products obtained from IUU fishing into the Community (Article 12). The catch certificate contains information such as vessel name, fishing licence number, flag state, description, date of catch, and estimated weight for all landings, transshipments, and imports of fish products into the Community. It also requires competent authorities of the flag state of the catching vessel to certify that the catches concerned have been made in accordance with the applicable laws, regulations, and international conservation and management measures. It applies to all fish products except for those listed in an Annex, the contents of which are to be reviewed each year (Article 12[5]; see Annex I).

Within RFMOs, one of the best regarded catch documentation schemes is from CCAMLR (Calley 2012: 150ff). It has sought to address IUU fishing of Patagonian toothfish since the 1990s with a range of conservation procedures, monitoring programmes, and a catch documentation scheme that requires the specification of vessel name, licence number, location, date of catch, and gross weight for all landings, transshipments, and imports of toothfish into CCAMLR countries.⁹ The North-East Atlantic Fisheries Commission (NEAFC) also hosts a catch documentation scheme developed from earlier bilateral arrangements between Norway and Russia and private initiatives (Stokke 2009). The FAO is currently convening

an expert consultation, with the support of Norway, on the harmonisation of catch documentation schemes.¹⁰

At the multilateral level, customs requirements similar to catch documentation schemes have been agreed by states party to CITES as a means of implementing their agreement to restrict the trade in listed threatened species. In the context of fisheries, CITES parties are increasingly seeking to include marine species as threatened, despite opposition from commercial fishing groups (for a description of the issue, see Young 2010). Although CITES does not specifically address IUU fishing, its parties may agree that particular commercially exploited species be listed in the Convention, after which any trade or taking from the sea will be subject to a strict permit and certificate authorisation system operated by domestic authorities.

Traceability requirements

With their reliance on disclosure of information, the catch documentation schemes are similar to traceability requirements seen elsewhere, particularly in food safety regulation.¹¹ Traceability is facilitated by electronic storage of data as well as scientific and technological developments relating to the genetic identification of products. The EU Regulation on IUU Fishing “seeks to ensure full traceability” of marine fishery products traded with the EU (European Commission 2009: 8) through its catch documentation scheme. The catch certificate may be established, validated, or submitted by electronic means, or may be replaced by electronic traceability systems, ensuring the same level of control by authorities, in agreement with flag states (Article 20[4]).¹² EU traceability provisions are also contained in Regulation 1224/2009, which aims to introduce “a comprehensive traceability system to track all fish and fisheries products throughout the market chain,” at least

8 European Commission staff working document. Accompanying the Proposal for a Council Regulation establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing (Impact Assessment, SEC. 2007; 1336: 1–98, cited in Borit and Olsen 2012: 96).

9 See, for example, CCAMLR Conservation Measure 10-06 (2008), Scheme to Promote Compliance by Contracting Party Vessels with CCAMLR Conservation Measures, para 25l, Resolution 19/XXI – Flags of Non-Compliance; and Conservation Measure 10-07 (2009), Scheme to Promote Compliance by Non-Contracting Party Vessels with CCAMLR Conservation Measures, para 30.

10 Report of the 31st Session of the Committee on Fisheries, 9–13 June 2014, Rome, para 59; <http://www.fao.org/3/a-ML770e.pdf>.

11 Note, however, that the catch documentation schemes and traceability schemes may strongly differ. See, for example, Clarke (2012): “RFMO CDSs are fishery management tools and are not designed as traceability systems for markets/consumers.”

12 Such arrangements exist with Norway, the US, New Zealand, Iceland, Canada, Faroe Islands and South Africa; see Annex IX: Administrative Arrangement with Flag States Pertaining to the Implementation of the Catch Certification Provisions, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:02009R1010-20130917&from=EN>.

to all fishing activities in EU waters and to EU vessels in other waters, as well as the general food safety traceability requirements covering production, processing, and distribution within the EU internal market.¹³

In the US, the Presidential Taskforce on Combating IUU Fishing and Seafood Fraud proposes to increase the information available on seafood products through additional traceability requirements. While the US Food and Drug Administration (FDA) currently collects information on the identity of imported seafood products, the proposals aim to coordinate efforts across many agencies, including the National Oceanic and Atmospheric Administration (NOAA) and the US Customs and Border Protection (CBP). It will initially apply to “at risk” species, and also aim to make available certain types of captured information (such as species, geographic origin, means of production, and gear type) to the end consumer (US Presidential Task Force 2015: 36–37).

These current and proposed measures suggest that trade measures can provide incentives for—or enforce—the traceability of fish products. This strengthening of traceability requirements should be developed to ensure that they do not create technical barriers to trade, as discussed further in Part 4. In addition, greater attention is needed to the question of how public measures ensuring traceability sit alongside private standardisation, certification, and labelling schemes. Those schemes are mentioned briefly later in this paper, but before this discussion, the next section describes the most trade-restrictive aspect of IUU measures—the prohibition of importation and transshipment.

Vessel lists and the prohibition of import and transshipment of IUU fish product

Schemes to identify potential IUU fishery products rely heavily on vessel lists—either positive or negative lists, or both. Negative lists, or “blacklists” operate to identify violating vessels—for example, the International Commission for the Conservation of Atlantic Tunas (ICCAT) compiles lists of vessels presumed to have carried out IUU fishing, requires states to operate vessel monitoring systems, and provides for the parties to prohibit the import, landing, or transshipment of particular species from vessels included in the IUU list.¹⁴ In 2013, for example, concerns about fish products from West Africa led to alerts to the UK and other EU member states about reliance on forged or fraudulent documents, illegal transshipping at sea, and lack of effective monitoring, control, and surveillance.¹⁵ Positive lists (or “white lists”), on the other hand, oblige participant states to only allow vessels deemed to be of “good standing” to land or tranship catches—the ICCAT provides that fishing vessels that are “not entered into the record [of ICCAT vessels] are deemed not to be authorised to fish for ... tuna-like species.”¹⁶

According to the EU’s Regulation on IUU Fishing, trade in fish products stemming from IUU measures should be

prohibited. This is made effective with a catch certification scheme applying to all traded fish products described above as well as through a negative list. The European Commission works with EU member states, third states (including the competent flag state), and other bodies to identify fishing vessels suspected of carrying out IUU fishing. If these enquiries lead to a finding that a fishing vessel is engaged in IUU fishing and that the competent flag state has not taken effective action, the Commission places the vessel on a special IUU vessel list. This process is based on a risk-management approach that is intended to systemically identify risk and regularly monitor and review outcomes, and the procedure for listing IUU vessels has hearing rights for the vessel owners or operators. If relevant flag, port, coastal, or market states fail to take appropriate measures to ensure compliance by the vessels, the Community may adopt trade measures, which include the prohibition of fish imports and the non-acceptance of accompanying catch certificates.

Following these procedures, in March 2014, the EU decided to restrict the import of fish products from Belize, Cambodia, and Guinea.¹⁷ Other countries, which had been identified as possible violators, Fiji, Vanuatu, and Togo, were not addressed by the ban because they were deemed to have made progress against IUU fishing. In October 2014, the ban on Belize was lifted while a new ban on Sri Lanka was imposed.¹⁸ In April 2015, Thailand was put on formal notice, and inquiries into Ghana and Curacao are continuing.¹⁹

¹³ The relevant EU Regulation on food safety defines traceability as “the ability to trace and follow a food, feed, food-producing animal or substance intended to be, or expected to be incorporated into a food or feed, through all stages of production, processing and distribution.” In Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 Jan 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority, and laying down procedures in matters of food safety, Article 3. The main emphasis of the EU food safety regulation is a requirement for the proper marking or labels to include the commercial designation of a species, the production method (caught at sea, in inland waters, or farmed), and the catch or production area.

¹⁴ See, for example, ICCAT, Recommendation 02-23, Establishment of a List of Vessels Presumed to Have Carried out Illegal, Unreported and Unregulated Fishing Activities in the ICCAT Convention Area, para 9; and ICCAT Recommendation 06-11 prohibiting transshipments at sea by purse seiners.

¹⁵ See letter from Department for Environment, Food and Rural Affairs to tuna importers on “Important Information Regarding the Import of West African Fish Products into EU and UK markets,” 27 Feb 2013; http://www.seafish.org/media/771007/letter_to_tuna_importers_130227.pdf.

¹⁶ Recommendation 02-22 by the ICCAT Concerning the Establishment of an ICCAT Record of Vessels Over 24 Metres Authorised to Operate in the Convention Area, Article 1 (Nov 2002).

¹⁷ Council of the European Union, Implementing Decision establishing a list of non-cooperating third countries in fighting IUU fishing, 25 Feb 2014 (6262/14).

¹⁸ European Commission Press Release, “Illegal Fisheries: Green Cards for Five Countries, but Red Card for Sri Lanka,” http://europa.eu/rapid/press-release_IP-14-1132_en.htm.

¹⁹ European Commission Press Release, “EU Acts on Illegal Fishing: Yellow Card Issued to Thailand while South Korea and Philippines are Cleared,” http://europa.eu/rapid/press-release_IP-15-4806_en.htm.

Bilaterally, too, reference to IUU vessel lists appear in agreements by states seeking access to another state's exclusive economic zone (EEZ). For example, the fisheries partnership agreement between the EU and Morocco, which provides EU vessels access to Moroccan waters in exchange for financial contributions, contains provisions for administrative cooperation and the exchange of information to prevent and combat IUU fishing.²⁰ Morocco may refuse transshipment if the relevant EU vessel has carried out IUU fishing, and the agreement may be terminated by either party for failure to comply with their undertakings on combating IUU fishing. A protocol agreed between the parties in 2013, which came into force on 15 July 2014, contains licensing provisions that prohibit vessels that have been legally listed as IUU vessels.²¹

The US approach allows for the unilateral prohibition of fish imported from countries engaged in IUU fishing in certain circumstances. The relevant legislation requires the secretary of commerce to identify, in a biennial report to Congress, those nations whose fishing vessels are engaged, or have been engaged at any point during the preceding two years, in IUU fishing.²² The definition of IUU fishing extends the FAO's definition to include fishing activities that harm vulnerable marine ecosystems. (Fishing activities that lead to bycatch of protected living marine resources, and which fail to comply with shark conservation rules, are also covered by this approach.) The third biennial report to Congress, which was submitted in January 2013, identified ten states involved in IUU fishing, with one of the ten also identified for bycatch of a protected living marine resource (NOAA Fisheries 2013). After identification, these states must take appropriate action. If they fail to achieve certification, their fishing vessels will be denied entry to US ports, and they could be subject to other trade-restrictive measures, including import prohibitions on certain fisheries products.²³ No such trade measures have been taken to date, and the identification and certification procedures are ongoing. Information on the identification process and how the information received will be used in that process, as well as responses to comments from a range of interested stakeholders, including trade bodies, was published in January 2013 (NOAA 2013).

The measures to compile vessel lists and restrict the import of IUU fishery products are consistent with the FAO's IPOA-IUU Fishing, under which states have agreed to "take all steps necessary, consistent with international law, to prevent fish caught by vessels identified by the relevant regional fisheries management organization to have been engaged in IUU fishing being traded or imported into their territories" (para 66). Such trade measures may be used for "exceptional circumstances" (para 66) where other measures have proven unsuccessful, and further discussion about their consistency with trade law is in Part 4. Practice demonstrates that a graduated set of trade measures normally applies before the most trade-restrictive measure is imposed.

Finally, it is important to note that vessel lists are increasingly compiled through cooperation between relevant

agencies—for example, the Northwest Atlantic Fisheries Organization (NAFO) automatically adds vessels on the North East Atlantic Fisheries Commission (NEAFC) list to its own list, and vice versa (Stokke 2009). There is scope to further develop collective responses to the black listing of vessels and the application of import restrictions on a collective (that is, regional) basis, especially given the lacuna that may exist for fishery products banned from the EU to simply seek access to a different market.

ADDITIONAL TRADE-RELATED MECHANISMS FOR IUU FISHERY PRODUCTS

In addition to the current or proposed use of catch documentation, traceability, and market denial measures, there are a range of mechanisms that have a trade dimension, including domestic prosecutions; private standardisation, certification, procurement, and labelling schemes; subsidy rules; and protected areas.

Domestic prosecutions of importers for trade violations

In the US, the Lacey Act deems it unlawful for fish to be taken, possessed, transported, or sold in violation of any law or regulation of any state or in violation of any foreign law.²⁴ Lacey Act provisions have been invoked to prosecute importers of illegal fish, and prison terms and fines have been imposed.²⁵ This suite of laws may be subject to renewed reform as part of the US national strategy to combat black market fishing and seafood fraud; in particular, the low maximum for civil penalties has been targeted as a deficiency (US Presidential Taskforce 2015: 30, 32).

20 See Council Regulation (EC) No 764/2006 of 22 May 2006 on the conclusion of the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco.

21 See Protocol between the EU and the Kingdom of Morocco setting out the fishing opportunities and financial contribution provided for in the Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco, Annex on "Conditions Governing Fishing Activities by EU Vessels in the Moroccan Fishing Zone," *Official Journal of the European Union* (L 328/2), 7 Dec 2013.

22 High Seas Driftnet Fishing Moratorium Protection Act; see also Magnuson-Stevens Fishery Conservation and Management Act.

23 See High Seas Driftnet Fisheries Enforcement Act (16 U.S.C. 1826a).

24 Amendments to the Lacey Act have enlarged its scope considerably. See 16 USC §§ 3372(a)(2)(A). Notable exceptions to the Lacey Act's operation include exceptions for any activity regulated by a fishery management plan in effect under the Magnuson-Stevens Fishery Conservation and Management Act and activities regulated by Tuna Convention Acts and the harvesting of highly migratory species taken on high seas; see §§3377.

25 See, for example, prosecutions regarding illegal import of rock lobster and toothfish from South Africa in High Seas Taskforce (2006: 33, 35).

Notwithstanding the low civil penalties, which are not relative to the high profits of IUU fishing, Lacey Act-type methods are considered to be relatively effective in combating IUU fishing. In 2006, an intergovernmental taskforce recommended that states consider the adoption of Lacey Act-type legislation as part of their proposal to strengthen domestic legislation controlling imports of IUU product (High Seas Taskforce 2006: 64, 79–80). The taskforce noted that similar provisions had been enacted by Papua New Guinea (PNG), Nauru, and the Federated States of Micronesia, and that PNG had successfully prosecuted an IUU fishing vessel operator for illegal fishing in 2000 (High Seas Taskforce 2006: 79). It also noted the benefits of an approach whereby penalties and forfeitures could be shared between the country of import and the country where the underlying violation took place (High Seas Taskforce 2006: 34, citing the US Pacific Insular Areas Act and the Papua New Guinea Fisheries Act). Studies undertaken as part of the taskforce on IUU fishing considered Lacey Act-type provisions to be WTO-consistent (Ortiz 2006).

In addition to domestic enforcement procedures, there are emerging efforts by the International Criminal Police Organization (INTERPOL) to detect and combat fisheries crime. Interpol aims to raise awareness about fisheries crime among law enforcement and government agencies, disrupt trafficking routes, and harmonise enforcement efforts.²⁶ It issued a "Purple Notice" for the first time in 2013 for a vessel illegally fishing in the South Atlantic Ocean, which had operated under 12 different names in the past ten years, and had already been blacklisted by the CCMALR and the South East Atlantic Fisheries Organisation (SEAFO)²⁷

Private standardisation, procurement, certification, and labelling schemes

Efforts to develop better traceability (from net to fork), which have been described above, operate together with private schemes relating to interoperability of data, purchasing decisions through the supply chain, certification, standards, and labelling.

Private initiatives to combat IUU have focused on the need for sharing information and compliance verification all through the seafood supply chain. Such initiatives have successfully operated in various places. For example, the European Fish Processors and Export/Import Association (AIPCE) introduced a purchasing control document for white fish from the Barents Sea in 2006, which has been replicated in private and RFMO-led schemes. According to the control document, which is entered into individually by purchasers and suppliers along the supply chain, the decision to purchase is dependent on the supplier's statement that the fish was legally caught, subject to independent third-party auditing. A failure or refusal of an audit could effectively mean blocking the supplier from the market if enough purchasers adopt the scheme. These voluntary initiatives, combined with additional port control initiatives, were estimated to have a major impact on IUU fishing, with

illegal landings reduced by more than 50 percent (Burnett et al. 2008). The model has been applied in other places such as Mexico's Gulf of California, including through partnerships between seafood suppliers, vendors, and producers.²⁸ Work is currently being done on establishing a global framework for such practices, with different roles foreseen for governments and industry (Expert Panel 2014).

Other examples that broadly affect IUU fishing are voluntary programmes for the certification of sustainable fisheries, such as the Marine Stewardship Council (MSC) and ecolabelling initiatives. The FAO has published guidelines to respond to these developments (see Washington and Ababouch 2011).

Prohibition on IUU-related subsidy

The trade measures envisaged by the FAO's IPOA-IUU Fishing as permissible in exceptional circumstances sit together with voluntary plans which call on states to eliminate IUU fishing and reduce subsidies that contribute to the build-up of excessive fishing capacity (Washington and Ababouch 2011; IPOA for the Management of Fishing Capacity). The ongoing WTO negotiations to clarify and agree on rules on fisheries subsidies, which are conducted under the Doha Development Agenda, have proposed that subsidies that contribute to IUU be expressly prohibited under the Agreement on Subsidies and Countervailing Measures (ASCM).²⁹ Separately, there have been calls to implement improved corporate liability procedures to ensure transparency of commercial actors who may be beneficiaries of IUU fishing (Griggs and Lugten 2007).

Protected zones

While not strictly a unilateral trade measure, decisions by states to ban commercial fishing, including by establishing marine protected areas (MPAs), may serve to reduce IUU fishing. Research suggests, for example, that the exclusion of foreign vessels from coastal waters in the Southeast Atlantic led to reductions in illegal fishing (Agnew et al. 2009). Other objectives for establishing MPAs include the preservation of biodiversity "hotspots," said to be tied to the 2014 US decision to create a large marine sanctuary in the

26 See Media Release, "INTERPOL Launches Project Scale to Combat Fisheries Crime," 26 Feb 2013; <http://www.interpol.int/News-and-media/News-media-releases/2013/PRO24>.

27 See Media Release, "Norway Requests First INTERPOL Notice for Illegal Fishing," 6 Sep 2013; <http://www.interpol.int/en/News-and-media/News/2013/PR104/>.

28 See the work of Fisheries Improvement Programs (FIPs), which can include control documentation; www.sustainablefish.org/fisheries-improvement/fisheries-improvement/fip-stories/gulf-of-california-shrimp-fip.

29 For an early example, see Draft Consolidated Chair Texts of the AD and SCM Agreements (Ambassador Guillermo Valles Games), WTO Doc TN/RL/W/213 (30 Nov 2007), Annex VIII to the SCM Agreement (87–93).

Pacific.³⁰ The UK also drew on environmental justifications for its proclamation of an MPA in the Chagos Archipelago, a decision that had significant economic implications for Mauritius. In another example, the island state of Palau departed from its previous policy of allowing foreign vessels access to Palau's waters to raise revenue from fishing taxes and licensing fees, and imposed a ban on commercial fishing. These developments give rise to important legal issues. In Palau's case, there is an exception for local fishers, although they may not export. If Palau was a WTO Member, this could give rise to an allegation of a General Agreement on Tariffs and Trade- (GATT) inconsistent quantitative restriction (albeit one that could be defended on GATT Article XX grounds). In the case of the Chagos archipelago, Mauritius was successful in challenging the UK's proclamation on the grounds that there was a failure to consult and cooperate with them on the establishment of the MPA, given the United Nations Convention on the Law of the Sea (UNCLOS) provisions relating to the duty to consult and the clear and acknowledged historic interests of Mauritius in the area.³¹ It is clear that large-scale fishing bans create new tools and demands for combating IUU fishing.

ILLEGAL TIMBER: SOME COMPARISONS

Illegal logging is a massive global problem, with impacts particularly in developing countries. Regulatory efforts have, at times, developed in parallel with the fisheries sector, and, at other times, in quite different directions and at a different pace. Some recent developments in the forests sector provide useful lessons for fisheries, as this section emphasises.

Illegal logging flouts national laws and international treaties regulating the harvesting, processing, transporting, and trading of timber. Although data is difficult to obtain, some estimates suggest that the percentage of timber of illegal origin marketed worldwide is between 20 and 50 percent of all marketed timber products.³² The percentage of illegal timber in total timber production is estimated to be between 60 and 90 percent in developing countries, including Cambodia, Indonesia, PNG, Bolivia, Peru, and Gabon (INTERPOL/World Bank 2009: 6), and deprives those countries of massive revenues from taxes and concessions. In value terms, global illegal logging, including processing, is estimated to be worth between US\$30 and US\$100 billion, or 10 to 30 percent of the global timber trade (Nellemann and INTERPOL 2012). Like fish products, scientific developments have led to improvements in the traceability of timber products, although there is still a gap between what the law requires and what the science can provide (Johnson and Laestadius 2011).

There are a range of multilateral, regional, bilateral, and unilateral trade measures to address the trade in illegal logging. This section does not aim to comprehensively identify the relevant measures, but notes some of the important recent developments. These include both public initiatives that utilise certification schemes, make trade and investment opportunities contingent on legality, and create alternative market or funding incentives. These laws add to existing private approaches that operate voluntary programmes for the certification of sustainably harvested timber, such as the Forest Stewardship Council (FSC). The FAO has noted that verification of the legality of harvested timber is expanding, with an enhanced role of the private sector (FAO 2014b: 63).

MULTILATERAL TRADE MEASURES

Multilateral trade measures have been mooted for the forest sector. The species-specific approach of CITES restricts trade in certain timber products that have been listed in the CITES appendices. While the Forest Principles adopted at the 1992 Rio Conference called for "open and free international trade in forest products" (para 13), a US interpretative statement reiterated that, "in certain situations, trade measures may provide an effective and appropriate means of addressing environmental concerns, including long-term sustainable forest management concerns" (UNCED 1992: 21). Since then there have been a number of multilaterally agreed instruments recognising the need of both importers and exporters to help curb the trade in illegal logging.³³

An alternative multilateral approach to promote incentives that divert communities away from illegal logging is currently being developed under the United Nations Framework Convention on Climate Change (UNFCCC). These programmes to Reduce Emissions from Deforestation and Forest Degradation (REDD+) aim to provide funding for developed forested countries to keep their forests intact. While not a trade measure, the financial mechanisms envisaged for REDD+ schemes may involve the allocation of credits that can be traded on carbon markets. Negotiations are ongoing in the UNFCCC, but a significant aspect of the

30 See President Barak Obama's Sep 2014 announcement for the creation of the largest marine sanctuary in the Pacific: <http://www.abc.net.au/news/2014-09-25/obama-to-announce-worlds-largest-marine-sanctuary/5769312>

31 *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)*, Award of 18 March 2015. See further www.pca-cpa.org/showpage.asp?page_id=1429.

32 Rome Report on Illegal Timber, NCB Rome / State Forestry Corps/ General Inspectorate/ Division 7/ CITES Central Service/ Investigation, Aug 2008, cited by INTERPOL/World Bank (2009).

33 See, for example, the 2005 Saint Petersburg Declaration on Forest Law Enforcement and Governance in Europe and North Asia Region.

development of REDD+ has been the need to identify the impacts on indigenous and forest-dwelling communities, and to work with a range of existing forestry governance regimes (Tehan et al. forthcoming). Given scientific evidence of the link between overfishing and climate change, and the ability of the oceans to act as “carbon sinks” in similar ways to forests (Wilson et al. 2009: 359), it may not be far-fetched to imagine similar schemes being developed to further promote the use of MPAs.

REGIONAL AND BILATERAL DEVELOPMENTS

A number of RTAs relate to the timber trade. Some have a general aim to promote trade in timber products through expanding market access or fiscal instruments (such as Australia and China) (FAO 2014a: 58). Many operate to preserve general environmental protections contained in GATT Article XX, as is discussed further below. The draft Trans-Pacific Partnership (TPP) appears to allow for import restrictions on certain illegal timber, and recognises the mutual interests of trading partners in exchanging information and experiences on combating illegal logging.

A notable bilateral trade agreement is the US-Peru Trade Promotion Agreement, which promotes forestry governance and capacity building in Peru, and provides for trade bans if it fails to implement provisions to combat illegal logging. Its annex on forest sector governance is said to have catalysed reform in Peru's forestry sector, including through the adoption of laws and other measures necessary to comply with CITES, as well as the provision of US financial support for the strengthening of the institutional capacity of Peru's agencies and regional governments. Stakeholder consultation was developed throughout the process, including with affected indigenous communities. In January 2013, the US and Peru agreed on a bilateral action plan to improve tracking and verification systems, in part in response to a petition from an environmental group to the US Trade Representative requesting audits and verifications. Some criticisms have pointed to recent reports that suggest that the primary ways of identifying timber—in transit or post-harvest official inspection—have come too late to be effective. There are calls for reform of the verification system to shift the focus away from transit documents and towards verifying extraction of wood at the source and then through the subsequent custody chain (Finer et al. 2014).

Alongside trade measures, there is an increasing set of approaches that target the investment in logging. A combined INTERPOL/United Nations Environment Programme (UNEP) report recognises that large investment funds, including from Asian, EU, and US investors (and pension funds), facilitate the laundering of illegal timber.³⁴ Ways to reduce the attractiveness of investment in forest enterprises linked with illegal logging are explored. The report draws on an example of the Norwegian sovereign wealth fund, which is mandated to consider environmental, social,

and governance factors in allocating investment (and which divested US\$1 billion in shares with a mining company in 2008 based on these factors). The report suggests a scheme that would allocate a risk rating to companies extracting, operating in, or buying from regions with a high degree of illegal activity.³⁵ This suggestion is paralleled in recent commitments made by commodity producers and traders to zero-deforestation production and trade of commodities.³⁶

UNILATERAL MEASURES

The main unilateral trade measures are proposed in recent instruments from the EU, the US, and Australia, and it is noteworthy that these operate together with bilateral or multilateral processes. In March 2013, the EU Timber Regulation came into effect, which prohibits wood or wood products from being imported into the EU market if they have contravened applicable domestic laws in the country of origin.³⁷ This regulation imposes a “due diligence” and record-keeping requirement on exporters, and provides for automatic compliance for wood that carries a CITES permit or a special licence developed through the EU's Forest Law Enforcement, Governance and Trade (FLEGT) Action Plan. The EU has operated the FLEGT Action Plan since 2003, which, among other things, provides for a licensing system. Legality verification is supported through a Voluntary Partner Agreement (VPA) between the EU and a timber-producing state wishing to export into the EU. Six countries are implementing a VPA (Cameroon, Central African Republic, Ghana, Indonesia, Liberia, and Republic of the Congo) and are currently developing the systems needed to control, verify and license legal timber, while others are in current negotiations with the EU.

In 2008, the US introduced amendments to the Lacey Act, which extended the its application to the trade or possession of illegally obtained plant specimens—including timber—and provided a definition of illegal logging. The Act prohibits the “trafficking” of plants and draws on both foreign laws and CITES. Importers are prohibited from falsely recording, accounting, labelling, or identifying plants in international trade, or transported in interstate or foreign commerce. They must declare, among other things, the country of origin and species name of all plants contained in the traded products. The US government may impose civil and criminal

34 | See Chagos MPA, note 64, p. 7.

35 | See Chagos MPA, note 64, pp. 57–58.

36 | New York Declaration on Forests (Climate Summit 2014), Provisional copy, 23 Sep 2014.

37 | EU Regulation No 995/2010 of the European Parliament and of the Council of 20 Oct 2010 laying down the obligations of operators who place timber and timber products on the market, *Official Journal of the European Union* 295/24.

penalties against persons who violate the Act, with the threat of forfeiture of traded plants. In 2012, Australia passed its Illegal Logging Prohibition Act, which also prohibits importing illegally sourced timber. This legislation makes it a criminal offence to intentionally, knowingly, or recklessly import or process illegally logged timber or timber products. Regulations that came into effect on 30 November 2014 add due diligence requirements for businesses importing certain timber products.³⁸ These laws follow dialogues with Australia's trading partners, which have been formalised in a number of instruments such as the 2012 Arrangement on Combatting Illegal Logging and Promoting Sustainable Forest Management with New Zealand (which promotes systems for legality verification), and the 2007 Forestry and Timber Sub-Working Group with Malaysia.

ANALYSIS

This think-piece has identified a range of trade measures that can be used to combat IUU fishing, together with similar or alternative trade measures used to combat illegal logging. In broad terms, the measures depend on the identification and assessment of legality at the source of the illegal product, that is, by the vessel engaging in IUU fishing or by the forest enterprise harvesting the timber. Monitoring and surveillance systems are necessary, but not sufficient, and deficiencies in such resource-intensive activities can be alleviated through market measures. It is imperative that the identification continues along the supply chain—a complex issue for both sectors, especially perhaps for fisheries, which may involve vessels operating on the high seas or with permitted access to the coastal waters of other states. The blocking of port access and landings can address this, as can the imposition of traceability requirements and due diligence requirements on importers. Once illegal activity is identified, the measures generally operate by prohibiting the import, transshipment, or trade in the illegal product. The measures depend on not only customs and other authorities for enforcement, but also non-government organizations (NGOs) and even law enforcement agencies such as INTERPOL, given the transnational nature of the crimes. In addition to these public arrangements, there are a range of private schemes, which seek to combat IUU fishing or otherwise use illegality as a criterion of unsustainability. Such initiatives are motivated by suppliers wishing to safeguard the ongoing supply, or by attempts to harness the concern and purchasing power of consumers. The initiatives depend on labelling, monitoring, purchase decisions, reporting, verification, and certification, often by private bodies, including industry groups. This part provides a brief analysis of the trade law consistency of the identified public measures or private initiatives, with reference to the GATT, the WTO Agreement on Technical Barriers to Trade (TBT), and other issues.

Before turning to the law, however, it is important to note that many of the measures and initiatives identified in this think-piece are interlinked, and it is sometimes artificial to categorise them as “unilateral,” “bilateral, regional or plurilateral” or “multilateral,” or indeed public or private. What is clear is that many of the unilateral measures (such as the EU Regulation) and private initiatives (such as the AIPCE control document) have been developed over many years of negotiations with affected trading partners. It is outside the scope of this think-piece to detail those methods and developments, but it is important to note that such negotiations will have gone a long way in ensuring that the trade measures or private initiatives do not unjustifiably or arbitrarily discriminate against trading partners, or serve as a disguised restriction on international trade. The implementation of trade measures must be fair, transparent, and non-discriminatory, with efforts to reduce costs and enhance the capacity for fish-exporting states, many of whom will be developing countries.

GATT AND ARTICLE XX EXCEPTIONS

The public measures identified in this think-piece have a range of trade law implications. Most clearly, they may result in unilateral import or export restrictions, which would be contrary to the GATT,³⁹ unless justified pursuant to GATT Article XX or the relevant provisions under the TBT Agreement (the latter is discussed in the next section).⁴⁰ It is noteworthy that at the Rio Conference in 1992, the US made a declaration to Principle 12 of the Rio Declaration, and stated that trade measures could be an effective and appropriate way to address “long-term sustainable forest management concerns outside national jurisdiction, subject to certain disciplines” (UNCED 1992: Vol. IV, 21; Young 2015). The US assertion that trade measures are sometimes appropriate to address environmental issues outside the jurisdiction of a country has been supported in WTO jurisprudence.⁴¹ As noted above, it is also supported by countries at the FAO, who, while reaching a general agreement that the use of trade measures should follow

³⁸ Note that on 1 Dec 2014, the Australian Government announced an independent review of the impact of the Illegal Logging Prohibition Regulation 2012 on small business; see further www.agriculture.gov.au/forestry/policies/illegal-logging.

³⁹ The most relevant provisions are GATT Article I (most-favoured nation treatment), GATT Article III (national treatment), and GATT Article XI (quantitative restrictions).

⁴⁰ A useful precedent could have emerged from the decision of Chile over a decade ago to refuse port access and landings of swordfish caught by Spanish vessels on the high seas adjacent to Chilean waters. The refusal was based on alleged failures by the EU to cooperate in relation to highly migratory species, but the EU threatened to challenge Chile's action at the WTO. After Chile initiated a claim at the International Tribunal for the Law of the Sea, the dispute was resolved. See Serdy (2002).

⁴¹ AB Report, US – Shrimp (circulated 12 Oct 1998); see also Young (2015).

the principles of non-discrimination,⁴² have agreed that, in exceptional circumstances, trade bans should be used to prevent, deter, and eliminate IUU fishing.⁴³

According to the GATT Article XX(g) exception, trade measures combating IUU fishing are likely to be justified because they relate to the conservation of exhaustible natural resources (which would apply especially to wood or fish products listed under CITES). They may also be justified as necessary to protect animal or plant life or health, to secure compliance with relevant domestic laws, or even to protect public morals, according to GATT Article XX(b), (d) and (a) respectively. The latter exception was recently successfully argued by the EU when it banned the import and trade in seal products because of public concerns about animal welfare (although it failed to meet other requirements because its application of the exemptions to the ban was found to be discriminatory).⁴⁴ It is not far-fetched that the illegality of timber or fish trade and the connection with organized crime could outrage a sense of public morals. However, it is important that the measures are no more trade-restrictive than necessary, and are conducted in ways that are fair, transparent, and even-handed as between producing countries.⁴⁵

A key issue will be the processes of developing and implementing the relevant trade measures. It will be important that trade-affected countries are included in consultations,⁴⁶ which appears to have been followed in the examples cited. The agreement between the US and the EU to cooperate on their approaches to IUU fishing, announced in September 2011, is a welcome development.⁴⁷ However, this must be augmented by a systematic consultation with a broad range of affected parties.

A particular sensitivity may emerge in the compilation of lists of IUU vessels, which needs to follow clear, transparent procedures that also allow affected parties to be heard. It is significant, for example, that the European Commission is to work in collaboration with the relevant EU fisheries control agencies, third states, and other bodies in identifying fishing vessels suspected of IUU fishing on the basis of risk management, and that it has to also seek information from competent flag states as to the accuracy of the findings. A salutary note is from Mexico's 2012 challenge to the US regulations establishing conditions for the use of "dolphin-friendly" labels on tuna products.⁴⁸ The Appellate Body found that the measure's scope of application (which set stricter labelling conditions for tuna caught in the Eastern Tropical Pacific Ocean), was discriminatory.⁴⁹ In an IUU context, if different conditions in different fisheries and regions leads to different trade measures, these must be appropriately accounted for. The FAO's proposed Global Record of Vessels would form a useful basis to multilateralise the process of vessel list compilation (it is conceded, however, that this process is still in its infancy and requires many resources and much attention) (FAO 2014a: 135–36).

TBT AGREEMENT

Aside from the GATT, the TBT Agreement may apply disciplines to any requirements such as traceability and catch documentation schemes. A key question is whether the measures identified in this think-piece are "technical regulations" as defined by the TBT Agreement,⁵⁰ and thus subject to the highest form of scrutiny.

The question of whether a particular measure constitutes a technical regulation is dependent on the measure itself and the circumstances of the case.⁵¹ Although early decisions have been broad in their consideration of the definition of technical regulations,⁵² attention must be given to two somewhat contradictory recent decisions of the WTO Appellate Body. On the one hand, a voluntary labelling scheme for "dolphin-safe" tuna operating in the US was held to be a technical regulation by a WTO Panel and Appellate Body. Even though participation in the scheme was voluntary, the Panel emphasised the involvement of the

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- 42 | FAO Code of Conduct for Responsible Fisheries, especially paras. 11.2, 11.3.
- 43 | IPOA-IUU Fishing, para. 66. Note that the language of avoidance of unilateral measures is also reproduced.
- 44 | AB Report, *EC – Seal Products (European Communities - Measures Prohibiting the Importation and Marketing of Seal Products)* WT/DS400, 4011/AB/R.
- 45 | GATT Article XX, introductory para. (*chapeau*).
- 46 | AB Report, *US – Shrimp* (circulated 12 Oct 1998). *Brazil-Tyres (Brazil – Measures Affecting Imports of Retreaded Tyres)*, WT/DS332/AB/R, adopted 17 Dec 2007.
- 47 | "EU and US Join Efforts Against Illegal Fishing," http://ec.europa.eu/commission_2010-2014/damanaki/headlines/press-releases/2011/08/20110907_en.htm.
- 48 | *US – Tuna II (United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products)*, WT/DS381/AB, adopted 13 June 2012.
- 49 | *US – Tuna II*, see especially paras. 298–99.
- 50 | Technical regulations are defined in Annex I:1 of the TBT Agreement as including a "document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method."
- 51 | *US – Tuna II*, para. 199.
- 52 | See, for example, *EC-Sardines* (marketing standards for preserved sardines); *EC-Asbestos* (ban on asbestos fibres); *US-Cloves* (law prohibiting sale of cigarettes with flavours other than tobacco or menthol); *US-COOL* (country-of-origin labelling for certain meat products). But contrast WTO Panel Report, *EC-Trademarks/GIs*, paras. 7.492–515; and Panel Report, *US-COOL*, paras. 7.149–217.

US government in setting out conditions under which tuna could be labelled as “dolphin-safe” and verifying that these were followed,⁵³ and the Appellate Body stressed that the US effectively controlled what “dolphin-safe” means in relation to tuna products.⁵⁴ This approach has been criticised for not following the text of the TBT Agreement and for rendering government support of voluntary labelling schemes more difficult (Howse 2014: 593, 595–96). On the other hand, in a recent challenge to the EU’s seal product ban, the Appellate Body overturned the Panel’s decision that the seal ban was a “technical regulation,” finding that despite its stipulations relating to the identity of seal hunters and the type of hunt (which facilitated an exception for indigenous peoples), the ban did not “lay down product characteristics.”⁵⁵ If the more recent approach of the Appellate Body to the EU’s seal product ban is followed, the requirements of schemes such as the EU Regulation on IUU Fishing and the Australian Illegal Logging Prohibition Act will not be considered as technical regulations, and therefore will be outside of the scope of the TBT Agreement. Likewise, voluntary schemes such as private certification arrangements are unlikely to be defined as technical regulations, and instead meet the requirements of a voluntary code, as described below.

Should the relevant measures relating to IUU fishing fall within the definition of “technical regulations,” however, they are subject to a range of disciplines. An important provision is that they must not be discriminatory (TBT Article 2.1). The issue of discrimination could be a particularly difficult issue if certain catch documentation schemes or traceability requirements target “at risk” species or identify “trusted traders.” For example, it could be open for a WTO panel to find that because of established fishing practices, some countries would suffer this burden more than others, thus leading to a finding of de facto discrimination (*US – Tuna II*).

The measures may fall outside of the TBT requirements for non-discrimination in certain circumstances. According to current interpretations in the case law,⁵⁶ TBT provisions relating to discrimination should be interpreted as balancing the pursuit of trade liberalisation and Members’ right to regulate, in the same way that is achieved by GATT Articles III and XX. As such, the regulatory concerns that underlie the relevant technical regulations may be drawn on to defend the measure as non-discriminatory, in a similar way to the operation of GATT Article XX.⁵⁷ To pre-empt such a finding, the relevant measures would need to be developed after wide consultation with the affected trading partners, and governments should also ensure their measures are applied even-handedly and appropriately calibrated to reflect the level of risk presented by imports from different places. Moreover, if efforts to create relevant criteria for catch documentation schemes are “common” or “multilateral” within organisations such as the FAO or the WTO, the diverse conditions across nations are impliedly addressed. It is pertinent to note that the well-regarded catch documentation scheme of the CCAMLR was discussed in the WTO Committee on Trade and Environment.⁵⁸ Open and

coordinated efforts would also be important in defending the measure through the TBT Agreement and through GATT Article XX (which, as mentioned above, may serve to provide a wider group of exceptions to TBT violations). Alternatively, a waiver might be sought (as described below), although this risks giving the impression that such a measure is prima facie likely to violate TBT Agreement Article 2.1.

The TBT Agreement also requires WTO Members to ensure that their technical regulations are not prepared with a view to creating unnecessary obstacles to trade, and are not more trade restrictive than necessary to fulfil a legitimate objective (Article 2.2). Legitimate objectives include many objectives covered by IUU regulation, namely “national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment” (Article 2.2) and would therefore likely pass this hurdle at the WTO.

Technical regulations that are based on international standards attract a rebuttable presumption that they are not an unnecessary obstacle to international trade (Article 2.5). As such, to ensure consistency with the TBT Agreement, it is prudent that measures such as catch documentation and traceability rules are based on existing standards, or, if none exist, that collective or regional efforts be devoted to creating such standards. Of relevance to such efforts is the TBT Committee’s 2000 decision relating to the development of international standards, guides, and recommendations, which has become integral to interpreting the legal obligations of the TBT Agreement.⁵⁹ The 2000 decision contains principles for international standardising bodies which emphasise the need for transparency; openness; impartiality and consensus; relevance and effectiveness; coherence; and the development dimension

53 | *US – Tuna II*, paras. 7.127, 7.131, 7.145.

54 | *US – Tuna II*, para. 199.

55 | *EC – Seal Products*, paras. 5.58–5.60. Note that the AB did not consider whether the ban would qualify as a technical regulation as laying down “related process and production methods” as this had not been explored at first instance.

56 | *US – Clove Cigarettes* (AB Report, 2012), especially para. 109; see also para. 120 (“To the extent that they are relevant to the examination of certain ‘likeness’ criteria and are reflected in the products’ competitive relationship, regulatory concerns underlying technical regulations may play a role in the determination of likeness”); see also *US – Certain Country of Origin Labelling* (AB Report, 2012).

57 | Or, the measure may be defended by GATT Article XX, although it is by no means certain that it applies to TBT violations (and this was not argued by the US in *US – Clove Cigarettes*). See further *China – Rare Earths* (AB Report), para. 5.56, quoting *US – Clove Cigarettes*, paras. 96 and 101.

58 | WTO, Communication from the CCAMLR Secretariat, WT/CTE/W/148, 30 June 2000.

59 | Committee on Technical Barriers to Trade, G/TBT/9 (13 Nov 2000). This decision was found to be “subsequent practice” and thus relevant to the interpretation of the TBT Agreement according to rules of treaty interpretation (VCLT Article 31(1)(a)), *US – Tuna II*, para. 372.

(including facilitating developing countries' participation in international standards development). Such principles are relevant for international organizations such as the FAO, which may be facilitating common catch documentation schemes.

PRIVATE INITIATIVES AND THE TBT CODE OF GOOD PRACTICE ON STANDARDS

The private or voluntary initiatives that facilitate or coexist with efforts to ensure traceability and keep IUU fish products out of the marketplace, such as standards, procurement, certification, and labelling schemes, may fall within trade law disciplines in certain circumstances. As discussed above, notwithstanding their private nature, such initiatives may be classified as technical regulations and thus be subject to a range of disciplines under the TBT Agreement—much depends on the level of involvement of the state in the design and implementation of the initiatives and whether stipulations relating to legally caught products are interpreted as laying down “product characteristics or their related processes and production methods.” In the much-criticised finding in *US-Tuna II* described above, compliance with certain characteristics was held to fall within the definition of “mandatory” compliance, even for a voluntary labelling scheme.

In the main, however, private initiatives are not “technical regulations.” They may, nonetheless, be “standards,”⁶⁰ and, as there may be some alternative provisions in the TBT Agreement, of relevance. As mentioned above, principles that apply to the development of international standards, guides, and recommendations were articulated by the TBT Committee in 2000. Moreover, the TBT Agreement contains, as an annex, a Code of Good Practice for the Preparation, Adoption, and Application of Standards. The Code applies to standardising bodies, which are defined broadly in the TBT Agreement.⁶¹ An example of a body that has accepted the TBT Code of Good Practice in the fisheries context is a private body aiming for the standardisation of fish names.⁶²

According to the Code of Good Practice, standardising bodies are urged to ensure that their standards are not applied “with a view to, or with the effect of, creating unnecessary obstacles to trade” (Annex 3.E) and are to “afford sympathetic consideration to, and adequate opportunity for, consultation” (Annex 3.Q). These substantive requirements are best practice-oriented and do not create legal rights.

As for the WTO Members themselves, the TBT Agreement states that they “shall ensure that their central government standardising bodies accept and comply with the Code of Good Practice” (Article 4.1). In addition, WTO Members are to take reasonable measures to ensure the Code is followed by standardising bodies operating in their territories, as well as regional standardising bodies of which they are

members,⁶³ and shall not take measures “which have the effect of requiring or encouraging such standardising bodies to act in a manner inconsistent with the Code of Good Practice” (Article 4.1). These obligations apply irrespective of whether or not a standardising body has accepted the Code of Good Practice (Article 4.1). Such obligations may become important given that WTO Members may be overseeing catch documentation schemes, even by private bodies.

For private initiatives seeking to combat IUU fishing (or illegal logging), the first question to pose is whether the private initiative falls within the definition of “technical regulation” or “standard.” For example, could these definitions apply to the supply chain requirements that focus on a private arrangement between suppliers (such as the “control document” approach adopted by the AIPCE or, in the forestry context, the voluntary arrangements recently pledged at the UN Climate Summit 2014)? Another question to pose is whether the body responsible for the private initiative is a “standardising body.” Even if the answers to these questions are unclear, it is perhaps prudent for private initiatives to proceed according to the principles articulated by the TBT Committee in 2000 and the TBT Code of Good Practice. Another benefit of doing so, of course, would be to follow common principles of good governance in a world where markets are becoming increasingly interlinked through trade, investment, and value chains.

OTHER ISSUES

There are some remaining issues pertinent to the trade law analysis, which are mentioned here for completeness—the relevance of bilateral and regional trade negotiations; the possibility of exemptions and the building of capacity; the need for a waiver; subsidy reform; and policy coordination.

60 A standard is defined in the TBT Agreement, Annex 1, para. 2 (“Document approved by a recognised body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method).

61 The TBT Agreement contains definitions for ‘international body or system’, ‘regional body or system’, ‘central government body’, ‘local government body’ and ‘non-governmental body’: see Annex 2. The definition for non-government body is “Body other than a central government body or a local government body, including a non-governmental body which has legal power to enforce a technical regulation.”

62 See ‘Seafood Services Australia Ltd’, listed in *WTO TBT Standards Code Directory* (update 2007-08-31) 19.

63 Article 4.1. The “reasonable measures” allow a range of factors to be taken into account in evaluating the conduct of the relevant WTO Member. See also obligations with respect to conformity assessment procedures in Article 8.

Bilateral and regional trade negotiations

While RTAs allow for a range of trade measures for environmental purposes (by reproducing the general exceptions in GATT Article XX,⁶⁴ by augmenting the GATT provisions, by creating separate environmental chapters or side agreements,⁶⁵ or even by according priority given to certain environmental treaties such as CITES),⁶⁶ recent developments suggest a more explicit link with combating IUU fishing. For example, current negotiations on the TPP suggest that states intend to include provisions relating to IUU fishing,⁶⁷ including providing for appropriate measures for the prohibition of trade, transshipment, or transaction of wild fauna and flora taken or traded in violation of the relevant party's law or a foreign law.⁶⁸

Trade-related measures place responsibilities on importers as well as exporters and can be a way to apportion the heavy costs associated with compliance and legality verification. The Peru-US Trade Promotion Agreement sought to alleviate concerns that enhanced trade liberalisation between the two countries would lead to a reduction in environmental standards by initiating a novel and highly detailed forestry governance annex. This could be the basis for future bilateral or regional trade negotiations in the fishing sector, too. The FAO's 2013 Voluntary Guidelines for Flag State Performance could provide a useful precedent for the types of obligations for flag states and could be linked expressly to the relevant RTA.

Exemptions and capacity building

An issue that may arise in the future is the impact of trade measures on indigenous communities or artisanal, subsistence, or small-scale fishers. This issue has already arisen in WTO subsidies negotiations as well as in the development of many of the laws relating to illegal timber and REDD+. For example, the World Bank excluded the logging that was illegal but done "in relation to securing basic subsistence and involving individuals living in poverty without access to adequate timber supplies from legal sources" from the definition of illegal logging (INTERPOL/World Bank 2009). The FAO has also argued that prohibiting certain kinds of forest uses fails to recognise socioeconomic benefits for local and small-scale forest producers (FAO 2014b: 84). For IUU-related trade measures, states will need to consider whether there will be groups exempt from their trade measures, and there may be a need for dynamic definitions and responses as fishing practices change.⁶⁹ When identifying exempt groups, states will need to engage in consultations with affected groups and may need to draw on the approaches of indigenous rights regimes and other human rights regimes (see Young 2014). Arguably, the EU has already satisfied this requirement by applying its IUU Regulation only to commercial fishing, as defined in the Regulation itself. It should be noted, however, that the small exemptions sometimes accumulate to a large and significant impact, and this risk should be monitored—if the exemptions

in aggregate cause too many environmental problems, the social objectives may need to be managed in other ways.

It is also important to bear in mind that the trade measures will impose high costs, especially on developing countries. Financial and technical assistance could be combined with a longer transition period for them, subject to a threshold level of fishing. The provision of financial incentives and support for capacity building, as contained, for example, in the US-Peru Trade Promotion Agreement and in the EU VPA processes, will be important. It is pertinent that the FAO notes in its recommendations on catch certification and catch documentation that "consideration should be given to assisting developing countries in meeting the requirements of any catch certification or trade documentation scheme."⁷⁰

Waiver

Within the WTO, Members may create a waiver of obligations in particular circumstances (WTO Agreement, Article IX[3]). Each year, several waivers are granted—most famously, a waiver was obtained in 2003 for the Kimberley Process Certification Scheme for Rough Diamonds.⁷¹ That scheme restricted the trade in so-called conflict diamonds, and even though a number of WTO Members were confident that the trade restrictions would be justified by GATT Article XX or GATT Article XXI, a waiver was granted for legal certainty.⁷² This think-piece does not consider a waiver necessary for the trade measures identified here to combat IUU fishing.

64 | An example of this approach is the Singapore-Australia Free Trade Agreement, Article 12.

65 | See, for example, the side-agreement to the North American Free Trade Agreement (NAFTA), the North American Agreement on Environmental Cooperation, which created the Commission for Environmental Cooperation.

66 | See, for example, NAFTA, Article 2101; Article 104.

67 | See, for example, Office of the United States Trade Representative, Remarks by Ambassador Michael Froman at the Department of State "Our Ocean" Conference, 17 June 2014.

68 | WikiLeaks release of secret Trans-Pacific Partnership Agreement (TPP) Environment Chapter, Consolidated Text, 24 Nov 2013.

69 | For example, traditional Indonesian vessels have been permitted within Australian waters in the past, but in recent times there has been a shift in the nature of the fishing, with vessels targeting shark fins: www.daff.gov.au/fisheries/iuu/overview_illegal_unreported_and_unregulated_iuu_fishing.

70 | Recommendations on Catch Certification and Catch Documentation for the FAO COFI Sub-Committee on Fish Trade, para. 47, in FAO (2002).

71 | General Council, Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds, Decision of 15 May 2003, WT/L/518 (27 May 2003). The waiver was extended in 2006 by General Council Decision of 15 Dec. 2006, WT/L/676 (19 Dec. 2006).

72 | Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds, at para. 1 on exports, at para. 2 on imports.

Subsidies

As noted above, rules surrounding IUU fishing complement existing disciplines on the use of subsidies. This could complement the prohibitions on subsidies supporting IUU fishing under the ASCM, which are currently the subject of clarification and development by trade negotiators as part of the Doha Development Round.

Policy coordination

It is evident that addressing IUU fishing requires interaction between a range of organizations and laws. There is an obvious need for policy coordination between domestic agencies relating to fisheries, marine biodiversity protection, trade, customs, investment, and criminal law enforcement. Indeed, the latest US Taskforce emphasises that effective enforcement of import bans requires cooperation and coordination with border control agencies (US Presidential Taskforce 2015: 32).

Policy coordination within countries is necessary but not sufficient. Coordination and cooperation between international organizations such as the WTO, the CITES Secretariat, RFMOs, FAO, INTERPOL, and UNEP will be imperative, and studies suggest this is not a trivial task of simple information sharing (see Young 2011). For example, parties to the CCAMLR and CITES failed to agree on mutual requirements for catch documentation due in part to disruptions by member states (Young 2011: 176–79). The interaction between regimes requires support from state parties, the organizations themselves, NGOs, and other actors. NGOs are particularly important in providing information about suspected violations, as has been evident in Antarctica (Osterblom and Folke 2013). One should also bear in mind that norms and procedures from other regimes may be invoked as standards in WTO litigation. Regime interaction occurs at all stages of law making, implementation, and dispute resolution and is affected by a range of administrative, political, technical, social, cultural, and legal factors (Young 2011). From the perspective of reforms to address IUU fishing, recommendations should therefore be directed not only to states, but also to international organizations and forums (including the WTO, FAO, the CITES Secretariat, RFMOs, and RTA negotiations, to name a few), and other non-state actors.

CONCLUSION AND RECOMMENDATIONS

This think-piece has demonstrated that current approaches to address IUU fishing increasingly depend on methods to secure information about how the product was sourced, including through catch documentation or traceability requirements; the identification and assessment of vessels engaged in IUU fishing; the blocking of port access and landings; and prohibition on imports, transshipments, or trade of fish products. It has provided examples from both the fisheries and forests sectors to point to existing, new, emerging, and potential approaches, which utilise the enforcement power of trade and markets through these and other techniques, and which are advanced by states and regional organisations (including RFMOs), and through private initiatives. These measures and initiatives complement existing regulatory approaches to which states have agreed, including the Port State Measures Agreement that is yet to come into force.

This think-piece has pointed to the intersections between these approaches and trade law, and identified the action necessary by states to ensure WTO compatibility of their measures, which require, in particular, that trade measures are fair, transparent, and non-discriminatory. Prohibition of imports and other trade measures are currently most often developed on a unilateral basis, but there is scope for a more collective or regional approach—especially in the sharing of IUU lists, the harmonisation of catch documentation schemes and traceability requirements, and the prohibition of fish imports, and non-acceptance of accompanying catch certificates for relevant flag, port, coastal, or market states who have failed to take appropriate measures to ensure compliance by their vessels. Just as port state measures may be undermined by the use of ports of convenience, so too can import bans be undermined by the openness of alternative markets. It is in the interests of an effective market mechanism that states act together in denying access to markets to all IUU landed catch. In cooperating to achieve this unified response, states must be sensitive to the need for consultation and due process for affected trading partners, and the EU Regulation on IUU Fishing provides a good model for this. It is also likely that states will need to engage with affected trading partners and also affected communities, such as indigenous peoples or small-scale fishers, to ensure an approach that meets its objectives, and to ensure that the measures improve the legality of catch rather than simply diverting illegal catch to other markets.

Current negotiations on RTAs are important avenues for trade-related IUU measures to be developed through consultation. For example, there is scope for the inclusion of IUU obligations in the agreements or associated side-

agreements or environmental chapters—some RTAs, such as the TPP, now under negotiation, involve multiple and significant fish-producing and consuming nations and include a significant proportion of global trade. In addition, current schemes such as the catch documentation schemes in RFMOs provide useful precedents for other RFMOs, for states, and for a more general application. There is also a role for industry groups and other private actors to maintain good practices in designing and implementing their initiatives. Aside from trade-related measures and initiatives to combat IUU fishing, there is scope to consider independent legal developments in the forest sector, particularly those that are seeking to create alternative incentives for the safeguarding of forest carbon sinks, and those that are reducing the attractiveness of investing in forest enterprises linked with illegal logging.

In conclusion, there are four recommendations for the use of trade-related measures to address IUU fishing.

- 1) The unilateral trade measures identified in this think-piece, such as those contained in the EC Regulation No 1005/2008, appear to have been designed and implemented to ensure that they are fair, transparent, and non-discriminatory. While they include import prohibitions, these are preceded by the use of less trade-restrictive measures, before moving to more restrictive measures in case of need. As such, the measures provide solid models of WTO-compatible regulation.
- 2) The unilateral trade measures could be made more effective through collective or regional implementation. While some efforts have already been made by RFMOs, such as through the CCAMLR, this could be extended. This would involve cooperation by states and RFMOs, and possibly even private bodies, in the compilation and sharing of lists of IUU vessels; the harmonisation of catch documentation schemes and traceability requirements; and the prohibition of fish products being imported, landed, or transhipped by states who have failed to take appropriate measures to ensure compliance by their vessels.
- 3) Such cooperation on the use of trade-related measures should be open and transparent and could occur in one or several forums, including the FAO, the WTO Committee on Trade and Environment, CITES, RTA negotiations, and RFMOs. Cooperation will adapt to situations where the relevant trade measures are principally state based (such as a joint import ban) and where they involve private initiatives (such as some traceability and certification schemes). In addition to interaction among states and between international regimes relating to trade, environment, and the law of the sea, policy coordination within states is necessary.
- 4) Industry groups and other private actors seeking to remove IUU fishing products from the supply chain through voluntary arrangements have an important role

to play, as can also be seen through the AIPCE purchase control document, and in the forestry sector through the recent commitment to zero deforestation by private actors along the commodity chain. Such initiatives should maintain good practices, including in consulting with affected stakeholders and proceeding with transparency, openness, and impartiality.

ANNEX

TABLE OF MEASURES AND INITIATIVES

Trade-related measure or initiative	Examples	Possible implementation domestically	Possible implementation regionally/plurilaterally/multilaterally	Trade law and other issues
Catch documentation schemes to verify source of product, which can include traceability requirements	<p>EU Regulation on IUU Fishing.</p> <p>US traceability proposal for border measures to collect information on the identity of imported seafood products for 'at risk' species.</p> <p>RFMOs like the ICCAT, CCAMLR (toothfish), NEAFC, NAFO.</p> <p>Fishery access agreements between Morocco and the EU require information sharing.</p> <p>CITES (does not cover all IUU species but some, eg., sharks).</p>	<p>Catch documentation required as a precondition for the import of product.</p> <p>Documentation to contain specific information, usually validated by the flag state (the catch certificate may use electronic traceability systems). Importing country may restrict the import of fish products from states that fail to comply—see next row.</p> <p>Licensing scheme for vessels may also utilise list of IUU vessels from other sources (eg., RFMOs).</p>	<p>The UN General Assembly 2013 resolution on sustainable fisheries called on states to work with the FAO on the elaboration of guidelines and other relevant criteria relating to catch documentation schemes.</p> <p>RTAs are useful forums. Note ongoing discussions in the TPP.</p> <p>RFMOs are also useful forums.</p> <p>See, eg., EU Oct 2014 notification for working group on catch documentation scheme for the Indian Ocean Tuna Commission (IOTC).</p> <p>Such provisions can be included in EEZ access agreements. For example, the fisheries partnership agreement between the EU and Morocco includes a licensing agreement for EU vessels.</p> <p>List of IUU vessels to be developed within RFMOs or within the FAO-proposed Global Record of Vessels.</p>	<p>Measures must be applied on a most favoured nation (MFN) basis and to like domestic products. Likely to fall within the GATT Article XX exception as a measure relating to an exhaustible natural resource (g), as necessary to protect animals (b) or as necessary to protect public morals (a).</p> <p>If product characteristics are laid down, may be a "technical regulation" under the TBT Agreement. May not attract a GATT Article XX-type exception.</p> <p>Measure shall not be more trade restrictive than necessary to fulfil a legitimate objective (combating IUU likely to be legitimate).</p>

Trade-related measure or initiative	Examples	Possible implementation domestically	Possible implementation regionally/plurilaterally/multilaterally	Trade law and other issues
<p>Prohibition of import of IUU fish product, based on listed IUU vessel and failure of flag state to address violations, together with restrictions on transshipment</p>	<p>EU Regulation on IUU Fishing (eg., in March 2014, the EU decided to restrict the import of fish products from Belize, Cambodia, and Guinea).</p> <p>See also RFMOs, such as the CCAMLR, NEAFC, NAFO. See also EU and Morocco fisheries partnership agreement (Morocco may refuse transshipment if the EU vessel has been blacklisted—see row above).</p> <p>Examples from forestry context: Peru-US TPA; EU Logging Regulation; Australian Illegal Logging Prohibition Act (Forestry); (especially due diligence requirements).</p>	<p>Domestic legislation has been passed after cooperation with affected trading partners (eg., Australia-Malaysia Forestry and Timber Sub-Working Group).</p>	<p>Note key obligations set out in relevant RTAs such as the TPP.</p> <p>Peru-US TPA (in forestry context) is an example of an RTA that allows for the prohibition of trade in a timber product if there is no effective enforcement of specified environmental/biodiversity obligations, and other areas of governance (if a similar measure was developed in the fisheries context, the FAO's 2013 Voluntary Guidelines for Flag State Performance could provide guidance on the relevant flag state responsibilities).</p> <p>Also relevant to WTO compatibility:</p> <ul style="list-style-type: none"> - Consultation and cooperation with affected trading partners and groups; - Discussions in Doha Round and committees such as the Committee on Trade and Environment (CTE); - Waiver from WTO requirements according to WTO Agreement, Article IX(3) not considered necessary. 	<p>Prohibition could violate WTO rules on quantitative restrictions or national treatment. Could be justified pursuant to GATT Article XX (eg., conservation of exhaustible natural resource; necessary to protect animal life; necessary for public morals).</p> <p>Consultation and cooperation essential, especially during listing of IUU vessels. Ideally, agreement would be obtained with participating states – RTA fora may be useful, as occurred with Peru and US; see also current TPP drafts.</p>
<p>Domestic prosecutions of importers for trade violations</p>	<p>US Lacey Act makes it unlawful to trade in specimens taken, harvested, transported, sold, or exported in violation of underlying laws in a foreign country or in the US.</p>	<p>Domestic legislation; relies also on CITES.</p>	<p>Penalty sharing provisions developed between country of import and country where violation occurred (eg., South Africa and US received a split of penalties in a major lobster export prosecution). This could be negotiated even in RTAs (eg., the TPP).</p> <p>Note need for increased maximums for civil penalties to better correlate with high IUU profits.</p>	<p>Given the stringent requirements on domestic products (perhaps more stringent than imported products, given that any US law can provide the underlying violation), trade law issues are minimised.</p>

Trade-related measure or initiative	Examples	Possible implementation domestically	Possible implementation regionally/plurilaterally/multilaterally	Trade law and other issues
<p>Private standardisation, procurement, certification and labelling schemes, as contained in commitments of private actors in fishing industry</p>	<p>Traceability schemes may draw on private standards. AIPCE example of agreements signed by suppliers on source of cod; see further Fishery Improvement Projects (FIPs). Note also labelling and certification from the Maritime Stewardship Council (MSC) and Forestry Stewardship Council (FSC); these include eco-labels such as dolphin-friendly labels.</p> <p>See also Climate Summit 2014 (agreement to meet zero deforestation within certain value chains).</p>	<p>Private statements and commitments could be further developed (eg., relating to IUU fishing and trade in IUU fish products and other mechanisms). Private or voluntary labels often use legality as a criterion.</p>	<p>There is scope for the development of a regional or collective framework on initiatives such as the sharing of information and compliance verification throughout the seafood supply chain. This may have different roles for the public and private sectors.</p> <p>See also multilateral 2014 New York Declaration on Forests—states expressed support for the private sector goal of eliminating deforestation from the production of agricultural commodities (palm oil, soy, paper, and beef products) by 2020.</p> <p>Note also the FAO guidelines on ecolabels (marine capture; aquaculture).</p>	<p>Possible TBT Agreement issues depend on whether these initiatives fall within definition of “technical regulation” or “standards.” Note possible shift away from broad interpretation (<i>US-Tuna labelling case, EU-Seal Products</i>).</p> <p>If these fall within definitions, disciplines may apply if initiatives are discriminatory or create an unnecessary obstacle to trade.</p> <p>WTO’s Code of Good Practice on Standards and 2000 Decision of TBT Committee may be relevant.</p>
<p>Prohibition on IUU-related subsidy</p>	<p>No precedent; issue of subsidy currently on Doha agenda; see previous subsidies dispute Canada-Softwood Lumber (forestry context).</p>	<p>(The common unilateral response to a trade-distorting subsidy is the domestic levying of countervailing duties as part of a domestic trade remedy.)</p>	<p>A WTO Member could bring a complaint using the dispute settlement avenues of the ASCM, if it could be shown the results of certain subsidies were assisting IUU fishing, and if this affected their trade in fish.</p>	<p>The ASCM is a blunt instrument given difficulties in the fish sector in demonstrating trade-distorting subsidies (which is why clarification and negotiation of fish subsidies have been proposed on the Doha agenda). Note that the TPP draft text contains forward-looking subsidy disciplines.</p>
<p>Protected zones</p>	<p>MPAs or REDD programmes are not strictly trade measures, but will impact on the supply side.</p>	<p>Countries receiving funding through REDD+ develop laws and frameworks (REDD ‘Readiness’) before protecting nominated forested areas. They must comply with safeguards agreed at UNFCCC Conferences of the Parties (COP).</p>	<p>REDD is being agreed at COP to the UNFCCC, and being implemented by dedicated international agencies such as the UN-REDD Collaborative Program (a coalition of the UNEP, the United Nations Development Programme [UNDP] and the FAO) and the World Bank’s Forest Carbon Partnership Facility. MPAs are being discussed in forums such as the World Parks Congress and the Convention on Biological Diversity.</p>	<p>In the REDD+ context, safeguards are not currently mandatory, but failure to provide information on how states meet the safeguards may affect funding decisions. Note that REDD+ is financed in part by official development assistance; similar avenues for financing are relevant for fisheries management and MPAs.</p>

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